



CITY OF SOMERVILLE, MASSACHUSETTS
MAYOR'S OFFICE OF STRATEGIC PLANNING & COMMUNITY
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Case #: ZBA 2013-88
Date: January 2, 2014
Recommendation: See Below

PLANNING STAFF REPORT

Site: 0 aka 16 South Street

Applicant & Owner Name: 18 South Street Condominium Trust
Applicant & Owner Address: 18 South Street Somerville, MA 02143
Alderman: Maryann Heuston

Legal Notice: Applicant, 18 South Street Condominium Trust, seek an administrative appeal per SZO §3.1.9 from a decision from the Inspectional Services Division that issued building permits to construct a 3-family dwelling at 0 aka 16 South Street, Owners Patrycja Missiuro and Dmitry Vasilyev. BA Zone. Ward 2.

Dates of Public Hearing: Zoning Board of Appeals – January 8, 2013

BACKGROUND

A Word About This Case

Some of the most fundamental questions about this case relate around the issue of merger of lots in common ownership and the related issue referred to as ‘infectious invalidity’. This question needs to be established in cases where lots may have merged for zoning purposes where re-subdividing and re-selling those lots will create non-conformities on pre-existing structures. Fundamentally, based upon the known facts, there are two lots at 16 and 18 South Street that came to be owned by the same entity. They were transferred together to another entity. At that time, the lot at 16 South Street served to provide parking for



the lot at 18 South Street that had no other parking available to it. To address the primary issue in this case, the ZBA must address two complicated issues of law: 1) Did the lots merge for zoning purposes at the time that they were combined or some point after that time; and 2) Does the separation of these lots into separate ownership 'infect' one lot with an invalid status, and what is the impact of this situation on the other lot.

Property Description

The subject property is 0 aka 16 South Street, a 2,994 square foot vacant lot that has recently become the site of construction of a new structure. The property is in a BA zone, in a neighborhood of mixed residential and commercial/industrial properties near the Somerville and Cambridge city line.

In a plot plan dated December 27, 2011 the site had a shed in the back corner, garden, and paved area. The site was, at least at the time of the satellite images on the next page, used for parking. It appears that 4 or 5 cars would fit on the paved area. The shed on the lot was demolished sometime after the 2011 plot plan. No permit was issued for the demolition.

The lot is owned by Patrycja Missuiro and Dmitry Vasilyev.

The construction project permitted for 16 South Street is based upon a building permit granted by ISD and appealed. The ISD commissioner reviewed the initial application upon appeal and indicated that the initial appeal to ISD provided insufficient evidence to overturn the issuance of a building permit. At that time, the appellant filed a further appeal with the ZBA.

This appeal also concerns the property of the appellant, at 18 South Street, the 3-unit building next door. The property was built around 1900. It is currently in a condominium form of ownership, based upon a Master Deed filed for the property in 2010 establishing the 18 South Street Condominium Trust. The current owners are Adam Freidman (Unit 1), Leung Minwah (Unit 2), and Madjarac Marko (Unit 3). The Condominium Trust is filing the appeal.

The history of this site and the circumstances of the appeal also impact the house next to 18 South Street, at 22 South Street. The home is currently owned by the 22 South Street Realty Trust. The home was built around 1989.



Satellite image showing parking area and shed, with 18 South Street in the center and 22 South Street to its right (Image taken April 15, 2009)

