

ADMINISTRATIVE APPEAL

Pursuant to Somerville Zoning Ordinance §15.5.2 and M.G.L. Chapter 40A, §8

Filed with the Somerville Zoning Board of Appeals

March 16, 2026 (revised June 2, 2026)

Appellant: Thomas Higdon

Appellant Address: 23 Avon St, Somerville, MA 02143

Subject Property: 24 Berkeley St, Somerville, MA 02143

Property Owner: 24 BERKELEY ST LLC

Building Permit No.: B25-001643 and B25-001644

1. Decision Being Appealed

This appeal challenges two related determinations of the Inspectional Services Department and Building Commissioner with respect to the construction of a Backyard Cottage at 24 Berkeley Street.

First, the Inspectional Services Department has classified the Appellant's pre-existing rear building at 23 Avon Street as an accessory structure rather than an accessory building. In its correspondence, ISD referred to that building as "the accessory structure at the rear of 23 Avon" (Exhibit A), and the PPZ Staff Memo of May 18, 2026 takes the position that the building is an Outbuilding accessory structure to which the building separation requirement does not apply. As set forth in §3a below, that classification is incorrect: under the Zoning Ordinance, the building is an accessory building of the Backyard Cottage type, and it is therefore entitled to the building separation protection of §2.4.3.b.

Second, and in the alternative, this appeal challenges the determination of the Building Commissioner that the minimum building separation distance specified in the Somerville Zoning Ordinance for the Backyard Cottage building type (§3.1.12) is preempted by the Massachusetts State Building Code (780 CMR) with respect to fire separation distance.

These determinations were communicated to the Appellant by Josh Manion of the Inspectional Services Department via email on March 13, 2026. A copy of that correspondence is attached as Exhibit A.

As a result of these determinations, a building permit for the construction of a Backyard Cottage at 24 Berkeley St. was issued and construction has proceeded, without

compliance with the 10-foot minimum building separation distance required by the Zoning Ordinance.

2. Factual Background

The Appellant is the owner and occupant of the property at 23 Avon St, which is directly adjacent to and shares a rear lot line with the subject property at 24 Berkeley St. Both properties are located in the Neighborhood Residence (NR) zoning district.

The Appellant's property includes an accessory building located approximately 2 feet from the rear lot line, which has been present since before 1900, according to the Sanborn Map of Somerville. The property owner at 24 Berkeley St. is constructing a Backyard Cottage pursuant to §3.1.12 of the Zoning Ordinance. The foundation of the Backyard Cottage, as constructed, is located approximately 7 feet from the Appellant's accessory building, resulting in a building separation distance of approximately 7 feet between the two structures.

The building permit plans for the Backyard Cottage identify a building separation distance of 10.1 feet, but this measurement is taken to the principal building on the subject property's own lot—not to the Appellant's accessory building on the abutting lot. The Inspectional Services Department has acknowledged this in its correspondence.

Exhibit B shows a photograph of the measurement between the accessory building and the concrete forms on the ground, a distance of 7ft. Exhibit E shows photographs of the proposed building plan of the backyard cottage and screen captures of measurements from the Somerville GIS website, showing that the plan, when executed, will violate the 10ft Building Separation clause in the zoning ordinance.

Prior to the pouring of the foundation, on the evening of Tuesday March 10, the Appellant notified the Inspectional Services Department of the apparent violation with photographic evidence and measurements, and separately notified, on the morning of Friday March 13, the property owner in writing (via text message) that the building separation requirement appeared to be violated. The foundation was poured after all parties had been notified of the issue on the afternoon of Friday, March 13. The owner of the property is 24 BERKELEY SOMERVILLE LLC, with agent and manager Paul Fombelle. The conversation was with Paul Fombelle. Screenshots of the text messages are attached as Exhibit C.

The Appellant is not opposed to the construction of a backyard cottage at 24 Berkeley Street. The Appellant asks only that the cottage be sited in compliance with the Zoning Ordinance's 10-foot building separation requirement, as it would be for any other building type in the NR district.

3. Grounds for Appeal

In reviewing the Building Commissioner's determination, this Board exercises independent authority. M.G.L. c. 40A, § 14 provides that a board of appeals may "reverse or affirm in whole or in part, or modify any order or decision, and to that end shall have all the powers of the officer from whom the appeal is taken." The Board is not limited to asking whether the Building Commissioner's decision was reasonable; rather, the Board steps into the commissioner's shoes and decides the question independently. See *Smith v. Bldg. Comm'r of Brookline*, 367 Mass. 765, 773 (1975) (recognizing the board's authority under § 14 to exercise "all the powers of the officer from whom the appeal is taken" and to "issue or direct the issue of a permit"). The Appellant respectfully submits that the Building Commissioner's determination was legally incorrect for the following reasons.

3a. The structure at 23 Avon Street is an accessory building of the Backyard Cottage type, not an accessory structure.

The threshold question in this appeal is how the Zoning Ordinance classifies the Appellant's rear building. That classification determines whether the building separation requirement of §2.4.3.b applies. The Inspectional Services Department treats the building as an accessory structure — specifically an Outbuilding under §10.2.2.p — and on that basis concludes that building separation does not apply. That classification is incorrect. Under the Ordinance's own framework, the building is an accessory building of the Backyard Cottage type.

Section 2.3.1.a establishes three exclusive categories: *"This Ordinance regulates structures as either principal buildings, accessory buildings, or accessory structures."* The rear building at 23 Avon Street is not a principal building. It must therefore be classified as either an accessory building or an accessory structure. The choice between these classifications is not a matter of preference but of fit against the standards that define each category.

