NOTICE OF APPEAL

Denise Provost ("Denise"), 20 Albion St., Somerville, MA, hereby files this Notice of Appeal of the decisions of the Building Official that approved Building Permits B25-000079 and B25-000081 (collectively referenced as the "Building Permits" herein) on September 4, 2025, for the property located at 17 Hudson Street, Somerville, MA. (the "Premises).

I. INTRODUCTION

The facts are straightforward. Denise Provost resides at 20 Albion Street, Somerville, MA. Her property shares a rear boundary line with the Premises. By decision dated December 18, 2024, the designee of the Somerville Zoning Board of Appeals ("ZBA") approved a lot split by the developer of the Premises to split a lot of approximately 6,226 square feet into two lots of approximately 3,113 square feet each. The ZBA provided no notice of the application to abutters and did not hold any public hearing or meeting. In essence, the ZBA's approval was conducted in private with no notice to anyone. After receiving the lot split approval, the developer then filed building permit applications for the Premises, including the two challenged in this appeal.

Denise is a direct abutter and has standing as "a person aggrieved" to bring this Notice of Appeal. Her rights under the Somerville Zoning Ordinance ("SZO"), which required the ZBA to follow the special permit requirements of the SZO, were denied by this ZBA procedure. That denial included her right to present her concerns to the Zoning Board of Appeals at a public hearing for the grant of a special permit by the ZBA for the lot split, which should have included the entire proposed development on the Premises. Instead, the Zoning Board of Appeals' Rules of Policy & Procedure (the "ZBA Rules") merely required that the developer submit a lot split application to the ZBA. As set forth below, the SZO requires that a proposed lot split together with the resulting development that will be built, (the "Building Permit Development") must be submitted to the Zoning Board of Appeals as a complete special permit application. The ZBA then must hold a special permit public hearing on the site plan that includes the Building Permit Development as required by SZO 10.1.2. The ZBA Rules and practice, however, impermissibly bifurcates this mandatory process.

In the first step of their bifurcated procedure, the ZBA refers the lot split application alone, without the proposed development, to the Director of Planning, Preservation, & Zoning (the "Director"). The Director then evidently reviews the lot split application in the abstract on a plan of land without examining the Building Permit Development. Given the simple standards that the Director thereafter must apply to such a lot split application, the Director's perfunctory approval is mandatory. Once the split is approved, the developer in step 2 submits their proposed development to the Building Official in form of building permit application (s). The Building Official then reviews the application for compliance with the Zoning Ordinance and building code. This review is done without public comment and the ability to incorporate the

powers given to the ZBA under the SZO to modify the development proposal. In addition, this process deprives the City of affordable housing benefits that would otherwise be required under the SZO.

Moreover, the issuance of Building Permit B25-000081also violates the provisions of SZO 3.1.12 because the proposed structure does not meet the definition of a "Backyard Cottage."

II. ARGUMENT

A. The Issuance of the Building Permits Violates the Provisions of SZO 15.3.2

Denise relies on the Plans provided by the Developer of the Premises dated June 17, 2025, that were provided at a neighborhood meeting (the "Plans"). She reserves the right to supplement this Appeal in the event that the developer submitted any subsequent plans to the Building Official which were relied on in connection with the Building Permit approvals. These Plans originally provided for a lot split of 17 Hudson St. into two separate lots, Lot A and Lot B, each of which would contain a three family condominium building with a fourth condominium designated as a Backyard Cottage. Thereafter, the developer withdrew the application for a building permit for the Backyard Cottage that had been proposed for Lot A. The Building Official thereafter issued Building Permit B25-000079 for the foundation of the Lot B three family building and Building Permit B25-000081 for the foundations of the Lot B Backyard Cottage.

The provisions of SZO 10.1.1.c. requires the ZBA to follow the comprehensive special permit process set forth in SZO 15.3.2 for a lot split. "Lot splits, lot mergers, and lot line adjustments require Site Plan Approval. See §15.3.2 Site Plan Approval for more information." That dictate is repeated in SZO 15.3.2 which states "**The Building Official may not issue a Building Permit or Certificate of Occupancy for development that requires Site Plan Approval until the Site Plan Approval process has been completed in accordance with the provisions of this Article.**" (emphasis added). There is no doubt that the Building Permits were issued without the ZBA implementing the Site Plan approval procedure, including the review of the Building Permit Development as required by the SZO.