Site History

- A. 1944: The deed history of this site was traced by staff back to 1944. A plan from 1944 shows the division of 18 and 22 South Street. At this time, the plan placed these two buildings on separate lots, marked at Lot A and Lot B. Lot A had a larger building at the time, likely since demolished and replaced with the ranch house that is there today. Lot B was the site of the current building at 18 South Street. The division created the current boundaries described with the structure at 18 South Street. That land division also included a common passageway, 10 feet wide (5 feet on each lot) to be shared by the owners of Lot A (22 South Street) and Lot B (18 South Street).
- B. 1957: By 1957 the Francisoso family owned the land. Despite the plan showing two lots, both Lot A and Lot B on the plan (18 and 22 South Street) remained with the Francisoso family. The family and also had purchased the adjacent lot at 16 South Street.
- C. 1983: The Francisoso family transferred Lot A (22 South Street), and around 1989 a new house was built upon this site. According to the appellant's attorney, around this time the neighbor at 22 South Street built a driveway, sheds and a fence within the 'common passageway' area shown on the 1944 plan. At some time, there was also a small addition to 18 South Street built within the passageway. The issue of any actual abandonment of the passage rights in this 'common passageway' remains an issue between the developer and the appellant in this case.
- D. 1995-2008: Rosemary Francisoso remains a record owner of 16 and 18 South Street.
- E. 2007: Marion and Scott St. Croix purchase 22 South Street
- F. 2008: Dmitry Vasilyev and Patrycja Missiuoro purchase 16 and 18 South Street. They are purchased on a single deed, but each "parcel of land" is referenced separately. The first parcel is the property known as 16 South Street. The second parcel, referenced as Lot B on the 1944 plan, is the parcel at 18 South Street. The deed notes that the parcels are conveyed with the "Benefit of the right to use in

Permit History

March 26, 2012

A permit application was filed for zoning review at Inspectional Services. The project was determined to be by-right at that time with a note that there were 3 bedrooms per unit and 6 parking spaces.

February 22, 2013

A complaint was filed with ISD by 18 South Street. The gate that exited from 18 South Street to 16 South Street had been locked by the owner of 16 South Street. An inspector visited the site and summarized it as a neighbor dispute and that there was no building code violation.

March 20, 2013

On March 20, 2013, a permit was issued to start construction of a 3-family, 4 story residential unit. The plans show parking on the first floor and a common entrance/stairwell leading to each apartment. The permit was essentially for the entire project including foundations, wood framing, windows, doors, fiber cement siding, electrical, plumbing, heating/ac, 5/8" gypsum board and plaster, roof, skylights, ceramic and hardwood floors, bathrooms, kitchens, appliances, pantry, finish carpentry, garage door, and landscaping.

April 23, 2013

A letter is sent to Inspectional Services regarding an exit easement between 16 and 18 South Street. Joseph A. Lopisi, Esq clarifies that the only easement recorded is between 18 and 22 South Street.

October 18, 2013

The tenants of 18 South Street submitted a request for a Cease and Desist Order to Inspectional Services citing that 'substantial alterations were made to the construction process without a corresponding amendment filed to said plans.' They requested that updated plans be filed including an engineer's certification and that the City certify that maintenance of lateral support and the structural integrity of surrounding building are maintained during construction.

October 28, 2013

Inspectional Services and other City Staff are delivered a letter requesting that all permits for construction for 16 South Street are revoked for the following reasons:

- A. The construction creates a parking violation for 18 South Street Condominium Trust. Prior to construction, the tenants of 18 South Street parked in the paved area of 16 South Street (parking area shown in the satellite image on the previous page).
- B. The construction creates a safety violation for 18 South Street. The area provided by 16 South Street was used to provide a means of rear egress for 18 South Street. The existing fence, which was erected shortly after the building's sale as condos, had a gate to allow for passage to the public way, parking, trash storage, and the garden. The construction blocks access to the public way.
- C. 18 South Street no longer has an alternate means of rear egress. The tenants of 18 South Street have egressed via 16 South Street for nearly 30 years. There is a documented common passageway between 18 South Street and 22 South Street that has been abandoned. The common passageway has been used as a private driveway since construction of the house at 22 South Street in 1989.
- D. The construction has created a structural concern for 18 South Street. IBC Chapter 33, Section 3307 requires protection to adjoining properties' foundations from damage during construction. The depth of the pits being excavated are documented as being 9.5' in depth. Subcontractors associated with the project have received work orders for pits of 14.5' in depth.

- E. The current design for 16 South Street creates a nuisance and hazard to residents of 18 South Street. The current parking design for 16 South Street burdens 18 South Street with noise, headlight glare, and fumes which is in violation of SZO Section 9.1.
- F. The design for 16 South Street's parking and driveway are non-conforming. The current parking design will not provide sufficient turning radius for parking spaces 1 & 6 to exit in a forward facing manor. In addition, the garage entrance is not wide enough to avoid vehicles queuing in the right-of-way. Both of these are violation of SZO Section 9.11.e.