The barn fits the standards that define a Backyard Cottage accessory building type, and falls outside the standards that define the Outbuilding accessory structure type. The following sections address each in turn.

The barn satisfies every character standard of the §3.1.12 Backyard Cottage type.

Against the §3.1.12 Backyard Cottage accessory building type, the barn satisfies every dimensional standard that defines the type's character: floor plate (within the 576 sf maximum), stories (within 1.5), story height (within 12 ft), roof type (gable permitted), dwelling units (within the maximum of 1), and use (among these, vehicular parking, one of the four enumerated "typical" uses for the type). It conforms to the type's primary front setback (60 ft minimum, with the barn at ~70 ft) and to the type's building separation

requirement from the principal building on the lot (10 ft minimum, with the barn at more than 10 ft from the principal residence). It is nonconforming as to side and rear setbacks (3 ft minimum) — placement standards that Article 14 (Nonconformance) protects.

Section 3.1.12 defines the 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 rear building at 23 Avon St. is a small floor plate, detached, accessory building used for vehicular parking, among other uses — a use expressly included as one of the “typical” uses for Backyard Cottages as defined in the SZO.

The barn falls outside the §10.2.2.p Outbuilding accessory structure category.

Against the §10.2.2.p Outbuilding accessory structure category, the barn fails the category’s defining dimensional standards. The Outbuilding category caps height at 12 ft (§10.2.2.p.iii); the barn is 17 ft. The Accessory Structures section (§10.2.2) contemplates at most single-story structures, with height limits between 8 and 12 ft. The barn is a 1.5 story building, not within a framework that the Accessory Structure category addresses.

The barn should not be classified as a “nonconforming Outbuilding.” In the case of the Outbuilding type, the non-dimensional specifications are so general that without them the type becomes meaningless. If a building exceeds the Outbuilding’s height cap, then it cannot be termed an Outbuilding.

The following comparison summarizes the fit of the barn against each category:

Standard	Outbuilding (§10.2.2.p)	Backyard Cottage (§3.1.12)	23 Avon Barn
CHARACTER STANDARDS			
Height	≤12 ft (implied ≤1 story) X	≤12 ft/story; ≤1.5 stories ✓	17 ft total, 1.5 stories
Floor plate (max)	None specified	≤576 sf ✓	~300 sf (City GIS)
Roof type	None specified	Flat or Gable ✓	Gable
Dwelling units (max)	None specified	≤1 ✓	0
Use	Vehicle parking, home occupation, ancillary residential	“Typically dwelling, home occupation, playhouse, or vehicular parking” ✓	Workshop, gym, storage, vehicular parking

Free-standing , fully enclosed	Required ✓	Implicit ✓	Yes
PLACEMENT STANDARDS			
Primary front setback (min)	≥20 ft ✓	≥60 ft ✓	~70 ft
Side setback (min)	≥3 ft ✗	≥3 ft ✗	<3 ft (Article 14 protects)
Rear setback (min)	≥3 ft ✗	≥3 ft ✗	<3 ft (Article 14 protects)
Building separation from principal	None specified	≥10 ft ✓	>10 ft
RESULT	Fails character standards (height, stories) — outside the category	Meets all character standards; nonconforming only on placement (Article 14)	Properly classified as Backyard Cottage accessory building type

Accessory structures are a closed list; the broader “accessory building” definition admits the barn.

Accessory structures are not defined explicitly in the Ordinance. We must therefore depend on the list of accessory structure types defined in §10.2.2 — a closed list. There is no language describing other types of accessory structures, or a more general category of accessory structure outside of the permitted ones in that list. These are the only permitted types of accessory structures; therefore, any pre-existing building that does not fit in this set is not an accessory structure.

By contrast, the Glossary definition of accessory building — “*A building or structure designed, used, or occupied in relation to the principal use(s) of a given lot*” — is much more general, and clearly admits the barn at 23 Avon St.

Faced with two potential classifications under §2.3.1.a, the barn fits the defining standards of one (Backyard Cottage) and exceeds the defining boundaries of the other (Outbuilding). Both classifications would carry the same placement nonconformities, protected equally by Article 14. The classification that fits is the Backyard Cottage building type accessory building.

Under ISD’s own stated interpretation, the barn is an accessory building.

At a recent hearing, ISD described the line between the two categories. As Josh Manion of the Inspectional Services Department stated on the record: *“Accessory structures are generally outbuildings, garages, things that are — you wouldn’t consider to be a habitable space or to be used for a dwelling unit.”* (Statement of Josh Manion, 17 Hudson Street Hearing (ZP25-000094), Somerville Zoning Board of Appeals, February 4, 2026, at approximately 1:08:04.)

The accessory building at 23 Avon is, in fact, used for habitable space. In addition to use for vehicle storage and as a workshop space, it is used as a home gym on the second floor, with drywall, residential vinyl windows, and molded baseboards. Therefore, according to ISD’s own interpretation of the SZO, the barn at 23 Avon would not be classified as an accessory structure. It must therefore be classified as an accessory building.

Classification follows the structure’s characteristics, not the labels on prior permits.

The PPZ Staff Memo relies on a prior permit record: *“Per permitting records (B17-001896), the outbuilding located at the rear of 23 Avon is identified as a garage and is therefore classified as an accessory structure, not a Backyard Cottage accessory building type.”* That reliance is misplaced.

