CITY OF SOMERVILLE, MASSACHUSETTS
MAYOR'S OFFICE OF STRATEGIC PLANNING & COMMUNITY DEVELOPMENT
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Case #: ZBA 2018-167
Site: 654 Mystic Avenue
Date of Decision: January 9, 2019
Decision: *Denied*
Date Filed with City Clerk: January 23, 2019

ZBA DECISION

Site: 654 Mystic Avenue
Applicant Name: Linda Pingiaro and James DeMichelle, individually and as Trustee of 48-50 Ash Avenue Condominium Trust
Applicant Address: 48 Ash Avenue, Unit B, Somerville, MA02145
Agent: Philip H. Cahalin
Agent Address: 85 Exchange Street, Ste 206 Lynn, MA 01901
Alderman: Jesse Clingan

Legal Notice: Applicant, Linda Pingiaro and James DeMichelle, individually and as Trustee of 48-50 Ash Avenue Condominium, seek an Administrative Appeal per SZO §3.1.9, §3.2, and §3.2.3 of building permits numbered B18-000680, B18-000681, and B18-000682 issued by the Inspectional Services Department (ISD) for the building lots located at 654, 656, and 658 Mystic Avenue. The properties for which the building permits were issued are owned by 654 Mystic, LLC. BB zone. Ward 4.

Zoning District/Ward:	BB zone. Ward 4.
Zoning Approval Sought:	SZO §3.1.9, §3.2, and §3.2.3
Date of Application:	October 25, 2018
Date(s) of Public Hearing:	December 12, 108 and January 9, 2019
Date of Decision:	January 9, 2019
Vote:	4-1

Appeal #ZBA 2018-167 was opened before the Zoning Board of Appeals in the Aldermanic Chambers at Somerville City Hall on November 7, 2018. Notice of the Public Hearing was given to persons affected and was published and posted, all as required by M.G.L. c. 40A, sec. 11 and the Somerville Zoning Ordinance. On January 9, 2019 the Zoning Board of Appeals took a vote.

I.DESCRIPTION:

I. GROUNDS FOR APPEAL

Linda Pingiaro and James De Michelle, individually and as Trustee [sic]of 48-50 Ash Avenue Condominium (hereafter referred to as "the Appellants") are abutters to the 654 Mystic Avenue. 654 Mystic Avenue is the subject of the Administrative Appeal.

The Appellants allege that building permit B18-000680 issued on September 27, 2018[1].

> 1 – The developer has impermissibly split the lot into more than two lots and the project does not qualify as a subdivision.
>
> 2 – The proposed building is not permitted because the proposed units are not found in the table of permitted uses.
>
> 3 – The project needs a special permit because it is a six unit dwelling.
>
> 4 – The buildings violate the height limits of three stories and 40'.

The Appellants' allegations and related sub-claims are discussed below. Due to the length of the statements submitted by the Appellants, Board responses to each of these arguments and sub-claims are addressed in red text within the body of the Appellant's arguments.

II. BACKGROUND

Subject Property

The subject property is a 9,745 square foot lot containing an 830 square foot commercial structure formerly housing an auto garage. The locus is covered with bituminous material (asphalt) and presents a retaining wall running along the rear length of the property. A shorter, stepped retaining wall runs along the Moreland Avenue frontage. Currently, there are three, large curb cuts providing access to the property from Mystic Avenue. For some time, a chain-link fence has run the length of the Mystic Avenue frontage. The property overlooks Mystic Avenue and I-93. The property is located in the BB zone, but the rear of the property abuts an RA zone.

History

The property at 654 Mystic Avenue came before the Planning Board for the purpose of a lot split along with Design and Site Plan Review. Though the parcel is located in the BB zone, the Planning Board is the SPGA that has authority over lot splits and the design and site plan reviews associated with them (§5.4 of the SZO).

The proponents of the development project at 654 Mystic Avenue came before the Planning Board several times. In 2016, the proponents came before the Planning Board for a subdivision. In 2017, the

[1] The Appellants note in their supporting statements that they contest the issuance of building permits B18-000681, and B18-000682 as well. These building permits were issued for two additional lots created out of the original 654 Mystic lot, 656 and 658 Mystic Avenue. The above said, the Appellants submitted their appeal application only noting 654 Mystic Avenue as the locus subject to their appeal.

proponents changed their request from a subdivision to a lot split. This was done to ensure that the language of the Planning Board approvals was consistent with the language in the SZO and because the property owners' proposal met the description of a lot split, but not that of a subdivision. Further appearances before the Planning Board in 2017 and 2018 allowed for review and approval of changes to façade details and the number of units in each residential structure on each new lot.

An brief overview of the recent history of this site appears below:

December 8, 2016 – Planning Board grants approval for a subdivision to subdivide one lot into three

July 13, 2017 – Planning Board grants approval for lot splits, dividing one lot into three lots. Three-unit buildings are proposed for each lot.

July-August 2017 – Abutter, Linda Pingiaro files an Open Meeting Law (OML) violation complaint with the Commonwealth regarding the July 13, 2017 Planning Board hearing. The City responded to the Commonwealth regarding this complaint. The complaint was later dismissed.