November 14, 2013

The Superintendent of Inspectional Services acknowledges that there is not sufficient evidence presented to show that 16 South Street has violated zoning or building code. In addition, ISD requested that the attorney for the project at 16 South Street respond to the initial request for action by the owner of 18 South Street.

November 19, 2013

An administrative appeal is filed.

January 2, 2014

The owners of 16 South Street provide a written response to the appeal. In the response, they raise the following points:

- A. The appeal was filed after 30 days from the date of the order or decision which is being appealed, violating MGL 40a
- B. The appeal was filed many months after the building permit was issued and after construction began, in violation of SZO 3.2.3.2
- C. The appeal was filed in violation of the condition that future owners do not object to this construction, as stated in the condominium Master Deed.
- D. The 16 South Street lot is a conforming lot, owned by right without easements and the proposed building satisfies all zoning requirements for this lot.
- E. The lots did not merge for zoning purposes, as the definition of a 'lot' under the Somerville Zoning Ordinance is different than the definition in other communities, and therefore claims of invalidity are not relevant to this case
- F. The six points raised by the appellant (noted above as a part of the October 28th complaint) are not valid (the owners provide specific reasoning for these items that will be discussed below).
- G. The owners raise a concern about an incident on December 14, 2013.
- H. The owners provide a 'concluding remark' regarding geotechnical studies.

ROLE OF THE ZBA

In an administrative appeal hearing, the ZBA hears appeals from the decisions 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 taken by any person aggrieved by an order or decision of the Superintendent of Inspectional services. The ZBA must determine whether to affirm the ISD decision or overturn it, and why. A party of interest may appeal the ZBA decision to court based upon provisions in Massachusetts General Law.

Planning Staff believe that 18 South Street Condominium Trust has status as an aggrieved party in this circumstance and the appeal is properly before your Board.

ANALYSIS OF THE APPEAL

OSPCD staff has reviewed: 1) Deed History 2) Permit Records at ISD; 3) the Administrative Appeal application and 4) The response from the owners of 16 South Street. Eighteen South Street Condominium Trust raised six (6) arguments in support of its appeal. The owners at 16 South Street responded to these six points and raised seven other points. All are addressed below. But, first the Staff would like to separately address the issue of lot merger.

Lot Merger

Many of the arguments below revolve around a baseline question: were 16 and 18 South Street under common ownership, and if so, what does that mean for the structures at 16 and at 18 South Street.

Based upon the known facts, there are two lots at 16 and 18 South Street that came to be owned by the same entity. They were transferred together to another entity. At that time, the lot at 16 South Street served to provide parking for the lot at 18 South Street that had no other parking available to it. Fundamentally, to address this issue, the ZBA must address two complicated issues of law: 1) Did the lots merge for zoning purposes at the time that they were combined or some point after that time; and 2) Does the separation of these lots into separate ownership 'infect' one lot with an invalid status, and what is the impact of such a thing on the other lot.

To understand why lot merger matters, one must first consider the issue of infectious invalidity. Let's assume that the lot at 16 South Street had never been owned in common with any adjacent lot. Had that been the case, the lot would meet the lot dimensions to be buildable, and provided an applicant proposed a structure that met use, height, setback, lot area per unit, lot size, parking, landscaping and other dimensional requirements of the code, then it could be built upon.

But, when such a lot is divided from another lot, the lot that it is divided from must not generate any new zoning violations. In the words of the Land Court "a property owner may not create a valid building lot by dividing it from another parcel rendered nonconforming by such division." This provision has been upheld in a number of cases before the Massachusetts Appeals Court and Supreme Judicial Court. In the 1968 case of Alley v. Building Inspector of Danvers, a landowner divided a lot into two nonconforming parcels. He then acquired a part of an adjacent lot leaving that lot deficient as well. Then he combined the two lots he created to get a conforming lot where he sought a building permit. The permit was denied and the court upheld that decision, determining that one cannot create a conforming lot at the expense of depriving other lots of area needed to comply with zoning requirements. This provision was further clarified in the 1972 case Lindsay v. Board of Appeals of Milton, which establishes that lots listed separately on one deed (as they were in this case) do not necessarily entitle the owner to the ability to develop the lots separately. These provisions of state law are also reflected in the Somerville Zoning Ordinance in many places. Sections 5.4, 8.2 and 8.6.1 of the ordinance note that lots cannot be divided in a manner that will result in new non-conformities.