B17-001896 is a permit from 2017 to renovate the first level of the principal residential building on the lot. The rear building at 23 Avon is referred to as a garage only incidentally — it was included peripherally in the architectural drawings, by the architect of the previous owner, labeled “23 Avon Street garage (existing), no proposed work.” No zoning classification of the rear building was performed in connection with that permit.

The permit is also from before the current zoning code regime was in force in 2019 — before “accessory structures” and “accessory buildings” were defined, and before the Backyard Cottage type existed — and so has no bearing on how the building should be regulated under the current zoning code.

Even if the rear building were a “garage,” that would not make it an accessory structure rather than an accessory building. The term “garage” is not defined in the SZO. If a garage is defined as an enclosed building used for vehicular storage, then it describes a defined typical use of an accessory building under the current SZO — §3.1.12 lists “vehicular parking” as a typical use of the Backyard Cottage accessory building type. Indeed, §8.3.5(j) of the SZO refers to *“the installation of accessory buildings such as garages”* — contemplating an accessory building that is in fact a garage.

This Board has applied the same analytical framework before, in 21 Francesca Avenue.

This Board considered the same legal question on May 17, 2023, in 21 Francesca Avenue (P&Z 23-001). There, the owner of a carriage barn at the rear of the property challenged ISD’s classification of the structure as an Outbuilding accessory structure, contending instead that it was an existing Backyard Cottage building type with some nonconforming features. The matter presented the same legal question (Outbuilding accessory structure or Backyard Cottage accessory building type), under the same SZO framework (§2.3.1.a, §3.1.12, §10.2.2.p), with the same ISD position, and the same dimensional issue of the structure exceeding the height limit of the defined Outbuilding.

The Board upheld the appeal, overturning ISD by a unanimous 5-0 vote and classifying the structure as a Backyard Cottage. The motion adopted by the Board recited that *“the character of the building more closely resembling an accessory building; the character of the building, as a whole, does not sufficiently match the definition of an accessory structure; the building dimensions are more appropriate to an accessory building (Backyard Cottage).”*

The PPZ Staff Memo in that case (April 27, 2023) articulated the governing standard: *“Any existing building might present some non-conformities for the building type for which it is currently classified. The Building Official (ISD) must classify any building, including non-conforming ones, to the closest applicable Building Type category that applies to the on-the-ground conditions.”* PPZ made no recommendation for or against the appeal in that case.

The Appellant does not contend that the Francesca decision binds the Board; each appeal is decided on its own facts. The Appellant offers it as evidence that this Board has already worked through this analytical question under the same provisions of the Ordinance and reached a result. The framework is the same; only the structure is different. And on the facts, the present case is cleaner. The Francesca carriage house exceeded the Backyard Cottage standards on height (28.2 ft), floor plate (975 sf), roof type (hip), and building separation from the principal building (7.1 ft), and still the Board classified it as a Backyard Cottage. The barn at 23 Avon Street, by contrast, satisfies every Backyard Cottage character standard and is nonconforming only on the side and rear setbacks that Article 14 protects:

Standard	21 Francesca Carriage House	23 Avon Barn
CHARACTER STANDARDS		
Height	28.2 ft ✓	17 ft ✓
Floor plate (max)	975 sf ✗	~300 sf ✓

Roof type	Hip ✗	Gable ✓
Dwelling units (max)	0 ✓	0 ✓
Use	Not in active use	Workshop, gym, storage, vehicular parking ✓
Free-standing, fully enclosed	Yes ✓	Yes ✓
PLACEMENT STANDARDS		
Side/rear setback (min)	<3 ft ✗	<3 ft ✗
Building separation from principal	7.1 ft ✗	>10 ft ✓
RESULT	ZBA classified as Backyard Cottage on May 17, 2023	Correctly classified as a Backyard Cottage

Because the barn at 23 Avon Street is properly classified as an accessory building of the Backyard Cottage type, it is entitled to the building separation treatment that §2.4.3.b affords to accessory buildings — including separation from buildings on abutting lots. The 6.5-foot separation between the barn and the new Backyard Cottage at 24 Berkeley Street is less than the 10-foot minimum, and therefore violates the Ordinance.

The appellant does not request nor require a permit or change in classification of the existing barn at 23 Avon St. Appellant requests only that it be appropriately classified as what it actually is in the context of the building permit for new construction at 24 Berkeley St.

Classification of a structure under §2.3.1.a is determined by application of the SZO’s textual criteria to the structure’s actual physical and use characteristics — not by the filing of permits. The Appellant is not required to file new permits to establish what the structure already is under the Ordinance, nor to trigger conformance with the SZO building separation requirements in §2.4.3.b.

When approving the permit for the Backyard Cottage at 24 Berkeley St, ISD decided to classify the barn as an accessory structure without requiring any permitting or formal process for that classification. Similarly, ISD may also have classified the building as an accessory building without requiring any permitting or formal classification process.

Neither a Backyard Cottage nor an accessory building is defined by any formal

permitting process. The SZO does not contemplate any permit requirement for buildings to be classified appropriately. As a parallel example, there is no permitting requirement for an existing principal building before it gains the protection of the Building Separation requirement – the principal building on an abutting lot gets that protection by virtue of its definition in the SZO, rather than any permitting process. It would be absurd if every homeowner with an abutting construction site were required to get a permit for their home to show that it's indeed a "principal building" worthy of Building Separation protections. Therefore, it is likewise for accessory buildings – no permitting process is required to gain that protection.