August 17, 2017 – Planning Board grants approval for lot splits, dividing one lot into three lots; SZO section numbers were corrected in this version of the approvals. Due to the Open Meeting Law (OML) violation complaint, the project proponents opted for their case to be re-heard to ensure the Planning Board decision could not be contested based on the OML complaint.

February 13, 2018 –Planning Board grants approval for lot splits, dividing one lot into three lots. The Applicant proposes changes to the fenestration and reducing the number of units per building/lot from three (3) to two (2). This is also approved.

September 27, 2018 – Building permits B18-000680 (654 Mystic), B18-000681 (656 Mystic), and B18-000682 (658 Mystic) are issued by the Inspectional Services Department (ISD)

October 25, 2018 – The Appellants file an Administrative Appeal of the building permit(s) with the Somerville City Clerk.

December 6, 2018 – Attorneys for owners of 654, 656, and 658 Mystic Avenue submit memorandum to the Planning Board refuting the Appellants' claims.

III. APPEAL

Role of the ZBA: In an Administrative Appeal hearing, the ZBA hears appeals of the decision of the Superintendent of Inspectional Services. The process for such appeals is set out in MGL 40A, Section 8 and Section 3.2 of the SZO. An appeal may be filed by any person aggrieved by an order or decision of the Superintendent of Inspectional Services. All Administrative Appeals must be heard by the ZBA, even if another Special Permit Granting Authority (SPGA) was the permit granting authority. In the case, of 654 Mystic Avenue, the Planning Board was the SPGA.

The ZBA must determine whether to affirm the ISD decision or overturn it and why.

The Board believes that the Appellant s have status as (an) aggrieved party in this circumstance due to their being a direct abutter(s) or an abutter to an abutter of the project site. The Board believes that this Administrative Appeal is properly before the Board.

2. Analysis of the Appeal

OSPCD Board has reviewed:

1. the Administrative Appeal application from the Appellants
2. ISD files for the lots located at 654, 656, and 658 Mystic Avenue
3. the zoning relief files from 2016 – 2018 pertaining to the original 654 Mystic Avenue parcel
4. memorandum from the property owner of 654, 656, and 658 Mystic Avenue

In their appeal, the Appellant has put forth four (4) main arguments and and myriad sub-claims. These arguments and sub-claims are discussed below. Due to the length of the statements submitted by the Appellants, the Board response to each of these arguments and sub-claims is addressed in red text within the body of the Appellant's claims. Where Appellant claims are repetitious, the Board will only address them in detail once.

1 – The Appellants allege that:
The developer has impermissibly split the lot into more than two lots and the project does not qualify as a subdivision.

The SZO makes an express distinction in the number of divisions of land allowed under lot splits and subdivisions, lot splits are allowed only for the "division of a lot or parcel of land into two (2) smaller lots or parcels of land." SZO, §2.2.95.b Subdivisions allow for division of land into "two (2) or more lots." SZO, §2.2.163. Allowing multiple or successive lot splits to by-pass the restriction on the number of divisions allowed effectively renders meaningless the distinction made in the Ordinances between subdivisions and lot splits.

Board Response: The initial approval sought by the property owner of 654 Mystic Avenue was for a subdivision with Design and Site Plan Review. The definition of a subdivision in §2.2.163 allows for the "…division of a tract or parcel of land into two or more lots…" This section of the SZO also indicates that, in order for a subdivision to be an appropriate division of land, the land must be situated *"…where a new thoroughfare or way is needed to provide access to the lot(s) which would otherwise be landlocked"*.

It was never the case with 654 Mystic Avenue that a new thoroughfare would be needed to access the site from any direction. The site is clearly not landlocked as it has frontage along Mystic Avenue and Mooreland Street. Due to this nuance of the subdivision definition, it was later determined that, in fact, the owner of 654 Mystic Avenue needed a series of lot splits, not a subdivision. It is a series of lot splits that the Planning Board approved.

The Appellants continue: If the number of divisions of land allowed under lot splits and subdivisions are the same, there is no purpose served by having two different types of division of land permitted. A division of land into "two or more lots" must qualify as a subdivision, i.e. it is permissible only "where a new thoroughfare or way is needed to provide access to the lot(s) which would otherwise be landlocked." SZO, §2.2.163. Otherwise, the property may be divided into no more than two smaller lots. No new thoroughfare or way is needed to provide access to landlocked lots at 654 Mystic Ave.

The Board Response: What is before the ZBA is not whether or not the property at 654 Mystic Avenue should have been divided via the subdivision method. The points made immediately above by the Appellants serve to distract the ZBA from the core issue that they must address in this concern: whether or not the building permit is invalid in part due to 654 Mystic Avenue having been divided into more than two lots through the lot split process.

Section 5.4 of the SZO provides the Planning Board with the authority to grant lot splits with Design and Site Plan Review. A Lot split is defined in §2.2.95.b of the SZO as *the division of a lot or parcel of land into two (2) smaller lots or parcels of land*. The Appellants contend that the SZO limits a parcel to having only one additional lot created from it. There is no evidence in the SZO to support this claim. Moreover, the SZO does not prevent the Planning Board from granting another lot split of the new parcel resulting from the first lot split.