The provisions of 15.3.2 expressly mandate that the lot split application include the development that is proposed. The purpose of the special permit requirements of 15.3.2.a.i. is to provide for the administrative review and approval of a development review application that is conforming to the provisions of this Ordinance to address any potential **development** impacts. The SZO definition of "**development**" includes the "expansion of any use of any structure or lands. Clearly, the intent of the lot to be split was to expand its use from a lot containing a single family dwelling and garage to a lot containing two separate three story buildings and the self-

described Backyard Cottage in the corner of the lot. The Building Permit Development clearly meets the definition of development and should have been included in the review of the lot split.

Similarly, the provisions of SZO 12.1.2.a. applies the city's affordable housing requirements to any lot split that results in two or more lots intended for residential use, sale, legacy or development in any manner before the lot is split. Section b. of SZO 12.1.2. states that "Development may not be segmented or phased in any manner. . ." Because the Building Permit Development resulted in a lot split with two or more lots intended for residential use and development, the entire Building Permit Development should have been submitted as the part of the Lot Split Application for a determination of affordable housing requirements. The entire Building Permit Development results in two separate three family dwellings and one self-designated Backyard Cottage for a total of 7 units. The SZO calculator at 12.1 indicates that at least one affordable unit is required. Instead, it appears that each lot was examined separately and no affordable housing was required. It therefore appears that the process currently in use by the ZBA and Building Official is expressly authorizing segmentation and thereby depriving the City of affordable housing.

B. The ZBA's Delegation of the Approval of the Lot Split to the Director of Planning, Preservation & Zoning Violated the SZO and M.G.L. 40A.

Instead of following these express SZO provisions by which the ZBA should have reviewed the Building Permit Development under the special permit requirements of the SZO as set forth above, the ZBA instead delegated the authority to approve the lot split the Director. The ZBA Rules at 5. f. ii.a.(iii). state that a lot split is a minor activity that only requires minor site plan approval by the ZBA with the Director of Planning, Preservation, & Zoning serving as the decision-making authority in-lieu of the ZBA. The ZBA rules cite SZO §15.7.3.d.iv.c, as support for its authority to implement that process. SZO §15.7.3.d.iv.c., however, only applies to the Planning Board. The ZBA's authority is set out in SZO 15.7.2.d.iv. (the "Enabling Provision")

It is instructive to compare the rule making powers granted to the Planning Board in 15.7.3 d.iv. versus those granted to the ZBA in SZO 15.7.2d.iv. The provisions of 15.7.3 d. iv). c and 15. 7.2 d.iv). c. empower the Planning Board and ZBA, respectively, the authority "to promulgate rules and procedures for a minor Site Plan Approval process for development activities that do not require the procedural steps for Site Plan Approval, but that are still deserving of plan review."[1] The Planning Board, but not the ZBA, is then given authority to promulgate "rules and procedures for subdivision, lot splits, lot mergers, and lot line

[1] There is also a constitutional problem posed by SZO 3.1.6 c.1 because it is impermissibly vague. The Zoning Ordinance itself should define those development activities that do not require the procedural steps for Site Plan Approval as part of an amendment to the SZA with an opportunity for a public hearing. Instead, it has given unbridled discretion to the ZBA, contrary to Massachusetts law. See, e.g., *Fordham v. Butera*, 68 Mass. App. Ct. 907, 909 (2007).

adjustments" in subsection d of 15.5.2 d iv). If the SZO had intended that subdivision, "lot splits, lot mergers and lot line adjustments" were all development activities that did not require the procedural steps for Site Plan Approval, then there would have been no reason to add subsection d to the Planning Board rule making provision but not the ZBA rule making provision. By expressly excluding that power from the ZBA but giving it to the Planning Board, the SZO clearly states that a lot split was not considered eligible for a minor Site Plan Approval process by the ZBA.