The Staff Memo's contrary suggestion — that *"the appellant would need to file building permits to convert their existing outbuilding into a backyard cottage, which would then need to comply with all minimum setback requirements to trigger building separation distance on 24 Berkeley St."* — presupposes that the building is an Outbuilding accessory structure, which it is not, given the lack of fit for that structure in §10.2.2. The building separation requirement is triggered by the new construction at 24 Berkeley Street, not by any act of the Appellant.

As stated above, the board need not simply review the decision of ISD to classify the barn as an accessory structure and decide whether that's correct. It is empowered instead to independently make a decision about the classification of the structure based on its own understanding of the appropriate laws and ordinances.

3b. The Zoning Ordinance unambiguously requires a 10-foot building separation distance from structures on abutting lots.

Section 3.1.12 of the Zoning Ordinance specifies a minimum Building Separation of 10 feet for the Backyard Cottage building type.

Section 2.4.3 (Building Placement – Standards & Measurements) defines how building separation is measured and explicitly provides:

"Any principal or accessory building must be separated from any other principal or accessory building on the same lot or on an abutting lot by the building separation distance specified for each building type."

This language is unambiguous. The 10-foot building separation requirement applies to the Appellant's building, which is an accessory building on an abutting lot. The measured distance of approximately 7 feet does not comply.

3c. The Zoning Ordinance governs where it is more restrictive than other regulations.

The Building Commissioner's determination rests on the premise that the Massachusetts State Building Code (780 CMR) preempts the Zoning Ordinance with respect to building separation. This is incorrect as a matter of law, as a matter of the Ordinance's own provisions, and as established by Massachusetts appellate case law.

The building code and zoning ordinance are parallel regulatory frameworks with different purposes. Massachusetts courts have consistently recognized that “the building code and zoning laws have different purposes and procedures. Whereas the main purpose of zoning is to stabilize the use of property and to protect an area from deleterious uses, a building code relates to the safety and structure of buildings.” *Lee v. Cai*, 102 Mass. App. Ct. 491, 500 (2023), quoting *Carstensen v. Cambridge Zoning Bd. of Appeals*, 11 Mass. App. Ct. 348, 356-357 (1981), quoting *Enos v. Brockton*, 354 Mass. 278, 280-281 (1968). Indeed, as the authoritative Massachusetts Zoning Manual (MCLE, 8th ed. 2024) confirms, “[t]he state building code is not part of the zoning law,” and harm attributable to a building code violation is analyzed separately from harm attributable to a zoning violation. *Id.* at § 11.4.8(b), citing *Rinaldi v. Bd. of Appeal of Bos.*, 50 Mass. App. Ct. 657, 660-661 (2001); *Carstensen*, 11 Mass. App. Ct. 348 (1981). At the same time, the manual recognizes that “the mere fact that the building code applies to structures does not mean that a proposed structure cannot cause cognizable zoning harm.” *Id.*, discussing *Lee v. Cai*, 102 Mass. App. Ct. 491 (2023).

The State Building Code's fire separation distance is a construction standard—it governs how buildings are constructed (e.g., fire-rated walls, materials, sprinkler systems) to ensure structural safety. The Zoning Ordinance's building separation distance is a dimensional and placement standard—it governs where buildings may be located to protect neighborhood character, light, air, privacy, and land use compatibility. These serve different regulatory purposes. Compliance with both is required.

The argument that compliance with the building code excuses noncompliance with the zoning ordinance has been squarely rejected. In *Lee v. Cai*, the Appeals Court rejected the argument that physical impacts on an abutting property were solely a building code concern and that zoning review need not consider them. The court held that deferring to the building code on such matters “would render meaningless” the zoning provisions at issue. 102 Mass. App. Ct. at 500. That reasoning applies directly here: accepting the Building Commissioner's determination that the Building Code's fire separation distance preempts the Zoning Ordinance's building separation requirement would render §3.1.12 and §2.4.3 of the Zoning Ordinance meaningless with respect to structures on abutting lots.

Similarly, in *Reddish v. Bowen*, 66 Mass. App. Ct. 621, 628 (2006), the Appeals Court treated a local zoning setback requirement as an additional obligation on top of the State Building Code—not as something displaced by it. The court found that a

contractor's violation of a local zoning setback constituted a violation of a "building law" precisely because the Building Code itself incorporated local zoning separation requirements as supplementary standards. This confirms that the Building Code and local zoning dimensional standards operate together, with the more restrictive requirement governing.

The Zoning Act itself draws a clear line between building code territory and zoning territory — and building separation falls on the zoning side. M.G.L. c. 40A, § 3 provides that "[n]o zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code." The Building Commissioner's preemption argument implicitly relies on this provision — suggesting that building separation is a "method of construction" governed exclusively by the building code. But § 3 does not say that. It prohibits zoning from regulating materials and methods of construction — meaning how a building is physically built (e.g., fire-rated walls, sprinkler requirements, structural materials). Building separation is not a material or a method of construction. It is a dimensional and placement standard that governs where a building may be located on a lot — the same category of regulation as setbacks, yard sizes, and lot area. Section 3 itself confirms that these dimensional standards are squarely within zoning authority, providing that even uses otherwise exempt from zoning "may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." The Somerville Zoning Ordinance's 10-foot building separation requirement is precisely this type of dimensional regulation — one that M.G.L. c. 40A, § 3 recognizes as falling within municipal zoning authority, not within the scope of building code preemption.

