



City of Somerville

# ZONING BOARD OF APPEALS

City Hall 3<sup>rd</sup> Floor, 93 Highland Avenue, Somerville MA 02143

**TO:** Zoning Board of Appeals  
**FROM:** Planning & Zoning Staff  
**SUBJECT:** 101 South Street, P&Z 21-120  
**POSTED:** September 9, 2021

**RECOMMENDATION:** None (Major Amendment)

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 development review application submitted for 101 South Street, identifies any additional discretionary or administrative development review that is required by the Somerville Zoning Ordinance, and provides related analysis or feedback as necessary. The application was deemed complete on August 30, 2021 and is scheduled for a public hearing on September 22, 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

101 South Street Owner LLC is proposing Major Amendments to previously issued permits (ZBA 2019-43 and ZBA 2018-21-E1-2/19) for 101 South Street/2 Earle Street.

## SUMMARY OF PROPOSAL

101 South Street Owner LLC is proposing a revision to previously approved plans that required multiple variances under the former zoning ordinance for relief from parking minimums, maximum Floor Area Ratio (FAR), and maximum building height. In ZBA 2018-21-E1-2/19 the Board granted a variance for parking minimums (permitting relief for 70 spaces). The number of parking spaces proposed is unchanged from the previous approval. In ZBA 2019-43 the Board granted a variance to permit a FAR of 6.2, which exceeded the permitted FAR of 5.5, and a variance permitting a building height of 150ft, which exceeded the permitted height of 135ft).

The proposed revision to the previously approved plans includes only a lot line adjustment to the lot lines of 101 South Street to accommodate development of a new throughfare abutting 101 South and providing frontage to the property. As required by the Somerville Zoning Ordinance (SZO), any proposed plan revisions are subject to an administrative review process by the Director of Planning & Zoning. This review determines if the proposed revision is a major amendment to the previously submitted plans or a de-minimis change because the revision is insignificant to the degree that persons familiar with the original application would not notice a substantial change in

operational or built outcome. If the proposed revision is determined to be a major amendment, the SZO requires the applicable review board to review the changes and issue a revised decision. If the proposed revisions are deemed de minimis, the zoning ordinance does not require additional review or permitting because the changes are considered substantially equivalent to the prior version.

On July 28, 2021, the Director of Planning & Zoning issued a written decision that the proposed revision, limited in scope to a lot line adjustment resulting in a smaller lot, is a de-minimis change to the previously approved plans because the building at 101 south street is not changing in operations or built outcome. Nevertheless, a property owner also has a right to apply for a permit and 101 South Street Owner LLC has applied for their previously issued variances to be revised to reflect the proposed revisions to the previously approved plans.

## **ANALYSIS**

Massachusetts General Law (MGL) ch. 40A, sec. 11 states that a variance does not take effect until a copy of the decision is recorded with the Registry of Deeds and 40A sec. 10 states that if the vested rights authorized by a variance are not exercised within one year of the approval date, then the rights provided by the variance expire. To the knowledge of Planning & Zoning Staff, the previously issued variance decisions were recorded by the Applicant at the Middlesex South Registry of Deeds. Furthermore, a building permit for 101 South Street was issued on June 11, 2019, to authorize construction of the building in accordance with the vested rights provided by the issued variances. These actions made the previously approved variances both 'in effect' and 'exercised' under state law. Additionally, MGL 40A sec. 6 states that the vested rights of a property owner are "frozen" from any changes to the zoning ordinance that would infringe upon those rights upon the issuance of a building permit if construction were commenced within six months of the issuance of the building permit. Since receiving the building permit, 101 South Street Owner LLC has commenced construction of the building and is continuing construction through to completion as continuously and expeditiously as possible, which is required by state law to maintain the "freeze" on any future restrictive zoning changes.

101 South Street was recently incorporated into a Master Plan (MPSP2020-002) approved by the Planning Board on January 21, 2021 and is referred to as Building 1 of Phase 1. The inclusion of this previously permitted development into this Master Plan is specifically allowed by the provisions of the Master Planned Development overlay district of the SZO. The land platting plans of the approved Master Plan move a small portion of the land that is currently included within the lot area of 101 South Street into a right of way to accommodate the construction of a thoroughfare included in the full build out of the Master Plan. No changes to the design of the 101 South Street building are proposed and the revisions to the lot boundaries to facilitate implementation of other parts of the Master Plan will not constitute a substantial change in operational or built outcome of 101 South Street.

New land platting is subject to the current Somerville zoning ordinance. The request by 101 South Street Owner LLC is to revise the previously issued variances in relation to the parking and Floor Area Ratio, but not building height, in response to the new platting of land. Analysis is provided for each case below:

- In *ZBA 2018-21-E1-2/19*, the variance issued authorized relief from 70 required parking spaces. The proposed changes to the lot boundaries of 101 South Street do not impact the number of parking spaces that were required under the former zoning ordinance or provided by the project, making any revision to the previously issued variance unnecessary.
- In *ZBA 2019-43*, the variance issued authorized 101 South Street to exceed the maximum permitted Floor Area Ratio and building height (to 6.2 FAR and 150 ft. in height). The vested rights provided by *ZBA 2019-43* have similarly been exercised and realized by the property owner. The proposed changes to the lot boundaries of 101 South Street have no impact on the rights exercised and realized by the property owner. Accordingly, alteration of 101 South Street's lot boundaries after exercising and realizing the vested rights of the previously issued variances requires only determining the proposals compliance with the current Somerville Zoning Ordinance, which no longer regulates FAR. It is important to note, the 'freeze' provided by MGL 40A sec. 6 is for changes to zoning that would infringe upon the vested rights provided by a permit, not to change that are more permissive.

Considering all the above, the current Somerville zoning ordinance governs the proposed new land platting, the previously issued variances and their vested rights have been exercised and realized by the property owner, and no new nonconformities to the SZO will be created by the new land plat. It is the recommendation of the Staff that this application be Withdrawn without Prejudice because it is unnecessary.

Notwithstanding the above, should the Board decide to revise the previously issued variances as requested by 101 South Street Owner LLC, the practical result of this approval would be to affirm entitlements already in place and provided by the Somerville Zoning Ordinance.

## **CONSIDERATIONS & FINDINGS**

The Applicant has presented arguments for the issuance of the revision to the previously issued variances in their narrative.

## **PERMIT CONDITIONS**

Should the Board approve the proposed revisions to the previously approved plans as a Major Amendment to either previously issued decision (*ZBA 2019-43* or *ZBA 2018-21-E1-2/19*), Planning & Zoning Staff do not recommend any additional conditions beyond the conditions imposed on the original approval.