The Staff finds that the Appellants' allegations are not supported by the SZO and that the Planning Board has rightly granted a series of lot splits of the original property at 654 Mystic Avenue such that three new buildable lots were formed.

2 – The Appellants allege that:
The proposed building is not permitted because the proposed units are not found in the table of permitted uses.

The building consists of three sets of two townhouse-like structures over jointly owned garages. This doesn't qualify for any permitted use in the Table of Uses. The units are not townhouses because the common garage prevents them from being entirely separated by a firewall "from foundation to roof line." SZO, §2.2.166.

The Board Response: The structures as-approved are considered townhouses by both Planning Board and ISD. The full definition of "townhouse" reads as follows:

2.2.166. Townhouse. *Attached dwelling units completely separated by a continuous vertical fire wall which are constructed so that each unit (a) has two (2) building faces with outside exposure; (b) has separate entrances from the outside; (c) reaches from foundation to roof line; and (d) each unit is arranged, intended and designed as a residence for one (1) family.*

The Appellant has misread the definition of townhouse. The Appellant mistakenly reads that the definition requires there to be a continuous vertical firewall through the parking garage level up through the roof. The definition requires the dwelling units[2] to be completely separated by a continuous vertical fire wall. A dwelling unit is where people live. People do not live in garages by zoning definition. The garage is not part of the dwelling unit.

[2] ***2.2.46. Dwelling Unit.*** A single unit providing complete, independent living facilities containing one (1) or more rooms arranged for the use of one (1) or more individuals living together as a single housekeeping unit, with cooking, living, sanitary and sleeping facilities.

As seen on Sheets A-101, A-102, A-103, and A-104, the dwelling units are separated by a continuous vertical firewall. Further, each of the three structures containing two-unit townhouses is also separated by a continuous vertical firewall and separating foundation wall.

The misreading of the definition of "townhouse" appears to come from a simple misunderstanding of the agreement between subjects and verbs in a complex sentence; the flow of the definition is broken up by items in a list, making for a more challenging read. The definition of townhouse breaks down as follows:

1. ***Attached dwelling units… which are constructed so that each unit (a) has two (2) building faces with outside exposure***

   As illustrated on Sheet A-300, there are two building faces for each unit contained in each townhouse structure.

2. ***Attached dwelling units… which are constructed so that each unit…(b) has separate entrances from the outside;***

   As illustrated on Sheet A-300, each of the units in each of the townhouse structures has a separate entrance from the outside.

3. ***Attached dwelling units… which are constructed so that each unit…(c) reaches from foundation to roof line;***

   As illustrated on Sheets A-101 through A-104, each of the two dwelling units in each of the townhouse structures reaches from foundation to roof line. The dwelling units do not overlap each other as in a "Philadelphia" style townhouse for example. Thus, each dwelling unit individually reaches from foundation to roof line.

4. ***Attached dwelling units… which are constructed so that each unit… and (d) each unit* [sic] *is arranged, intended and designed as a residence for one (1) family.***

   As illustrated on Sheets A-101 through A-104, each dwelling unit is intended and designed for one (1) family.

The Appellants continue: They are not two family or multiple dwellings because there is no portion of any unit that is entirely above or below another unit. SZO, §§2.2.42 and 2.2.45. Because the common garage is jointly owned by both units above, the portion applicable to one unit can not [sic] be considered below the other unit because it is not below the portion of the other unit which is also the garage. Because the proposed structure doesn't qualify as any permitted use in the Table of Uses, it is not permitted. SZO, §7.7

The Board's Response: The owner of 654 Mystic Avenue does not claim that the structures being built are two- or multi-family. The structures being built are townhouses. Townhouses are explicitly allowed in §7.11 of the SZO, the Table of Permitted Uses as follows:

Note— § 7.11 was amended by Ordinance 2000-8 on May 25, 2000.

PRINCIPAL USE (unless specified otherwise)	DISTRICT												
	RA	RB	RC	NB	CBD	BA	BB	IA	IB (18)*	IP	OS	UN	ASMD
d. Town houses													
2 units (1)*	Y	Y	Y	Y	-	Y	Y	-	-	-	-	Y	SPSR-A
3 units (1)*	-	Y	Y	Y	-	Y	Y	-	-	-	-	-	SPSR-A
4-6 units	-	-	SP	SP	SP	SP	SP	-	-	-	-	-	SPSR-A
7 or more units	-	-	SPSR	SPSR	SPSR	SPSR	SPSR	-	-	-	-	-	SPSR-A

* See Footnotes Section 7.12.

As can be seen from the table above, the SZO allows townhouse structures in the BB zone without the need for a special permit (hence the "Y" for "yes" in the BB column). In fact, a townhouse structure with two (2) units, exactly that which is proposed by the owner of 654 Mystic Ave, is allowed in this district.[3]

3 – The Appellants allege that:
The project needs a special permit because it is a six unit dwelling.

The proposed development consists of one building with six residential units. Because the property is in a Business B district. This requires a special permit. Irrespective of whether the units are considered townhouses or units in a multiple dwelling building. SZO, §7.11(1)(c) and (d).