Section 8.2 of the Somerville Zoning Ordinance states, "The lot or yard areas required for any new building or use shall not include any part of a lot that is required by any other building or use to comply with the yard, floor area ratio, or parking requirements of this Ordinance; nor may these area include any property of which the ownership has been transferred subsequent to the effective date of this ordinance if such property was a portion of the area required for compliance with the lot, yard, floor area ratio, parking, or landscape requirements applicable to the lot from which such transfer was made."

There seems to be no objection to the appellant's argument that the residents of 18 South Street regularly used the lot at 16 South Street as a parking area and a landscaped outdoor area for many years. It appears

that this activity commenced many years ago, and only ended recently as the condominiums were sold and the lot was prepared for development. Therefore, if these lots were merged for zoning purposes, the land at 16 South Street was used to meet parking requirements for the building at 18 South Street, and therefore the subsequent division of the lot would be a violation of the zoning ordinance as well as the provisions of ‘infectious invalidity’ as determined by the state courts. It is intriguing to note that the actual violation would be for a requirement at the current building at 18 South Street, not the new building at 16 South Street. But, previous cases have denied permits to build new structures when those structures would ‘infect’ existing adjacent lots with illegal non-conformities. Therefore, if these lots have merged, that illegal infection would occur with the development of the lot at 16 South Street.

But, that circumstance only applies if 16 and 18 South Street merged for zoning purposes. To make such a determination, the appellant raises the 2009 case of Hoffman v. Board of Appeals of Cambridge. This case quotes the 2001 case of Preston v. Board of Appeals of Hull, noting that, in order to achieve the goals of the zoning ordinance and reduce or eliminate non-conformities, that adjacent lots held together in common ownership are “normally merged and treated as a single lot for zoning purposes.” This follows the logic of the 1996 land court case Horgan v. Town of Barnstable Zoning Board of Appeals that notes (according to Mark Bobrowski’s Handbook of Massachusetts Land Use Law) that lot mergers result when the owner of a non-conforming lot acquires adjacent property. But, the SJC in the 2009 case used the term “normally” to describe the circumstances under which lots are merged for zoning purposes.

The court has identified two circumstances under which lot merger does not occur, stating that “if, however, the parcels have been kept from merger because they have retained ‘separate identities’ or because an indulgent local zoning law provision requires something more than just common ownership to trigger the otherwise applicable merger doctrine, then the parcels may be analyzed separately to meet the dimensional minima of the Ordinance, and may in that way satisfy them.” The 1979 case Heald vs. Zoning Board of Appeals of Greenfield provides further insight into the court’s reference to “indulgent local zoning law”. In the Heald case, the court notes that “in the absence of specific zoning provisions defining a ‘lot’ in terms of sources of title or assessors’ plans, the SJC has consistently held that adjoining parcels may and, indeed, in certain instances, must be considered one lot for zoning purposes.”

In this case, the use of the lot at 16 South Street to park cars for residents at 18 South Street hardly suggests that the lots retained ‘separate identities’ (although the owner makes a case through historic research that they once had separate identities, being the site of separate structures).

That leaves the question of interpretation of the local law. As far as the planning staff is aware, there has been no case to date where the SJC has ruled against a zoning lot merger due to such specific zoning provisions in a local ordinance or bylaw. In the Hoffman v. Cambridge case, the court deferred to the local board’s reasonable construction of the municipality’s own law to determine if the definition of “lot” in Cambridge was such that it would avoid merger of lots in common ownership. In Cambridge, the ZBA determined that the definition of ‘lot’ did not stop lots in common ownership from merging. Therefore, the Somerville ZBA must apply similar logic based upon the Somerville ordinance to rule on this case.

Cambridge defines a lot as follows, “A parcel of land in identical ownership throughout, bounded by other lots or by streets, which is designated by its owner to be used, developed or built upon as a unit.”