The Zoning Ordinance expressly addresses this situation. Section 1.1.8(b) provides: "Where the provisions of this Ordinance impose a greater restriction than required by other ordinances, regulations, resolutions, rules, easements, covenants, or agreements, the provisions of this Ordinance apply." Section 1.1.8(c) further provides: "Where the provisions of this Ordinance impose a greater restriction than required by Federal or State law, the provisions of this Ordinance apply unless otherwise prohibited by law." Nothing in the State Building Code or M.G.L. Chapter 40A prohibits a municipality from imposing building separation distances greater than the Building Code's minimum fire separation distance. The Zoning Ordinance's 10-foot building separation requirement is therefore the governing standard.

3d. The permit plans did not evaluate building separation to the abutting lot.

The building permit plans identify a building separation distance of 10.1 feet measured to the principal building on the same lot. The plans do not appear to evaluate the

building separation distance to the Appellant's accessory building on the abutting lot, despite the Ordinance's explicit requirement to do so. The Zoning Compliance Certificate, if issued, was therefore based on an incomplete analysis of the applicable dimensional standards.

The Building Commissioner's duty to enforce the Zoning Ordinance is mandatory, not discretionary. M.G.L. c. 40A, § 7 provides that the building commissioner "shall be charged with the enforcement of the zoning ordinance or by-law and shall withhold a permit for the construction, alteration or moving of any building or structure if the building or structure as constructed, altered or moved would be in violation of any zoning ordinance or by-law." The legislature's use of the word "shall" imposes a mandatory obligation. The statute contains no exception permitting the Building Commissioner to issue a permit that violates a zoning dimensional standard merely because the building code imposes a less restrictive standard. As the Massachusetts State Ethics Commission has recognized, "the issuance of a permit is the local building official's decision or determination that the work complies with all relevant codes, laws, ordinances, rules and regulations," including "the minimum side yard and set-backs of the local zoning law." EC-COI-88-9 (1988). The Building Commissioner's issuance of a permit for a Backyard Cottage that does not comply with the Zoning Ordinance's 10-foot building separation requirement was therefore in error, regardless of compliance with the Building Code's fire separation standards.

The Inspectional Services Department has acknowledged that the building separation distance shown on the plans was measured to the principal building on the same lot, not to the Appellant's accessory building on the abutting lot. See Exhibit A.

3e. The Building Commissioner's interpretation of the Zoning Ordinance is legally incorrect and not entitled to deference.

While courts give substantial deference to a board's reasonable interpretation of a zoning ordinance, "an incorrect interpretation ... is not entitled to deference." Shirley Wayside Ltd. P'ship v. Bd. of Appeals of Shirley, 461 Mass. 469, 475 (2012); Pelullo v. Croft, 86 Mass. App. Ct. 908, 910 (2014). This principle applies with even greater force at the administrative level: under M.G.L. c. 40A, § 14, this Board has "all the powers of the officer from whom the appeal is taken" and is empowered to independently determine whether the Building Commissioner correctly applied the Zoning Ordinance.

Here, the Building Commissioner's determination that the State Building Code preempts the Zoning Ordinance's building separation requirement is not a matter of reasonable interpretive discretion—it is a legal error. The Zoning Ordinance unambiguously requires a 10-foot building separation from structures on abutting lots. See §§ 2.4.3, 3.1.12. The Building Commissioner did not interpret ambiguous language; he declined to enforce a clear dimensional standard based on the incorrect legal premise that the Building Code

overrides it. This Board is not required to defer to that determination and should reverse it.

3f. The property owner cannot claim equitable hardship or reliance on the building permit.

To the extent the property owner or the Building Commissioner argues that ordering compliance with the Zoning Ordinance would cause undue hardship because the foundation has already been poured, this Board should give no weight to that argument. The property owner proceeded with construction with full knowledge that the building separation requirement was in dispute.

The timeline is as follows:

- On the evening of Tuesday, March 10, 2026, the Appellant notified the Inspectional Services Department in writing, with photographic evidence and measurements, that the proposed foundation appeared to violate the Zoning Ordinance's building separation requirement.
- On the morning of Friday, March 13, 2026, the Appellant separately notified the property owner in writing (via text message) that the building separation requirement appeared to be violated.
- On the afternoon of Friday, March 13, 2026—after both ISD and the property owner had been notified—the foundation was poured.
- Construction proceeded.
- May 12, 2026 - Property owner is aware of administrative appeal (Exhibit
- Work continues on the cottage. Work is observed: May 20 - worker on ladder inside building. May 28 - observed workers walking inside cottage carrying construction materials. June 1 - observed worker inside cottage and hammering. See Exhibit F.

The property owner's decision to pour the foundation after receiving notice of the potential violation and continue construction after being made aware of the ongoing administrative appeal is a deliberate choice to proceed at his own risk. Massachusetts courts have long held that a property owner who continues construction after being put on notice of a challenge to the legality of that construction cannot later claim equitable reliance on the permit to avoid the consequences of noncompliance.

