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October 9, 2024

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Via E-Mail

Ms. Orsola Susan Fontano, Chair
Somerville Zoning Board of Appeals
93 Highland Avenue
Somerville, MA 02143

Re: 16-20 Medford Street
Untimely Request for Enforcement

Dear Members of the Zoning Board of Appeals:

Nutter McClennen and Fish LLP represents Somerville Living LLC (the “Owner”) of the property located at 16-20 Medford Street in Somerville (“the Property”), which is an affiliate of the DiBiase Companies. This letter responds to the untimely appeal submitted by Dmitry Vasilyev and Patrycja Missiuro, owners of a rental property at 16 South Street (collectively, the “Petitioners”). For the reasons stated below, in addition to being entirely without merit and frivolous, the Petitioners’ request for enforcement is too late and the Board should affirm the Inspectional Service Department’s (“ISD”) determination that the appeal is untimely.

I. The Request is Too Late

This project, now several months into construction, went through an extensive public review and hearing process during which the Petitioners had no less than five opportunities to take an appeal. Despite their active participation in that public process and awareness of the appeal periods, they declined to do so. To be clear, section 15.3.2.a of the Zoning Ordinance specifically provides that site plan approval is when the City reviews “compliance to the provisions of th[e Zoning] Ordinance.” Accordingly, the site plan approval was the opportunity to appeal alleged zoning nonconformities. The Petitioners are barred by the statute of limitations and the Board does not have jurisdiction to hear this appeal.

The Petitioners have also carefully avoided any mention of the extensive public review process that went on in their appeal. Now, more than ten months after construction began and has progressed, they have filed what is effectively an appeal under the guise of a request for enforcement. Massachusetts law is clear that a project opponent cannot simply sit on their hands and wait to exercise their rights because doing so causes significant harm to the property owner. Accordingly, the appeal should be denied.

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A. Project History

Before the formal permitting process commenced for this project, the Owner held several neighborhood meetings. The first neighborhood meeting on the proposed project was held nearly three years ago, on October 25, 2021. Subsequent neighborhood meetings were held on January 10, 2022, February 27, 2023, and June 28, 2023.

This Project received four separate approvals, all of which were granted following public hearings with certified mail notice to abutters and abutters-to-abutters within 300 feet (including the Petitioners) and all of which were subject to a twenty-day appeal period pursuant to G.L. c. 40A, § 17. Following two duly-noticed public hearings, the project received a site plan approval and a special permit for the project on September 8, 2022. No appeals were filed, and the decisions were filed with the Middlesex South Registry of Deeds.

As a result of modifications to the project, following two more duly-noticed public hearings, on July 20, 2023, the project received both a major amendment to its special permit and a major amendment to its site plan approval. Both of those decisions were subject to a twenty-day appeal period and neither decision was appealed. Both decisions were filed with the Middlesex South Registry of Deeds.

Similarly, the project underwent review by the Somerville Urban Design Commission at four duly-noticed public meetings.

The Petitioners attended and actively participated in many of the public hearings and public meetings on these permits, including commenting on the project and asking questions. Yet, despite having attended these numerous, extensive public hearing sessions, they did not once raise the allegations they make in their request for enforcement, nor did they file any appeals.

Additionally, on September 6, 2023, more than one year ago, the Owner, along with its General Contractor, hosted a voluntary preconstruction neighborhood meeting on site to review general construction activities and potential impacts to the surrounding neighborhood due to construction. The Petitioners were present at that meeting and accordingly had ample advance notice that construction would soon commence.

On December 15, 2023, the project received its demolition permit. All abutters received certified mail notice of demolition commencing within thirty (30) days prior to the issuance of that permit. Demolition work commenced on December 26, 2023 and work on the project continued for the next four months.

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On April 18, 2024, the first building permit (B23-001657) authorizing construction of the foundation, underground utilities, the concrete slab at grade, steel, and the concrete slab on deck was issued. This is known as the “Foundation Permit.” Work began to install the footings and foundations on May 6, 2024. On July 15, 2024, after submitting an as-built plan of the foundation pursuant to the April 18, 2024 building permit as required by ISD, the second building permit (B24-000161) authorizing the remaining development was issued. Work has been continuously pursued on the site since December 2023. For months, the Petitioners have sat idly by and did not raise any concerns with respect to the zoning approvals for this site until this appeal. The Board should have no tolerance for this blatant, bad faith evasion of Massachusetts law.