The Board's Response: The Appellants' premise above is false. The BB zone has no dimensional requirements for side yard setbacks. Therefore, distinct and separate structures containing one or more dwelling units each may touch each other at the property line. The property lines literally run through the right or left sides of each of the structures. There is no special permit required. There are three legal, buildable lots that have been created through a series of lot splits, each of which was approved to contain one townhouse structure containing two dwelling units. The approved townhouses are allowed without a Special Permit as indicated in the Use Table and associated discussion above.

[3] The reference to Section 7.12 footnote 1 refers back to Section 7.3 of the SZO and increased density for affordable housing in RA and RB zones which does not apply to this case.

The Appellants continue: Splitting the lot into three smaller lots and placing a party wall at the lot line doesn't convert the project into three separate buildings because uses are not classified by lot, and a party wall is not an element that defines a building, and party walls don't create detached dwellings which are defined as "[a] dwelling which is designed to be and is substantially separate from any other structure or structures except accessory buildings." SZO §2.2.41. A multiple dwelling is defined as "A residential building intended and designed to be occupied by four (4) or more families, where each of the units or any portion thereof, must be above or below at least one of the other units." SZO §2.2.42.

The Board's Response: The Board is unclear as to what the Appellants mean by "uses are not classified by lot." Uses are categorized by zone. "Use" refers broadly to residential versus commercial and their related specific subsets. In this case, a residential use is being activated and is a use that is allowed in the BB zone.

The Board has already discussed the Appellants' claims regarding the creation of more than one legal building lot. The Board also has already addressed the Appellants' earlier point regarding the type of dwellings that have been approved for this site. They are townhouses both by definition and in fact of approved construction.

The Appellants continue: A building is defined as "[a]ny structure…having a roof or other covering, and designed or used for the shelter or enclosure of any person…situated on private property and used for purposes of a building." SZO, §2.2.21. It is clear that the project consists of one building as defined because it has one roof. Party walls are not mentioned in the definition. It is also clear that the structure does not consist of three detached dwellings because not only is there one roof, there are single facades on the front and the back. Party walls do not "substantially separate" the adjoining structures from one another.

The Board's Response: The Board has already discussed the fact that the BB zone has no required side yard setbacks. Therefore, separate structures may be built right on the property line such that structures touch.

The Appellants continue: The fact that the finished grade was calculated on the basis of the project's being one building also underscores the fact that it is not three separate two family buildings. See sheet A-021 for each permit. (With each permit there are two sets of plans. The plans filed with the Planning Board and the plans filed with each permit application. They have the same designations. Unless otherwise noted, the references are made to the plans filed with the individual permit applications.) Finally, to the extent that the project could be considered either three two family building or one six family building, it must be considered one six family building because that is the more restrictive classification. SZO §7.8.

The Board's Response: The Board has already discussed the fact that the BB zone has no required side yard setbacks. Therefore, separate structures may be built right on the property line such that structures touch. The structures are townhouses by definition.

4 – The Appellants allege that:
The buildings violate the height limits of three stories and 40'.

The building consists of four floors. Only three stories and 40' height are allowed because the structure is almost entirely within 30 feet of the RA line in the back. SZO §8.6.20.

The Board's Response: The townhouse structures are three stories. The basement-level garage area does not count as a story because its ceiling is less than 5 feet above the proposed average finished grade abutting the building.[4] This can be seen on Sheets A-021 and A-022. Therefore, the townhouse structures, at 40' are at the height allowed where they rest within 30 feet of the RA district at the rear of the property.

The Appellants continue: The developers claim that the first floor is a basement and not a story because the ceiling is less than five feet above the average finished grade. A-021; SZO §2.2.14. However, they calculated the average finished grade incorrected to arrive at this conclusion. If it has been calculated correctly it would be clear that the first floor does not qualify as a basement.

The calculations for the finished grade are shown on sheet A-021 for each property. The sheet A-021 with the permit application for lot 656 shows both side yard slopes relative to the proposed building. The developers used the average elevation of the adjoining land method rather than the lowest point on the slope method. Because of the substantial slope, they should have used the lowest point on the slope method. That would have made the finished grade 19'.

The Board's Response: The term "substantial slope" used by the Appellant above is not a term that is used or defined in the SZO. Further, the land does not slope away from the approved structures. The structures are to be built into the existing slope of the land. The existing slope exists at the left rear of the parcel and is shown along the property line with Moreland Street.

The average finished grade has been calculated correctly based on slope and based on the definition of a basement. In addition, the ZBA should review the calculations that the owner of 654 Mystic Avenue has provided in their approved plan set. **These calculations can be viewed on Sheet A-021**. There are four images on this page. Each image shows the slope of the land along with the points at which measurements were taken to determine the average grade in that area. Above each graphic, the architect has provided the formula used to calculate the average grade for each area. Lastly, the average finished grade around the garage is shown outlined at the right side of the sheet. The average finished grade has been determined to be 6'10".

The Appellants continue: The two side views show substantial slopes from the back of the property to the front. The Moreland Elevation shows a continuous slope from an elevation somewhat less than 28' in the rear to 19' in the front. The East Elevation shows a slope from 28' down to a point in front of the proposed structure about 4' lower and from there to the front property line where it vertically drops to 19'. The shown slopes clearly call for the lowest point on the slope method which would put the finished grade at 19' rather than the average elevation of the adjoining land method used by the developers.