Assuming, arguendo, that the ZBA had that ability to promulgate rules and regulations for lot splits, the ZBA could, presumably, enact procedural rules and regulations governing the conduct and processing of lot splits before it. Its rulemaking, however, goes further as it effectively amends the Somerville Zoning Ordinance contrary to the provisions of M.G. L. c. 40A. Under its minor site plan review regulations for lot splits, lot split proposals are directly submitted to the Director, in a vacuum, without including the development to occur after the lot split and without any public process or even a vote of the ZBA to determine whether the proposed lot split only requires minor site plan approval and can be referred to the Director. Instead, by this rule, the ZBA has effectively determined in advance that all proposed lot splits are minor by their nature and not subject to the special permit requirements. Because, however, the SZO has already determined that a lot split requires the formal special permit review process, the ZBA rules and regulations effectively amend that specific zoning provision. That it may not do. Instead, the City Council would have to approve a zoning amendment that declared lot splits to be minor and no longer subject to the Special Permit requirements, following all the zoning amendment requirements set forth in Chapter 40A, including a public hearing, approval by 8 city councilors and the signature of the Mayor.

As an additional reason for their invalidity, the Rules fail to follow the express requirements of the Enabling Provision. The Enabling Provision specifically requires that the ZBA implement a process for "**plan review**."(emphasis added.) The words "plan" or "plan review" are not defined in the SZO. Under SZO 1.1.9.c, "Words, phrases, and terms not defined by either Article 2: Glossary & Overview or the Commonwealth of Massachusetts State Building Code are defined by the most recent edition of Webster's Unabridged Dictionary." That dictionary defines "plan" as:

1. a drawing or diagram drawn on a plane,
2. a method for achieving an end,
3. an orderly arrangement of parts of an overall design or objective,
4. a detailed program (as for payment or the provision of some service)

Without doubt, nothing approaching a "plan" as defined in Webster was provided by the developer to the ZBA.

Moreover, under well established Massachusetts case law, "[w]here the draftsmanship of a statute is faulty or lacks precision, it is our duty to give the statute a reasonable construction." *Capone* v. *Zoning Bd. of Appeals of Fitchburg*, 389 Mass. 617, 622 (1983), quoting from *School Comm. of Greenfield* v. *Greenfield Educ. Assn.*, 385 Mass. 70, 79-80 (1982). Courts also have a duty to "view[] the statutory scheme as a whole; and [to] avoid[] a construction which would negate legislative intent or defeat its intended utility." *Milton Commons Assocs.* v. *Board of Appeals of Milton,* 14 Mass. App. Ct. at 116-117 (citations omitted). See generally *Bartlett* v. *Greyhound Real Estate Fin. Co.*, 41 Mass. App. Ct. 282, 286 (1996)." Kramer v. Zoning Board of Appeals of Somerville, 65 Mass. App. Ct. 186, 190 (2005).

Clearly, the Enabling Provision's grant of, authority "to promulgate rules and procedures for a minor Site Plan Approval process for development activities that do not require the procedural steps for Site Plan Approval, but that are still deserving of plan review," requires the submission and review of some sort of a plan. Moreover, the SZO's definition of development" includes the "expansion of any use of any structure or lands." Therefore, the Enabling Provision's requirement of a "Minor Site Plan approval process for development activities," unambiguously requires the submission of a plan that shows the proposed development activity. Instead, the only review that appears to occur is that of the lot to be split, without review of the proposed development, which fails to meet the requirements of the Enabling Provision.

For the reasons set forth above, Building Permits B25-000079 and B25-000081 were improperly issued and the decision of the Building Inspector should be reversed and the Building Permits denied.