Somerville defines a lot as follows (emphasis added by staff): A *single* parcel of land under one ownership and undivided by a street or public way, *with definite boundaries as indicated on a recorded deed or plan* and used or set aside and available for use as the site of one or more principal and accessory uses. Parcels constituting a lot for Planned Unit Development may be separated by a street, public or private way, but must otherwise be contiguous.

Putting aside the second sentence of the Somerville definition, which does not apply here, the significant differences in the Somerville ordinance are the use of the word “single” before “parcel, and the reference to “definite boundaries as indicated on a recorded deed or plan.” This may just be the situation referenced in the Heald case when the court referenced zoning provisions that define a lot in terms of “sources of title or assessors’ plans”.

This provides evidence that the ZBA may determine that lot merger may not apply in this case. The lot at 18 South Street is on a separate 1944 plan from the lot at 16 South Street, and has regularly been separately described as a parcel. Even the 2008 deed that lists both parcels on one deed refers to each as a separate parcel.

Therefore, while the Staff believes that there is evidence to suggest that lot merger does not apply, and that therefore, the circumstances of ‘infectious invalidity’ would not apply to the situation at 16 South Street, the Staff is also aware that this complicated area of law may be interpreted differently by others. This interpretation is important, as any decision by the ZBA that lot merger does not apply in this case will likely impact how other Somerville deeds can or cannot be divided when they contain multiple non-conforming parcels on a single deed.

For this reason, each point below is noted with the staff’s recommendation. In each case, it is noted that the validity of the appellant’s claim or the owner’s claim is either A) likely valid; B) likely not valid; or C) likely valid only if the Board determines that the lots were merged for zoning purposes.

POINTS RAISED BY THE APPELLANTS

- A. The construction creates a parking violation for 18 South Street Condominium Trust. Prior to construction, the tenants of 18 South Street parked in the paved area of 16 South Street (parking area shown in the satellite image above).

When the Missiuro/Vasilyev’s purchased the property in 2008 the deed details two parcels, a 3,000 square foot parcel and a 2,720 square foot parcel. The 2720 square foot parcel is referred to as Lot “B” on the 1944 plan. This is 18 South Street and the other parcel is 16 South Street.

In an affidavit provided with the appeal, a former tenant spoke about the use of 16 & 18 South Street. The tenant lived at 18 South Street from September 2008 to August of 2010. In that time, the property owner Missiuro/Vasilyev allowed each unit to have one parking space at 16 South Street. The remaining 2 spots were for Ms. Missiuro and Mr. Vasilyev who were tenants in the third unit. In addition this tenant describes that 16 South Street was used to store trash barrels and that the property owners and tenants used the space as one lot including using the hose from 18 South Street to water the garden on the other parcel.

Per SZO Section 9.5 the parking requirement for the property was five spaces. There is no parking capacity on the 18 South Street parcel.

In the Master Deed filed in 2010 when the building was converted to condos, parking was not addressed.

Therefore, this claim is likely valid if and only if the Board determines that the lots were merged for zoning purposes.

- B. The construction creates a safety violation for 18 South Street. The area provided by 16 South Street was used to provide a means of rear egress for 18 South Street. The existing fence, which was erected shortly after the building’s sale as condos, had a gate to allow for passage to the

public way, parking, trash storage, and the garden. The construction blocks access to the public way.

A fence was erected in 2010 separating the 16 and 18 South Streets but there was a gate still allowing free flow of tenants from one lot to the other. Tenants accessed trash storage and the garden as well as the public way. The proposed design for 16 South Street no longer allows this access. Essentially tenants of 18 South Street using their existing rear egress will be trapped in the rear yard. But, nearly using a means of trespass as a point of exit, as alleged by the owners of 16 South Street, does not allow such access to continue in perpetuity.

The condo owners at 18 South Street have proposed an easement or purchasing the strip required to maintain the 3' path required by building code but have been refused.

The Master Deed filed in 2010 states in Exhibit B, "The Declarants own the undeveloped lot adjacent to said condominium. The owners of the units of said condominium shall have no objections to the Declarants in the future developing said lot into a residential or commercial dwelling."