The Board's Response: The Board has already addressed this issue immediately above.

[4] As defined in §2.2.14 of the SZO as follows: ***Basement.*** *A story with at least forty (40) percent of its height below finished grade. However, for purposes of determining compliance to the height limit requirement of this Ordinance, a basement shall not be considered a story unless its ceiling is five feet or more above the average finished grade abutting the building*. [Emphasis added by Staff.]

The Appellants continue: It appears that the developers intend to use retaining walls on the property lines in some complex fashion in [sic] avoid this inevitable conclusion. For example, the East Elevation shows a sudden drop in grade of more than 4' at the front property line and the Moreland Elevation shows the grade below the top of the garage in the rear which requires at least 18" of dirt on top. Planning Board Decision, PB 2018-01, Condition 32.

The Board's Response: The SZO does not prohibit property owners/developers from bringing in fill or constructing retaining walls as mechanisms for achieving average finished grade / building height.
The Appellants continue: In the Land Court appeal, the developers claimed that retaining walls would not be used to obtain the finished grade. However, their plans clearly show retaining walls in use. The Site Plan and Sections A-A and E-E of the Grading & Stormwater Plan (the Grading & Stormwater Plan filed with the Planning Board has all of the Sections on one sheet for ease of reference) show proposed retaining walls on the sides of the building and sheets A-101 and A-410 show retaining walls in the front.

The Board's Response: Statements made in a Court appeal are of no consequence to Planning Staff and the ZBA in the matter of an Administrative Appeal and will not be considered.

Further, as stated above, the SZO does not prohibit property owners/developers from bringing in fill or constructing retaining walls as mechanisms for achieving average finished grade / building height.

The Appellants continue: In any event, it is clear that the developers haven't provided anywhere near enough information to show that they're entitled to use the average elevation of the land adjoining the building method rather than the lowest point on a slope method. It is noted that the "detailed engineering renderings" they're required to provide relative to the issue as a condition prior to the issuance of the permit don't appear to be in the ISD files. Planning Board Decision, PB 2018-01, Condition 7.

The Board's Response: The Board has already addressed the issue of slope above.

Regarding engineering renderings, they are noted as "Drawing 3" of the permit set for the site and were prepared by Strong Civil Design, LLC of Braintree. Condition 7 noted above (and as seen on attached Planning Board decision) has been met.

The Appellants continue: A couple of notes about any effort to use retaining walls to justify the average elevation of the land adjoining the building method. First, Sections B-B, C-C, D-D, and E-E of the Grading & Stormwater Plan show slopes away from the building and the proposed grades in the back and Moreland Street sides toward the proposed retaining walls.

The Board's Response: The Board has already addressed the issue of slope earlier in this report. The proposed building is to be built into the existing topography of the land.

The Appellants continue: Second, even if the finished grade were to be level from the building to a proposed retaining wall, that is irrelevant to the measure of the slope. Slope is simply the difference in height between two points divided by the distance. SZO, §2.2.147. The land at the building would be one point, the lot line at the bottom of the retaining wall would be the second. Hence there would be a substantial slope from the wall to the lot line irrespective of whether the land to the retaining wall was level.

The Board's Response: The Board has already addressed the issue of slope earlier in this report. Based on the calculations and graphs provided by the architect along with a review by the Zoning Review Planner, the Board finds that the average finished grade has been correctly calculated. Further, the term "substantial slope" does not exist in the SZO and, therefore, carries no definition with it.

The Appellants continue: Third, the language used in the definition of finished grade, SZO, §2.2.63 "[w]hen the finished ground level slopes away from the exterior walls" and Figure 2E show that the "substantial slope" is relative to the building as a whole. In this instance the slope is from the back of the building to the front. It is obviously substantial. Hence, the low point of the slope, 19', is the finished grade.

The Board's Response: The Board has already addressed the issue of slope earlier in this report. Based on the calculations and graphs provided by the architect along with a review by the Zoning Review Planner, the Board finds that the average finished grade has been correctly calculated. Further, the term "substantial slope" does not exist in the SZO and, therefore, carries no definition with it.

The Appellants continue: Finally, the height of the building shows the flat roof to be just 1'6" below the 40' height limit. There is a gabled roof on Moreland Street side of the proposed building. Although there is no height given, it looks to be clearly over the 40' height limit and clearly violates Condition 8 of the Planning Board Decision, PB 2018-01.

The Board's Response: If the flat roof is 1'6" below the 40-foot height limit, then clearly this complies with the height requirement for this site under these circumstances. Sheets A-020 and A-022 show the building heights. For gable roofs, the building height is not measured to the peak of the roof gable, but the average height between the plate and ridge of a gable (SZO §2.2.66). The gable may appear higher due to its architectural form and to how height measurements must be determined with this roof style.