B. Massachusetts Law Prohibits This Untimely Appeal

Massachusetts Courts have definitively ruled that where a party knows that a building permit has issued and had constructive notice of its issuance but does not file an appeal, they are precluded from filing a request for enforcement with respect to issues that could have been raised in an appeal from the building permit. *See Connors v. Annino*, 460 Mass. 790 (2011); *see also Janey v. Bd. of Appeals of Wareham*, 82 Mass. App. Ct. 1108 (2012), *Richardson v. Bd. of Appeals of Chilmark*, 81 Mass. App. Ct. 912 (2012), *Peters v. Oliveira*, 21 Land Ct. Rptr. 417 (2013)(Scheier, J.). Where, as here, a party has adequate notice of the issuance of a building permit, “the party may not lawfully bypass that remedy and subsequently litigate the question by means of a request for enforcement.” *Connors*, 460 Mass. at 796. Failure to timely file an appeal of that building permit “deprives the board or other permit granting authority, and later the courts, of jurisdiction to consider the appeal. *Id.* at 797.

Here, without doubt, Petitioners were aware of the April 18, 2024 issuance of the Foundation Permit. Not only did they receive notice before demolition commenced, they also attended a preconstruction meeting. The Petitioners had both actual and constructive notice of the April 18, 2024 Foundation Permit issuance. Construction is readily visible from their rental property. Accordingly, Massachusetts law precludes them from filing a request for enforcement where they failed to timely appeal the April 18, 2024 building permit. The April 18, 2024 Foundation Permit is the operative building permit for filing an appeal, particularly where the issue raised primarily concerns setbacks, which are certainly evident from and dependent upon the work authorized by the Foundation Permit. In communities where the building permit is phased into a foundation and vertical permit, appeals are taken from the foundation permit. *See, for example, Murchison v. Zoning Bd. of Appeals of Sherborn*, 485 Mass. 209 (2020); *Harris V. City of Amesbury Zoning Bd. of Appeals*, 19 MISC 000463 (Decision July 2, 2020)(Foster, J.). Here, the Petitioners’ delayed actions are even more egregious where they failed to appeal the special permit, the major site plan approval, the amended special permit, and the amended major site plan approval. Every single one of the issues they raise in their baseless request for

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enforcement is readily apparent, and was reviewed by the City of Somerville for zoning compliance, from the plans that were approved as part of the special permit and major site plan approval processes.

Accordingly, the Zoning Board should decline to hear the Petitioners' appeal as it is nothing more than an attempt to avoid the fact that they failed to appeal during the multiple, separate appeal periods available to them.

II. The Petitioners Do Not Have Standing

G.L. c. 40A, § 8 is clear that appeals to the Zoning Board are only available to a "person aggrieved." Nothing in G.L. c. 40A, § 8 defines a "person aggrieved" or establishes any presumption in favor of abutters, instead, Massachusetts courts have generally followed the case law under G.L. c. 40A, § 17 to interpret this section. Here, the Petitioners have not even made the barest allegation that they are aggrieved by ISD's denial of their request for enforcement. On August 6, 2024, Governor Healey signed the Affordable Homes Act into law with an emergency preamble that took immediate effect. The Affordable Homes Act modified the language in G.L. c. 40A, § 17 with respect to standing to remove any presumption of standing in favor of abutters or abutters to abutters within 300 feet. Accordingly, Petitioners must demonstrate that they are "persons aggrieved" in order to pursue this appeal. The Petitioners' rental property on South Street is separated from the Property by a public way and another property, 10 Bedford Street. Their appeal does not even purport to set out any injury to their property interests from the proposed development. Accordingly, the Board should also find that the Petitioners are not persons aggrieved within the meaning of the Zoning Act and accordingly do not have standing to appeal.

III. The Request is Frivolous and Wrong

This untimely appeal is entirely baseless. The Board can disregard all of Petitioners' graphics and calculations as they do not even use the correct plan set. To assist you, we have enclosed a plan set from the project architect, Khalsa Design Inc., demonstrating compliance with the provisions of the Zoning Ordinance the Petitioners raise. Furthermore, the building permit cited in the Petitioners request is a subsequent building permit, the July 15, 2024 building permit, the issuance of which was conditioned on the work and items noted in the Foundation Permit authorizing construction (B23-001657) including but not limited to a final as-built of the foundation once installed, issued on April 18, 2024. Accordingly, the appeal period ran from April 18, 2024 and lapsed with no appeals having been filed.