In *Barkan v. Zoning Bd. of Appeals of Truro*, 95 Mass. App. Ct. 378, 380 (2019), the Appeals Court noted that when the original owner began constructing a house after the building permit had been challenged, "the Land Court judge warned him that he was proceeding at his own risk." The court considered that fact in evaluating whether the owner was entitled to the protections of the shorter statute of repose—a provision

designed to protect owners who build in good-faith reliance on a permit. Similarly, the Massachusetts Zoning Manual (MCLE, 8th ed. 2024) notes that courts are “reluctant to apply principles of estoppel to public entities where to do so would negate requirements of law intended to protect the public interest,” *id.* at § 11.9.14, quoting *O’Blenes v. Zoning Bd. of Appeals of Lynn*, 397 Mass. 555, 558 (1986), and that a property owner who has received a building permit is not protected by estoppel where the permit was issued in error. See *Nichols v. Bd. of Zoning Appeal of Cambridge*, 26 Mass. App. Ct. 631, 634-635 (1988) (city not estopped from requiring a property owner to obtain a special permit, notwithstanding prior issuance of a building permit and permittee’s reliance thereon).

Here, the property owner was informed of the potential violation before the foundation was poured and chose to proceed. Any hardship resulting from the need to modify or relocate the building was not caused by the Appellant or by the Zoning Ordinance — it results from the property owner’s decision to continue construction after being notified of the dispute. The Board should ensure that proceeding with construction after notice of a potential violation does not override the Zoning Ordinance’s dimensional requirements. The appropriate remedy is to require compliance with the Zoning Ordinance, regardless of the current state of construction.

4. Relief Requested

The Appellant respectfully requests that the Zoning Board of Appeals:

- a. Reverse the Building Commissioner’s determination that the State Building Code preempts the Zoning Ordinance’s building separation requirement, and determine that the structure at the rear of 23 Avon Street is an accessory building of the Backyard Cottage type entitled to the building separation protection of §2.4.3.b;
- b. Find that the Backyard Cottage at 24 Berkeley St. does not comply with the minimum building separation distance required by §3.1.12 as defined by §2.4.3 of the Zoning Ordinance;
- c. Order that construction of the Backyard Cottage be stayed pending compliance with the Zoning Ordinance; and
- d. Grant such other and further relief as the Board deems appropriate.

The Appellant recognizes that achieving compliance may require modification to the foundation as constructed. The Appellant did not create this situation — the property owner proceeded with construction after being notified of the violation. To the extent the property owner cannot achieve compliance with the 10-foot building separation requirement, the proper mechanism is for the property owner to apply for a Hardship Variance under the Somerville Zoning Ordinance. The Appellant takes no position at

this time on whether such a variance should be granted but notes that the criteria for a Hardship Variance must be independently satisfied, and that a self-created hardship — resulting from a decision to build in a location that does not comply with the ordinance — does not ordinarily meet that standard.

5. Exhibits

Exhibit A: Email correspondence with the Inspectional Services Department, including the Building Commissioner’s determination and the Appellant’s response.

Exhibit B: Photographs and measurements documenting the building separation distance between the Appellant’s accessory building and the Backyard Cottage foundation, with dates and timestamps.

Exhibit C: Text messages to the property owner and contractor notifying them of the zoning violation prior to the foundation pour.

Exhibit D: Relevant excerpts from the Somerville Zoning Ordinance (§1.1.8, §2.4.3, §3.1.12).

Exhibit E: Includes photographs of the plans and screen captures from the Somerville GIS site, showing the overlap and distances leading to the Building Separation violation.

Exhibit F: Photos of continuing construction at 24 Berkeley Backyard Cottage

See also exhibits submitted in the slides presentation submitted to citizenserve on May 21.

Respectfully submitted,

Thomas Higdon
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Somerville, MA 02143
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765-430-2467

Date: 3-16-2026

EXHIBIT A



Thomas Higdon <thomas.p.higdon@gmail.com>

24 Berkeley St. (B25-001643): possible zoning violation, ongoing construction at 4 messages

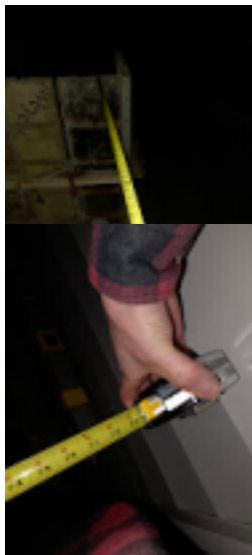
Thomas Higdon <thomas.p.higdon@gmail.com> Tue, Mar 10, 2026 at 11:08 PM To: ISD Emails <isd@somervillema.gov>

B25-001643 is for the construction of a backyard cottage at 24 Berkeley St. The plans for this permit specify a building separation of 10.1ft. In the zoning ordinance, the minimum building separation for a backyard cottage to another building in this district (NR) is 10ft, if I understand correctly (3.1.7 - Building Setbacks - E).

The contractor has built forms for a foundation. When measured parallel from the face of the exterior wall of my accessory building on the rear abutting lot at 23 Avon St, the inner wall of the forms are about 83 inches from my building. I believe this is less than the 10ft specified in the zoning ordinance, and would definitely be a violation, once built. Any eventual exterior wall would be even closer than 83 inches.

I've pictured my measurements. My tape measure is 3.5 inches, and shows 79.5 inches from the form to my outer wall, for a total of 83 inches.