IV. DECISION:

Present and sitting were Members Orsola Susan Fontano, Richard Rossetti, Danielle Evans, Elaine Severino, Josh Safdie and Anne Brockelman. Upon making the above findings, Danielle Evans made a motion to deny the Appeal. Elaine Severino seconded the motion. The Zoning Board of Appeals voted **4 voting to deny the Administrative Appeal and Uphold the ISD Decision and 1 Abstention.**

- The Board finds that the allegations put forth by the Appellant do not constitute a basis for overturning the decision of ISD to issue building permit(s) for 654, (656, and 658) Mystic Avenue.

- The ZBA recommends the **DENIAL** of the Appellant's administrative appeal and **UPHOLD** the issuance of the building permit by ISD.

Attest, by the Zoning Board of Appeals:

Orsola Susan Fontano, *Chairman*
Danielle Evans, *Clerk*
Richard Rossetti
Elaine Severino
Josh Safdie
Anne Brockelman (Alt.)

Attest, by the Administrative Assistant: _____
Monique Baldwin

Copies of this decision are filed in the Somerville City Clerk's office. Copies of all plans referred to in this decision and a detailed record of the SPGA proceedings are filed in the Somerville Planning Dept.

CLERK'S CERTIFICATE

Any appeal of this decision must be filed within twenty days after the date this notice is filed in the Office of the City Clerk, and must be filed in accordance with M.G.L. c. 40A, sec. 17 and SZO sec. 3.2.10.

In accordance with M.G.L. c. 40 A, sec. 11, no variance shall take effect until a copy of the decision bearing the certification of the City Clerk that twenty days have elapsed after the decision has been filed in the Office of the City Clerk and no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied, is recorded in the Middlesex County Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title.

Also in accordance with M.G.L. c. 40 A, sec. 11, a special permit shall not take effect until a copy of the decision bearing the certification of the City Clerk that twenty days have elapsed after the decision has been filed in the Office of the City Clerk and either that no appeal has been filed or the appeal has been filed within such time, is recorded in the Middlesex County Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The person exercising rights under a duly appealed Special Permit does so at risk that a court will reverse the permit and that any construction performed under the permit may be ordered undone.

The owner or applicant shall pay the fee for recording or registering. Furthermore, a permit from the Division of Inspectional Services shall be required in order to proceed with any project favorably decided upon by this decision, and upon request, the Applicant shall present evidence to the Building Official that this decision is properly recorded.

This is a true and correct copy of the decision filed on _____ in the Office of the City Clerk, and twenty days have elapsed, and
FOR VARIANCE(S) WITHIN
_____ there have been no appeals filed in the Office of the City Clerk, or
_____ any appeals that were filed have been finally dismissed or denied.
FOR SPECIAL PERMIT(S) WITHIN
_____ there have been no appeals filed in the Office of the City Clerk, or
_____ there has been an appeal filed.

Signed_____ City Clerk Date_____

CITY OF SOMERVILLE, MASSACHUSETTS
MAYOR'S OFFICE OF STRATEGIC PLANNING & COMMUNITY DEVELOPMENT
JOSEPH A. CURTATONE
MAYOR

GEORGE J. PROAKIS
EXECUTIVE DIRECTOR

PLANNING DIVISION STAFF
SARAH LEWIS, *DIRECTOR OF PLANNING*
SARAH WHITE, *PLANNER & PRESERVATION PLANNER*
ALEX MELLO, *PLANNER*
MONIQUE BALDWIN, *ADMINISTRATIVE ASSISTANT*

Case #: ZBA 2018-167
Date: January 9, 2019

Recommendation:
Deny Administrative Appeal & Uphold ISD Decision

ZBA ADDENDUM

As regards Appellant comments received December 15, 2018 on the matter of their Administrative Appeal

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The brief assessment below pertains to the additional comments regarding ZBA case #2018-167 that are dated December 14, 2018 and were emailed by the Appellants to Planning Staff on Friday, December 15, 2018. The full text of those comments, in original form, are also provided as an APPENDIX to the Updated Staff Report.

ZBA responses below are brief and in relation to additional comments submitted by the Appellants for their January 9, 2019 ZBA hearing

ADDITIONAL APPELLANT CONTENTIONS & RESPONSES FROM ZBA

The Appellants state the following:

"There were three building permits issued, B18-000680, B18-000681, and B18-000682 for development on three lots, 654, 656, and658 Mystic Ave, which had formerly been split from 654 Mystic Ave. The lot split is contested. The appellants Linda Pingiaro and James DeMichele filed appeals of all three permits. The issues on appeal for all three are the same."

The Board's response: As noted in the Updated Report, the Planning Office re-issued the legal advertisement for the Appellants' Administrative Appeal. The updated legal ad noted the all three addresses (654, 656, and 658 Mystic Avenue) and all three of the building permit numbers being contested. (*See legal ad in Updated Report).*

The Appellants continue:

1. **(Dated December 14, 2018), the Appellants allege the following:**

Special Permit

The developer contends that the development consists of three two-unit townhouses and that the use classification in the Table of Permitted Uses, at SZO §7.11.d for two-unit townhouses is applicable.