Notwithstanding the fact that the Board does not have jurisdiction as detailed above, in any event we will also address the Petitioners' baseless allegations of non-compliance. First, the

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Petitioners raise concerns with respect to building curb setbacks. As shown on page 1 of the attached plan set, the Petitioners appear to have measured curb setbacks from the property line, rather than from the curb of the sidewalk. When measured from the curb, as required by the Zoning Ordinance, the project complies with all required curb setbacks. Notably, rather than actually calculating curb setbacks as required (because they are wrong) Petitioners instead go on a lengthy speculative rant about what trees might better fit the space. Landscaping components such as this are expressly included in site plan approval, and reviewed and approved by the City of Somerville PSUF department, and accordingly the Petitioners may not raise this issue now.

Second, with respect to lot line designations, once again the Petitioners seem to have ignored that under Somerville's Zoning Ordinance, if a lot line is adjacent to a side lot line of an abutting lot, it is a side lot line, as ISD correctly points out in its denial of this frivolous request. Both lot lines that Petitioners claim are rear lot lines abut the side lot lines of adjacent lots and accordingly are side lot lines. Page two of the plan set demonstrates the lot lines of the abutting lots and how they influence lot line designations for the Property in accordance with the Zoning Ordinance. These lot line designations have been consistently marked on all plan sets since the very first submittal for this project more than three years ago in 2021.

Third, with respect to gross floor area, the Owner has calculated Gross Floor Area as required by the Zoning Ordinance. The Zoning Ordinance allows the inclusion of bicycle parking areas in Gross Floor Area. The Owner has not "double counted" staircases as alleged by the Petitioner to the extent we can discern what they mean by this, the horizontal plane of the staircase counts for each floor. In fact, under the Zoning Ordinance the project's Gross Floor Area and corresponding density factor could yield potentially up to 60 dwelling units, versus the approved 50 dwellings units.

Fourth, the Petitioners raise a new issue that was not included in their request for enforcement for ISD, once again, as they did with respect to 10 Bedford Street, they put forward their own calculation of Lot Coverage that is not supported by the Zoning Ordinance. The runoff coefficient for the permeable pavers is determined by the manufacturer, the Board should ignore the slanderous, wildly speculative and unsupported comments of Petitioners that the manufacturer's runoff coefficient is a "marketing gimmick." Lot Coverage was calculated as required by the Zoning Ordinance, with further manufacturer's specifications provided to ISD on 10/8/2024 at their request.

Finally, we vehemently disagree with the assertion that work was commenced without receipt of all permits. All necessary building permits were received before the relevant work commenced.

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In conclusion, the Board should decline to act on this frivolous, untimely appeal filed under the guise of a request for enforcement. Massachusetts law does not permit the Petitioners to sit idly by and allow five separate appeal periods to pass while the Owner invests significantly in reliance on its approvals. Particularly where the Petitioners had notice of all public hearings and actively participated in those public hearings, this blatant bad faith should not be condoned by this Board.

We respectfully request that the Board make the following findings with respect to this appeal:

- The Petitioners failed to timely appeal the project's special permit, site plan approval decision, amended special permit, amended site plan approval, and building permit and accordingly the Board does not have jurisdiction to hear their untimely request for enforcement.
- The Petitioners are not "persons aggrieved" within the meaning of G.L. c. 40A, §§ 15 and 17 and accordingly do not have standing to pursue this appeal even if it were timely filed.
- The Project complies with the Somerville Zoning Ordinance. As shown on the correct, approved project plans, the Project has compliant curb setbacks, compliant side yard setbacks, and has correctly calculated gross floor area and lot coverage.

We look forward to discussing this matter further with you at the Board's October 16, 2024 hearing. Thank you in advance for your consideration.

Very truly yours,



Valerie A. Moore

VAM:
Enclosure

cc: Ugo DiBiase
Paul DiBiase
Brian McGrail, Esq.
Tanya Carriere