Thomas Higdon <thomas.p.higdon@gmail.com> Tue, Mar 10, 2026 at 11:13 PM To: ISD Emails <isd@somervillema.gov>



measurements

20260310_222800.jpg
2494K

20260310_222752.jpg
1366K

Joshua Manion <jmanion@somervillema.gov> Fri, Mar 13, 2026 at 1:49 PM To:

"thomas.p.higdon@gmail.com" <thomas.p.higdon@gmail.com>
Cc: ISD Zoning <isdzoning@somervillema.gov>, Peter D'Agostino
<pdagostino@somervillema.gov>, Al Bargoot <abargoot@somervillema.gov>, Kelly
Como <kcomo@somervillema.gov>

Good afternoon,

<https://mail.google.com/mail/u/0/?ik=3e67fbb7f8&view=pt&search=all&permthid=thread-a:r-7798800067578738261&simpl=msg-a:r5970807190493650268&simpl...> 1/3

3/15/26, 2:13 PM Gmail - 24 Berkeley St. (B25-001643): possible zoning violation, ongoing construction at

Thank you for bringing this to our attention - I reviewed the building permit documents and discussed this matter with our team, and have the following feedback:

The building separation distance of 10.1' noted in the plans appears to be identifying the distance between the Backyard Cottage and the Principal Building on the lot, not between the Backyard Cottage and the accessory structure at the rear of 23 Avon.

That being said, the Building Commissioner had determined that the building separation provision in the zoning ordinance was preempted by the Building Code, in which building separation distance is regulated by minimum fire separation distance. I will need to defer to the building inspectors on the specifics of those requirements, but my understanding is that this development proposal complies with the relevant Building/Fire Code requirements. Otherwise, the situs of the proposed Backyard Cottage complies with the relevant setback requirements, which call for a minimum rear setback of 3'.

Please feel free to reach out should you have any further questions on this.

Thanks,

Josh Manion
Sr. Zoning Review Planner
Inspectional Services

City of Somerville Public Records Notice

Please be advised that the Massachusetts Attorney General has determined that email is a public record unless the content of the email falls within one of the stated exemptions under the Massachusetts Public Records Laws.

From: Kelly Como <kcomo@somervillema.gov>
Sent: Wednesday, March 11, 2026 7:06 AM
To: ISD Zoning <isdzoning@somervillema.gov>
Cc: Peter D'Agostino <pdagostino@somervillema.gov>; Al Bargoot <abargoot@somervillema.gov>
Subject: FW: 24 Berkeley St. (B25-001643): possible zoning violation, ongoing construction at

Thank you

Kelly Como

City of Somerville

Inspectional Services Division

Inspectional Services Liaison

[1 Franey Road](#)

[Somerville, MA 02145](#)

617-625-6600 ext 5606

617-666-2624 Fax

From: Thomas Higdon <thomas.p.higdon@gmail.com>

Sent: Tuesday, March 10, 2026 11:13 PM

To: ISD Emails <isd@somervillema.gov>

Subject: Re: [24 Berkeley St. \(B25-001643\)](#): possible zoning violation, ongoing construction

at

<https://mail.google.com/mail/u/0/?ik=3e67fbb7f8&view=pt&search=all&permthid=thread-a:r-7798800067578738261&simpl=msg-a:r5970807190493650268&simpl...> 2/3

3/15/26, 2:13 PM Gmail - [24 Berkeley St. \(B25-001643\)](#): possible zoning violation, ongoing construction at **This**

email is from an external source. Use caution responding to it, opening

attachments or clicking links.

attached are my measurements

[Quoted text hidden]

City of Somerville Public Records Notice

Please be advised that the Massachusetts Attorney General has determined that email is a public record unless the content of the email falls within one of the stated exemptions under the Massachusetts Public Records Laws.

Thomas Higdon <thomas.p.higdon@gmail.com> Fri, Mar 13, 2026 at 3:29 PM To: Joshua Manion <jmanion@somervillema.gov>

Cc: ISD Zoning <isdzoning@somervillema.gov>, Peter D'Agostino <pdagostino@somervillema.gov>, Al Bargoot <abargoot@somervillema.gov>, Kelly Como <kcomo@somervillema.gov>

Hello,

Thanks for your response.

According to 1.1.8b of the Zoning Ordinance: "Where the provisions of this Ordinance impose a greater restriction than required by other ordinances, regulations, resolutions, rules, easements, covenants, or agreements, the provisions of this Ordinance apply."

Therefore, because the zoning ordinance imposes a greater restriction than the building code here, it would override it.

To be more precise on the zoning ordinance language, the Somerville Zoning Ordinance 2.4.3.b.i states: Any principal or accessory building must be separated from any other principal or accessory building on the same lot or on an abutting lot by the building separation distance specified for each building type.

So the "Building Separation" is meant to include distance from structures on abutting lots, not just ones on the same lot.

If I understand correctly, the under-construction backyard cottage must conform to the Building Separation in the zoning ordinance for Backyard Cottages (3.1.12), which specifies a Building Separation of 10ft.

So I think if the backyard cottage does not have a separation of 10ft from the accessory building on my abutting lot, then it violates the zoning ordinance.

The building separation between the under-construction forms and the accessory building on my lot is 7ft, not 10ft. Therefore I think it would violate the zoning ordinance. And since this the zoning ordinance is more strict than the building/fire code, as you mentioned, it would override it.

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EXHIBIT B

Photographs taken Tuesday Mar 10, 2026. Measurements from the foundation forms prior to the concrete pour.

Measurement from the edge of the forms to my accessory building (grey siding on the right) are approximately 83 inches. $79.5 \text{ inches} + 3.5 \text{ inch tape measure} = 83 \text{ inches}$.



Measurement from the edge of the forms to the fence shows 58 inches.



EXHIBIT C

Screenshots taken Sunday March 15 of conversation occurring Friday March 13 at 9:37am.