> The Appellants Pingiaro and DeMichele contend that the development may be classified as the developer contends but that it can also be classified as one six-unit townhouses under SZO, §7.11.d. which requires a special permit. Because the development can be classified either way, and, because the six-unit classification is the more restrictive classification, requiring a special permit, the project must be classified as a six-unit structure under SZO, §7.8
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> > *Where a use, structure, development, or activity might be classified under more than one of the uses on the lines in the Table of Permitted Uses, the more specific classification shall apply; if equally specific, the more restrictive classification shall be used.*

The Board's Response: The Appellants' assessment above assumes that the project is being undertaken on one rather than on the three lots into which the original lot was split. The Appellants fundamentally disagree with the Planning Board approval to split the original parcel (654 Mystic Avenue) into three separate lots (resulting in 654, 656, and 658 Mystic Avenue). Therefore, by assuming that the project is being undertaken on one lot, the Appellants would have cause to argue that the project might, then, require a special permit under §7.11.d. This section of the SZO requires that a special permit be obtained when the Principal Use *on a site* [emphasis, Staff] in the BB zone is for townhouse buildings of 4-6 units each. The approved project is for one townhouse building on each lot. Each of these townhouse buildings will contain two residential units.

The Appellants' argument is invalid because it is premised on the project taking place on one site when, in fact, there are three projects taking place on three distinct sites. Therefore, contrary to the Appellants' assertion that the project could be classified as *either* two-unit townhouse projects *or* a six-unit structure as the principal use, by failing to acknowledge the fact that a two-unit townhouse project is being undertaken on *each* of the three lots, the Appellants nullify their argument.

The Board noted in its original report that, in the Board's professional assessment, the creation of these three lots is valid *(see report for December 12, 2018, Page 4, Item #1)*. The Board again underscores the validity of its assessment of the lot splits.

The Appellants cite §7.8 of the SZO which states that when more than one classification might apply to a use, structure, development, or activity, the more restrictive classification shall be used. The Table of Permitted Uses (§7.11 of the SZO) displays the *Principal Uses* that the SZO allows in each zoning district within the City. A *principal use* is defined in §2.2.127 of the SZO, in full, as follows:

> *2.2.128. Principal Use. The main or primary purpose for which a structure, building or lot is designed, arranged, licensed or intended, or for which it may be used, occupied, or maintained under this Ordinance.*

The principal use for each ***lot*** (654, 656, and 658 Mystic) will be residential. The principal use for each ***building*** on each of these lots is residential in the form of a two-unit townhouse. The principal use for each ***structure*** on each lot is a two-unit townhouse. Each of these individual two-unit townhouse structures/buildimgs on each lot terminate at the right and left side yard lot lines; there are no side yard

setbacks. Each townhouse unit in each of the individual structures is separated by a continuous vertical firewall, as per the definition of a townhouse in the SZO.

What makes this Administrative Appeal challenging to understand conceptually is that from a simple *visual* standpoint the project appears to the average eye to be one building. But from a *zoning* standpoint, three separate buildings are being constructed.

Further complicating matters is that, in this BB zone, no right and left side yard setbacks are required. As explained in the December 12, 2018 report, this means that buildings can be constructed right onto the side lot lines. These buildings can touch one another. One individual property owner could build three separate principal structures whose right and left elevations terminate on the lot lines, as the current property owner intends. Likewise, three different, legally-unrelated property owners could build three separate principal structures: one two-unit townhouse structure on each of the *individual* lots currently in question (654 Mystic, 656 Mystic, and 658 Mystic) at the same time or at different points in time. If each of the three separate owners were to build their two-unit townhouse structures at the same time or at different times, but made the front facades match those of other two-unit townhouse structures proposed or already constructed on the other sites, does this mean that one structure has been created just because the facades are uniform as the Appellants contend in their Administrative Appeal? The Board would still contend that three separate structures have been created, one on each lot.

In both of the scenarios described above, the construction of each principal structure (a two-unit townhouse) is legally allowed as each structure is being "designed, arranged, used, or occupied…*on a given site*" [1][emphasis, Board]. The *given site* in each of these two scenarios is a separate, legally-created building lot.

The Appellants continue:

> SZO, §7.8
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> The following provisions of the Zoning Code are relevant.
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> > No land shall be used and no structure shall be erected or used except in compliance with the provisions of this Ordinance and as set forth in the Table of Permitted Uses.
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> SZO, §7.1
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> The following Table contains a listing of all uses permitted in the City of Somerville…Unless specifically stated otherwise within the Table, all uses are assumed to be: 1) Principal uses as defined in Article 2 of this Ordinance… 2) Conducted within an enclosed building.

The Board's Response: See the Board's comments in this Memo and in the report provided to the ZBA and dated December 12, 2018.

[1] *2.2.127 of the SZO. Principal Structure.* A structure designed, arranged, used or occupied primarily in conjunction with the principal use(s) on a given site. A principal structure need not be used exclusively in housing the site's principal use or activity, and there may be more than one (1) principal structure on a site when the principal use requires several structures, except that more than one (1) principal structure on a lot in an RA or RB district shall be allowable only by special permit with site plan review.

The Appellants continue:

SZO, §7.11

The following are definitions of relevant terms used or referred to in these two provisions. There was some talk at the last hearing about the State Building Code. However, the State Building Code can not be used to alter or supplement those terms defined below. It can only be used to define terms not defined by the SZO. SZO, §2.1. If a term is defined by the SZO, that definition prevails.