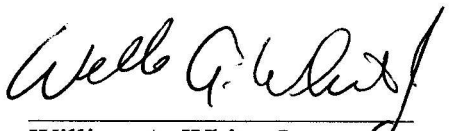
C. The Proposed Backyard Cottage Fails to Meet the Requirements of the SZO

Building Permit B25-000081permits the construction of a three bedroom condominium which includes a master bedroom suite in the basement under the guise that it is a "Backyard Cottage. That determination violates the provisions of SZO 3.1.12. SZO 3.1.13 defines a backyard cottage as: "A small floor plate, detached, accessory building type typically providing space for one (1) small dwelling unit, a home occupation, a playhouse for children, or vehicular parking on the same lot as a principal building type." The proposed backyard cottage is not an accessory building type because the principle structure is a three unit condominium and the cottage has no connection with any of the three units housed in the main building. For example, the proposed building is not useable by any of the condominium owners for any purpose. Instead, it will be a separately owned fourth condominium unit. Perhaps, if the principle building on the lot was owned by one of more residents, a backyard cottage could then be rented by those residents as the backyard cottage would be an additional rental unit, accessory to the main structure. A fourth condominium unit constructed on a lot with a building containing three other condominium units would not fit within the normal understanding of the word accessory.

In addition to not being an accessory structure, the proposed building does not fit within the normal definition of a cottage. The building has a finished basement containing a master suite with another story and one-half above. This "cottage" has a total of 3 bedrooms, 2 and one-half baths, a living room, dining room and kitchen, on three floors of living space. In common English usage, it would not be considered a cottage. When one views the sample photographs set forth in SZO 3.1.12 to show examples of backyard cottages, it is clear that none of them contain a finished basement. The reason, of course, is that a typical cottage does not contain a finished basement with a master suite. This common sense construction of the term cottage in combination with the photographic examples provided in SZO 3.1.12 conclusively establishes that the proposed structure in Building Permit B25-000081 is not a backyard cottage.[2]

For the reasons set forth above, the proposed building in Building Permit B25-000081 did not meet the definition of a Backyard Cottage with the result that the decision of the Building Inspector approving the Building Permit should be reversed and the Building Permit denied.

Denise Provost By Her Attorney



October 3, 2025

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[2] There is also a constitutional problem posed by SZO 3.1.6 c.1 because it is impermissibly vague as to the "Backyard Cottages" that may be built as of right. Questions such as whether a "Backyard Cottage" has two or three bedrooms or whether it includes a finished basement are not answered by the zoning provision and reasonable persons looking at it reasonably could come to different conclusions. Because the ZBA does not have the power to strike zoning ordinances enacted by a municipality, Denise does not raise this argument here. Should the matter proceed to the Land Court, this argument certainly will be raised. See, e.g., *Fordham v. Butera*, supra. As an example of a different approach that avoids the vagueness challenge, the Massachusetts Legislature established a 900 square foot limitation in its definition of an accessory dwelling unit. M.G.L. c.40A, Sec. 1A.

AMENDED NOTICE OF APPEAL

Denise Provost ("Denise"), 20 Albion St., Somerville, MA, hereby files this Notice of Appeal of the decision of the Building Official that approved Building Permit B25-000078 for 17 Hudson St. The Building Official approved this permit on October 9, 2025, after Denise had filed her initial Notice of Appeal to the ZBA, challenging the decisions of the Building Official that approved Building Permits B25-000079 and B25-000081 for the property located at 17 Hudson Street, Somerville, MA. (the "Premises).

Permit B25-000078 is a foundation permit for the construction of a second 3 unit condominium unit at the Premises. In her initial Appeal, Denise challenged the decision of the Building Official approving the foundation permit for the construction of the first 3 unit condominium building at the Premises. All of the facts and legal arguments set forth in the initial Notice of Appeal with regard to B25-000079, the first 3 unit condominium, likewise apply to her challenge of this foundation permit for the second 3 unit condominium building. Therefore, Denise challenges this foundation building permit B25-000078 for the same reasons set forth in Section I and Section II A. and B of her initial Notice of Appeal. Section II.C. does not apply because this challenged foundation permit is not for a Backyard Cottage.

For the reasons set forth in the initial Notice of Appeal and this Amended Notice of Appeal, Denise requests that approvals of Building Permits B25-000078, B25-000079 and B25-000081be reversed.

Denise Provost By Her Attorney

November 6, 2025

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