



City of Somerville

ZONING BOARD OF APPEALS

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

TO: Zoning Board of Appeals
FROM: Planning & Zoning Staff
SUBJECT: 515 Somerville Ave, P&Z 21-049
POSTED: June 18, 2021

RECOMMENDATION: Deny (AA)

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

This memo summarizes the administrative appeal submitted for 515 Somerville Ave and provides analysis or feedback as necessary. The application was stamped by the City Clerk on April 27, 2021 and is scheduled for a public hearing on June 23, 2021. 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

Applicant Claudia Murrow seeks an administrative appeal of the building inspector's decision of October 23, 2019, to issue two building permits for 515 Somerville Ave (B19-001687 and B19-001788). Remand pursuant to NO. 20 MISC 000283 (RBF).

SUMMARY OF PROPOSAL

Claudia Murrow is appealing the Building Inspector's decision to issue B19-001687 and B19-001788. These are the permits for the hotel at 515 Somerville Avenue, currently under construction. The core argument for why the two Building Permits should be revoked is that the plans reviewed when issuing the Building Permits ("BP Plans") were "substantively different" from the plans reviewed by the ZBA as part of the October 24, 2018, approval (referred to as the "OA Plans" in Murrow's appeal; Staff will refer to it as the ZBA plans). Murrow argues that because the BP and ZBA plan sets were different, the BP plans require "de novo review and approval by the Board for compliance" with the review criteria for SPSRs and Variances.¹ Murrow goes on to claim that the BP plans do not meet the necessary criteria for approval by the Board, and thus the Building Permits should be revoked.

PROCEDURAL HISTORY

¹ Quoted from pg. xiv of the application.

In August of 2018, YEM Somerville Ave, LLC, Jordan D. Warshaw, and DEVB, LLC (“the Developers”) applied for a Special Permit with Site Plan Review (SPSR) to establish a hotel use and for Variances regarding height, number of stories, and the number of off-street parking spaces. This project was submitted to the Board after the applicant had engaged the community in public meetings, and built significant public support for the project.

On October 24, 2018, the ZBA voted to approve a Special Permit with Site Plan Review and Variances for height, number of stories, and parking for a hotel at 515 Somerville Ave. The developer, staff, public and board were all supportive of the proposal at that tie. No timely appeal was filed for this decision (ZBA 2018-122; “2018 Decision”). This decision is the basis for the current building permits, which are now under appeal.

In 2019, the developer was seeking changes to the approved permit plans. The staff determined that, while some portions of this request were *de minimis*, the overall request included a material change - specifically to substantially reduce the footprint of the garage. The applicant also requested an extension to the permit timeframe. Because of the timeframe extension and because some changes were deemed by staff to be substantive (not *de minimis*) changes, the developer would need to return to the Board with these changes. The developer applied in July 2019 for the Board to approve these material changes and the time extension. On August 21, 2019, the ZBA granted approval of these revisions to the original decision (ZBA 2018-122-R1-7/19; “2019 Decision”). This decision was appealed by Murrow; Murrow and the Developers agreed to end the lawsuit if the 2019 Decision was annulled and the application withdrawn. The ZBA voted to annul the 2019 Decision on April 15, 2020, and approved the Developers’ request to withdraw the application without prejudice. Therefore, **this revision is not relevant to the matter now before the Board.**

On October 17, 2019, the Director of Planning & Zoning issued a *de minimis* approval for the relocation of stairs and the timing of conditions for ZBA 2018-122. No timely appeal was filed for this decision.

On October 23, 2019, the Inspectional Services Department (“ISD”) issued two building permits (B19-001687 and B19-001788) to the Developers. These permits were issued, and the project began construction, exercising the variances while they were valid under the initial Board approval and timeframe. These permits did not use the August 2019 time extension or plan changes.

On November 22, 2019, Claudia Murrow (“Murrow”) requested that the Director of ISD revoke the two building permits issued to the Developers, filing an appeal per MGL 40A Section 7.