The Board's Response: The Board refers to the following portion of the SZO to make a slight correction to the Appellants' statements above. If a term is not defined in the SZO, then it is the definition found in the most recent edition of Webster's Unabridged Dictionary that stands.

§2.1. - General of the SZO states as follows:

> For the purpose of this Ordinance and unless the context of usage clearly indicates another meaning, the following terms shall have the meanings indicated herein. Words used in the present tense include the future; the words "used" or "occupied" include the words "designed", "arranged", "intended", or "offered" to be used or occupied; the words "building", "structure", "lot", "land", or "premises", shall be construed as though followed by the words "or any portion thereof"; and the word "shall" is always mandatory and not merely directory. *Terms and words not defined herein but defined in the Commonwealth of Massachusetts State Building Code shall have meaning given therein unless a contrary intention clearly appears. Words not defined in either place shall have the meaning given in the most recent edition of Webster's Unabridged Dictionary.* Uses listed in the Table of Permitted Uses and Development and Operating Standards under the classes retail and service uses and wholesale and industrial uses shall be further defined by The Standard Industrial Classification Manual published by the U.S. Bureau of the Census. [emphasis, Board]

The Appellants continue:

Structure is defined as "[a]ny constructed, erected or placed material or combination of materials in or upon the ground, including, but not by way of limitation, buildings…SZO, §2.2.159. Building is defined as "[a]ny structure, either temporary or permanent, having a roof or other covering, and designed or used for the shelter or enclosure of any person." SZO, §2.2.21. Development is defined as "[t]he construction, reconstruction, conversion, alteration, relocation or enlargement of any building or other structure…for which SPGA review and/or approval is required by this Ordinance." SZO, §2.2.36. The principal use proposed by the developer are townhouses which are defined as "[a]ttached dwelling units completely separated by a continuous vertical fire wall which are constructed so that each unit (1) has two (2) building faces with outside exposure; (b) has separate entrances from the outside; (c) reaches from foundation to roof line; and (d) each unit is arranged, intended and designed as a residence for one (1) family." SZO, §2.2.166.

It is clear from the developer's plans that all six proposed units are "attached dwelling units completely separated by a continuous vertical fire wall" which otherwise comply with the requirements of a townhouse. It is also clear that the six unit development qualifies as a structure, building, and

development. There is a single continuous façade on both the front and the rear of the six units and one roof covering the six units.

Contrary to what was represented to the Board at the last hearing, the notion of lots is irrelevant to any of these defined terms. There is nothing in the SO which prohibits a structure, building, development, or townhouses from spanning over several lots.

The Board's Response: The Board has already addressed this issue of building lots, the manner of building construction, and the side yard setback issue in the BB zone. The question of building lots and side yard setbacks are quite relevant to this case, particularly since no side yard setbacks are required under the SZO. This has been addressed both in this memo above as well as in the December 12, 2018 report.

2. **(Dated December 14, 2018), the Appellants allege the following:**

Height.

The height issue is critical. The building will block my clients [sic] views of the Mystic River and have a substantially negative impact on the market value of their properties. The proposed plans call for fill in the back yard to the height of 8' or 9' above the existing grade with a slope down toward Mystic Ave in the front. The appellants do not contest that this can be done. But it is difficult to see how the lowest point on the slop method of calculating the average finished grade was not applicable rather than the average adjoining land method used. See SZO, §2.2.63. The method is critical because it was by use of the average adjoining land method that the developers were able to justify an extra story in height. The plans do not provide consistent, comprehensive, and clear information concerning the proposed finished grades. However, from the information provided, it appears clear that the lowest point on the slope method should have been used. The appellants urge that at the least more comprehensive and complete information be given on this issue, given its significance.

The Board's Response: The Board understands that the Appellants have concerns about losing their view of the Mystic River. The Board reiterates for the benefit of the Appellants, the ZBA and the reading public that, in this instance, the ZBA has no authority over whether or not the Appellants retain their view of the river.

The Appellants have filed an Administrative Appeal of the building permits that were issued for 654, 656, and 658 Mystic Avenue. Under an Administrative Appeal scenario, the ZBA can only decide whether the building permits were issued correctly or whether ISD made a mistake in issuing the building permits.

The final decision that the ZBA must render in an Administrative Appeal scenario is whether to deny an Appellant's claims and uphold the building permits or uphold an Appellant's claims and rescind the building permits. Due to the very nature of an Administrative Appeal, the ZBA has no authority to take into account the Appellants' views. Further, due to the nature of an Administrative Appeal, the ZBA has no authority to take into account the Appellants' claims of adverse effects on their property value. Even under a circumstance where the ZBA were evaluating this project as the Special Permit Granting Authority, they would have neither latitude nor expertise to take such things as impact on property value into account; it is not in their purview.

When the lot splits and design of the three structures was being publicly debated over the past two years, it was the Planning Board that had the authority to comment on the issue of height, design, and potential loss of view, not the ZBA.

With regard to the manner in which the building height and average finished grade was calculated, see the Board's December 12, 2018 report and the associated plan sheets that were marked for their convenience, identifying the relevant pages assessing building height/average finished grade.