2:14

73



Fombelle



Friday • 9:37 AM

RCS chat with Fombelle

Hey, I noticed at the construction site at 24 Berkeley that the foundation forms are up for the cottage. I think where they are currently placed, the wall for the cottage won't meet the minimum 10ft distance to my garage under the zoning ordinance. You want to verify this before pouring any concrete.

We had it measured 3x

By professionals

All approved and reviewed by city

You measured on site?

2:14 [📷] [📶] [🔋] [🔊] [🔴]

🔊 📶 📶 📶 73



Fombelle



By professionals

All approved and reviewed by city

You measured on site?

Yes - by a surveyor

Which has crazy strict over site

City has inspected and approved multiple times already

I measured with my tape measure, and the distance from my garage to the edge of the form is 84 inches.

Please stay off the construction site.

You can't go over there

I was able to measure it without entering the site.



9:48 AM [🔒] [🔒]

Mr. Fombelle is aware of the administrative appeal on May 12:

10:42

6 40



Fombelle



Please stay off the construction site.

You can't go over there

I was able to measure it without entering the site.



Tuesday, May 12 • 2:34 PM

I understand you filed Enforcement action with the city. Can you send me what you filed?

Pwfombelle@gmail.com



Tuesday, May 12 • 3:42 PM

It's on file with the city. ZP-26000037

EXHIBIT D

1.1.8 Conflicting Provisions

- a.
This Ordinance does not abrogate, annul, or otherwise interfere with any easement, covenant, or other private agreements.
- b.
Where the provisions of this Ordinance impose a greater restriction than required by other ordinances, regulations, resolutions, rules, easements, covenants, or agreements, the provisions of this Ordinance apply.
- c.
All development activity must comply with relevant Federal and State law and regulations. Where the provisions of this Ordinance imposes a greater restriction than required by Federal or State law, the provisions of this Ordinance apply unless otherwise prohibited by law.

2.4.3 Building Placement

- b.
Building Separation
 - i.
Any principal or accessory building must be separated from any other principal or accessory building on the same lot or on an abutting lot by the building separation distance specified for each building type.

3.1.12 Backyard Cottage

b. Building Placement

Building Setbacks	
A Primary Front <u>Setback</u> (min/max)	60 ft
B Secondary Front Setback (min/max)	10 ft
C Side Setback (min)	3 ft
E Rear Setback (min)	3 ft
Alley	3 or 20 ft
No alley	3 ft
E <u>Building Separation</u> (min)	10 ft

EXHIBIT E

Entire plan for backyard cottage shows no reference to building on Appellant's abutting lot.

Dimensions showing 24'0" building width and 5'0" setbacks from side.

ZONING DIMENSIONAL TABLE - DISTRICT: NR BACKYARD COTTAGE		ALLOWED REQUIRED	EXISTING	PROPOSED	COMPLIANCE
A	LOT WIDTH (min)	---	---	---	---
	No Driveway Access	32 ft	N/A	N/A	N/A
	Side or Rear Driveway Access	32 ft	N/A	N/A	N/A
	Front Driveway Access	34 ft	50 ft	50 ft	CONFORMS
B	LOT COVERAGE (max)	60 %	64 %	62.5 %	EXISTING NON-CONFORM
C	GREEN SCORE (min)	---	---	---	---
	Minimum	0.35	---	0.405	CONFORMS
	Ideal	0.40	---	---	CONFORMS
D	PRIMARY FRONT SETBACK (min/max)	60 ft	---	78.5 ft	CONFORMS
E	SECONDARY FRONT SETBACK (min/max)	10 ft	---	N/A	N/A
F	SIDE SETBACK (min)	3 ft	---	5 ft	CONFORMS
G	REAR SETBACK (min)	3 ft	---	5 ft	CONFORMS
	No Alley	3 ft	---	N/A	N/A
H	BUILDING SEPARATION (min)	10 ft	---	10.1 ft	CONFORMS
I	BUILDING WIDTH (max)	24 ft	---	24 ft	CONFORMS
J	BUILDING DEPTH (max)	32 ft	---	24 ft	CONFORMS
K	FLOOR PLATE (max)	576 sf	---	576 sf	CONFORMS
L	STORY HEIGHT (max)	12 ft	---	9.1 ft	CONFORMS
M	NUMBER OF STORIES (max)	1.5	---	1.5	CONFORMS
N	ROOF TYPE	Flat, Gable	---	Gable	CONFORMS
O	GROUND STORY FENESTRATION (min/max)	---	---	---	CONFORMS
	Residential Use	15% / 50%	---	21 %	CONFORMS
	Vehicular Parking	0% / 30%	---	N/A	N/A
P	UPPER STORY FENESTRATION (min/max)	15% / 50%	---	16 %	CONFORMS
Q	DWELLING UNITS (max)	1	---	1	CONFORMS

Screen capture of measurement from the Somerville GIS site, showing a 27.28ft distance from the lot line on the right side to the edge of the accessory building on the abutting lot.



Screen capture from the Somerville GIS site showing the 1.6ft distance from the accessory building to the rear lot line.



The proposed backyard cottage's southeastern wall will be 29ft from the lot line it shares with 26 Berkeley St, by summing the setback with the building width. This exceeds the 27.28 distance between the 23 Avon St. accessory building's northwestern wall and the 24-26 Berkeley St. lot line, meaning there will be overlap. And the distance between the two buildings in that overlap will be around 6.6ft, which is smaller than the required Building Separation.

Exhibit F:

May 20 1:20pm. Worker on a ladder inside under-construction backyard cottage.



June 1: 7:10am worker entering the cottage construction site