On December 12, 2019, the Director of ISD determined that Murrow’s request for enforcement from ISD was not the procedurally required path, and that the correct path was to appeal under MGL 40A, Sections 8 and 15 and Section 3.1.9 of the relevant version of the Somerville Zoning Ordinance. The letter noted that the plans were

substantially similar, but that there were some small differences that would be the subject of a forthcoming request for a *de minimis* change. These included removing the pool, changing wall thickness, and combining two guest rooms, thereby **reducing** the total room count by one unit.

On January 3, 2020, the Director of Planning & Zoning issued a second *de minimis* approval for changes to a number of civil engineering, landscaping, and architectural drawings. No timely appeal was filed for this decision.

Since that time, the building has been under construction following the building permit plan set, which is consistent with the original October 2018 Board approval as modified by the *de minimis* changes approved on October 17, 2019 and January 3, 2020.

On January 13, 2020, Murrow submitted an appeal of the ISD Director's December 12, 2019, determination regarding her request to revoke the Building Permits.

On April 22, 2020, the ZBA voted 4-1 to uphold the ISD Director's determination regarding Murrow's request, determining that it was not filed under the proper section of MGL 40A.

On July 21, 2020, Murrow filed an appeal of the ZBA's decision with the Land Court.

On March 17, 2021, the Court remanded the case to the ZBA so that Murrow may file an appeal, pursuant to MGL c. 40A §§ 8 and 15, of the two building permits issued by ISD in October 2018. This is the appeal now before the Board.

The Order of Remand dated March 17, 2021, states, in part, that "[i]n considering the Remand Petition, the Board shall reconsider the evidence presented in any application for or proceedings on the original petition that is the subject of this action along with the Remand Petition and any new evidence presented as part of the Remand Petition."²

SUMMARY OF BOARD PURVIEW

No timely appeal was filed for the original decision in 2018. Therefore, it is not within the Board's jurisdiction at this time to re-litigate whether the proposal has satisfied the required findings to be granted a SPSR or Variances. No appeals were filed of the Planning Director's *de minimis* decisions on October 17, 2019 and January 3, 2020.

The question before the Board at this time is whether the plans approved for construction by the two Building Permits (BP Plans) are substantively similar to the plans originally approved by the Board in ZBA 2018-122 (ZBA Plans), as modified by the *de minimis* changes approved by the Planning Director.

Arguments regarding whether the BP Plans meet the criteria for granting the SPSR and/or the Variances are not relevant to this case. Arguments about the impact of the

² Page 2 of the Order of Remand in Case NO. 20 MISC 000283 (RBF)

property on the surrounding neighbors are also not relevant to the administrative appeal of a building permit.

ANALYSIS

The only question before the ZBA at this time is whether the project has a valid building permit based on approved plans.

The appellant may argue that the between the approved ZBA Plans and the approved BP Plans, there are substantive changes (i.e. changes that were not *de minimis* in nature).³ But, since the Board's original decision in 2018, the Director of Planning & Zoning approved two applications for changes to the proposal which were determined to be *de minimis*. The first application, in October 2019, was for modifications to the timing of conditions attached to the 2018 Decision and for modification to the location of the rear stairs. The second application, in December 2019, was for a variety of changes which were required to coordinate the plans approved by the 2018 Decision with the construction documents. Some of these changes were a result of the project needing to comply with various other building requirements, including the state acoustical requirements and fire protection requirements. The Planning Director's determination that a change is *de minimis* can be appealed to the Board by an aggrieved party, but in this case neither were.⁴

Murrow claims that neither *de minimis* decision "specifically identified" what changes were approved or "which plans the Director was comparing the BP Plans to when she made that determination" and suggests that it "is obviously not true" that the *de minimis* decisions compared the requests to the 2018 Decision.⁵ However, when the Director's decision is view in conjunction with the *de minimis* application she was reviewing, it is clear that the plans are being evaluated against the plans approved by the ZBA as part of the 2018 Decision. For example, the October request shows the approved location and design of the stairs which match the 2018 Decision. And the narrative for the December request specifically states that the changes are "compared with the Approved ZBA Drawings, dated 10/04/2018" which are the plans approved as part of the 2018 Decision (see the Appendix at the end of this memo). It is clear from reviewing the plans approved as part of the 2018 Decision, the applications for *de minimis* changes, and the plans submitted as part of those applications that the changes were being evaluated against the 2018 Decision, not the 2019 Decision.

Murrow goes on to suggest that if any of the changes included in the revision sent to the Board in August 2019 were *de minimis*, they should have been identified as such in the Staff Memo to the Board, or should have been applied for separately from the revision

³ The criteria for determining that a change is *de minimis* are the same whether the request is evaluated under §5.3.8 of the Ordinance in place prior to December 12, 2019, or if it is evaluated under §15.2.4.e.i. of the Ordinance in place after December 12, 2019.

⁴ Both the Ordinance in place prior to December 12, 2019, and the Ordinance in place after that date permitted aggrieved parties to appeal the Director's decision to the ZBA.

⁵ Page ix-x.

sent to the Board.⁶ However, nothing in the Zoning Ordinance requires that applicants submit changes in a piecemeal fashion, or that the Planning Director evaluate them that way.

The application that the Developers submitted in August 2019 included a request to reduce the number of parking spaces from 80 to 58 spaces, which was clearly a substantial change to the proposal and the proposal's potential impacts on the neighborhood.⁷ The Planning Director determined that this application contained changes that were not *de minimis*, and that it required review by the Board. The Board held a public hearing and voted to approve the proposed changes; the 2019 Decision reflects this vote. As this decision was appealed by Murrow, the Developers decided to move forward with their project by relying on the 2018 Decision.

In December 2019, the Director received a new request from the Developers for changes to the plan set approved by the 2018 Decision. While there may be some similarities between the revision sent to the Board in August 2019 and this request, there were also important and substantive differences between the two applications. Specifically, the Developers were not proposing any changes to the number of parking spaces proposed for the project. After reviewing the request, the Director determined that the changes contained in it were *de minimis* and approved them.

The Developers' request to make modifications to their plans after receiving a building permit is an ordinary and common part of the development of projects of this size. And, while not ideal, in many cases those requests happen after building permits are issued and projects are underway. While applicants ideally build their plans exactly as approved by the ZBA, this rarely happens – *de minimis* changes are applied for and granted at different times during the construction process to address changes to the plans that may be necessary due to building code requirements, changes in interior layouts, or other issues that may not be foreseeable until construction drawings have been fully developed.

In conclusion, the project at 515 Somerville Avenue is consistent with community planning goals, and was well supported in the surrounding neighborhood. The plans were developed, before even reaching the ZBA, with some key design elements, including landscaping and front setbacks, that were designed to address specific neighborhood concerns. The project was issued a valid special permit and variance. Nothing about this project's review process is unusual, except for the intervening failed attempt at a modification that included substantive details. The project remains under construction in a format that is consistent with the original ZBA approval, and has only *de minimis* adjustments that were properly reviewed and were not appealed per the Zoning Ordinance when approved. Therefore, Staff recommends that the ZBA deny this building permit appeal and allow this project to be completed and open.

⁶ Page x.

⁷ The plans that were approved as part of the 2019 Decision were dated 07/18/19. They proposed 58 self-parking spaces and 32 valet-parking spaces, which was a substantial change from the 80 self-parking spaces originally approved.

APPENDIX

1. December 2019 request for Plan Changes.

Architecture
Urban Design
Master Planning
Programming
Interior Design
Graphic Design
Exhibit Design

Stefanie Greenfield
Patricia E. Intrieri
Gary C. Johnson
Yongjoo Kim
Peter Kuttner
Timothy D. Mansfield
Adam P. Mitchell
Marc Rogers
Jose Silveira

Stefan Bold
Jan L. Brenner
Justin Crane
Chris Muskopf
James C. Puopolo
Penny J. Sander
Douglas Simpson
Peter Sollogub
Joslin Stewart
Pamela N. Sullivan
David E. Wiborg

Memorandum

To: Adam Dash, Esq.
From: Jan L. Brenner AIA, Cambridge Seven Associates, Inc.
Subject: Summary of Permit Drawings – Plan changes for Cambria Somerville-Cambridge
Date: December 19, 2019

Plan changes on Permit Drawings, dated 09/17/2019, as compared with the Approved ZBA Drawings, dated 10/04/2018:

Civil Engineering Drawings

Changes to Sheet C1.0 – Site Layout & Utility Plan

1. Building doors to front patio have been deleted.
2. Upper story building overhang has been modified.
3. Domestic and fire suppression water services have been relocated.
4. Sanitary sewer service has been relocated.
5. There is now a BlueBike Station on Somerville Avenue.
6. Addition of site lighting.
7. Addition of bike racks.
8. Reconfigure portion of building & sidewalk – deleted fitness center.
9. ADA parking added, trash enclosure location revised.
10. Added crosswalk and ADA parking.
11. Added porous pavement.
12. Reconfigure portion of building/sidewalk, added transformer.
13. Footprint of below-grade garage has been modified.
14. Driveway with tip downs.
15. Proposed gas connection.

Changes to Sheet C1.1 – Grading and Drainage Plan

1. Added trench drain at bottom of ramp, pump chamber, and connection to CB#1
2. Added trench drain (TD#2) near entrance, DMH#8 and water quality unit (WQU#1). Connecting the TD#2 and CB#6 to the WQU#1 and discharge to DMH#8.
3. Relocated CB#1, and added DMH.
4. Added CB#3.
5. Added CB#4, and area drain for trash enclosure.
6. Added CB#5, and DMH, relocated particle separator.
7. Relocated site storm drain to connect to 66" municipal drain line in Somerville Avenue.
8. Connected foundation drain the site storm drain system.
9. Connected foundation drain to DMH#8.
10. Replaced DMH6 over existing pipe with insert a tee.
11. Added CB#6.

Landscape Architecture Drawings (refer to clouded areas shown on L1.0 and on L4.0)

- 1- Hotel Drop off area:
 - a. Revised paver patterns and styles for simplified appearance

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- b Removed granite cobbles to assist snow plowing operations
- 2- Restaurant Outdoor Dining area:
 - a Reshaped plant beds and ADA access to conform to door location
 - b Replaced planters with railing to maximize square footage at seating area
 - c Added steps/access point on east end for ease of circulation
- 3- Blue Bike location:
 - a Added 15 station Blue Bike along Somerville Ave.
- 4- Rear/Service Doors
 - a Reshaped plant beds to conform to door locations and transformer location
- 5- Loading/Trash area
 - a Added ADA van parking space (covered)
 - b Added garage vent fencing
 - c Resized Trash Enclosure to meet requirements
 - d Moved bike racks to accommodate transformer location
- 6- West sidewalk
 - a Reshaped plant beds and paving to conform to door locations
- 7- North end wall
 - a Increased plant bed size slightly due to parking area adjustments
 - b Omitted greenscreen trellises due to cost constraints
- 8- Lighting
 - a Added 6 lighted bollards at Hotel entry for atmospheric light

Architecture Drawings (refer to clouded areas shown on A1.0 through A8.1)

- 1- Parking Plan:
 - a Revised Elevator Core due to Cambria Standards
 - b Added ADA Parking Spaces per code
- 2- First Floor Plan:
 - a Deleted Pool due to Construction Cost
 - b Added Covered HCP Van Parking per code
 - c Revised Overall Dimensions due to deletion of pool
- 3- Second through Fifth Floor:
 - a Revised Overall Dimensions due to increased Guestroom Wall thickness per Cambria Design Standards and to meet MA acoustical code requirement of STC 50
- 4- Sixth Floor Plan:
 - a Revised Overall Dimensions due to increased Guestroom Wall thickness per Cambria Design Standards and to meet MA acoustical code requirement of STC 50
 - b Combined two Guestrooms to create a 2-key suite
 - c Reduced from 12 to 11 rooms per above change
- 5- Drawing A1.7:
 - a Revised Area Stats per changes due to Guestroom Wall thickness and deletion of Pool
 - b Revised total room count from 164 to 163 due to Sixth Floor Change. (Refer to 4-b&c above)
- 6- Exterior Elevations:
 - a Changes to Exterior materials due to Construction Cost and because previous proposed wood material did not meet Fire Protection code (NFPA 285). Added windows on West and North elevation to improve aesthetics based on input at community meetings

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- b. Floor to floor height is reduced to allow for the thickness of roof insulation on 5th floor roof and to create an ADA accessible roof.