Staff should note that the allegations by the owners of trespass and cutting of locks are not relevant to the zoning case before the Board. But, the appellants have not established how the owners of 16 South Street are responsible for addressing the need for access at 18 South Street and therefore the Staff cannot determine any valid claim of a code violation.

C. 18 South Street no longer has an alternate means of rear egress. The tenants of 18 South Street have egressed via 16 South Street for nearly 30 years. There is a documented common passageway between 18 South Street and 22 South Street that has been abandoned. The common passageway has been used as a private driveway since construction of the house at 22 South Street in 1989.

The common passageway has been on a plan since 1944 and was re-recorded in 2010. However, there is a fence on the lot line and, in an emergency situation, tenants would have to scale the 6' fence to escape a fire. The tenants of 18 South Street argue that this passageway has been abandoned. But, there is no documentation that it has been dissolved.

The passageway is referenced in the 2008 deed and the legal description of land attached to the condominium documents. There are obstructions in the passageway on both the 18 and 22 South Street properties, although it should be noted that the construction of a driveway does not constitute an obstruction.

The owner of 16 South Street has offered to remove a portion of the obstruction on the 18 South Street lot to re-establish the passage for egress purposes. But, the enforcement of these easement rights are a private matter between the owners of 18 and 22 South Street and have no relevance to a ZBA appeal.

D. The construction has created a structural concern for 18 South Street. IBC Chapter 33, Section 3307 requires protection to adjoining properties' foundations from damage during construction. The depth of the pits being excavated are documented as being 9.5' in depth. Subcontractors associated with the project have received work orders for pits of 14.5' in depth.

During a site visit on Friday December 13th, there was a small crew working on the site. No further investigation of the depth of the pits has been conducted by Planning Staff. Planning Staff cannot determine the validity of this claim. ISD has determined that there are no current violations of structural codes.

- E. The current design for 16 South Street creates a nuisance and hazard to residents of 18 South Street. The current parking design for 16 South Street burdens 18 South Street with noise, headlight glare, and fumes, which is in violation of SZO Section 9.1.

18 South Street, like most Somerville homes, has an elevated first floor. The design of 16 South Street first floor, which is primarily all parking, is an open design. On the plans submitted to ISD, the architect documented an existing fence to remain. During the site visit, only a construction fence was visible. A fence or screening could help alleviate some of these concerns, and the owners of 16 South Street have now offered to build a light-impermeable fence in this location.

Nonetheless, there does not appear to be any valid claim of a zoning or building code violation within the purview of the ZBA in this circumstance. Section 9.1 of the SZO is a purpose statement, indicating the purpose of regulations in the remainder of Section 9. There is no violation of dimensional requirements of parking in Section 9.

- F. The design for 16 South Street's parking and driveway are non-conforming. The current parking design will not provide sufficient turning radius for parking spaces 1 & 6 to exit in a forward facing manor. In addition, the garage entrance is not wide enough to avoid vehicles queuing in the right-of-way. Both of these are violation of SZO Section 9.11.e.

The current design meets the driveway dimensional requirements of SZO Section 9.9.b for buildings of 3 or less units. SZO Section 9.11.e does require lots with 6 or more spaces to enter/exit in a forward facing manor. The maneuvering distances are tight but complying with the ordinance. There does not appear to be any valid claim of a zoning or building code violation within the purview of the ZBA in this circumstance.

OWNER'S CLAIMS

- A. The appeal was filed after 30 days from the date of the order or decision which is being appealed, violating MGL 40a

The applicant filed a complaint with the building inspector on October 28, 2013. That complaint was answered with a response on November 14, 2013. The appellant immediately appealed that response, with a reply submitted on November 19, 2013. This is compliant with MGL 40a Section 15, which states that any "appeal under section eight to a permit granting authority shall be taken within thirty days from the date of the order or decision being appealed."

MGL 40a does not place an immediate timeframe on a building permit appeal. The statute restricts removal, alteration or relocation of any structure that violates a zoning bylaw or ordinance after ten years have passed from commencement of the violation, and prevents any enforcement action to compel the "abandonment, limitation or modification of any use or the removal, alteration or relocation of any structure" that violates a zoning bylaw or ordinance after six years have passed from commencement of the violation if the property "has been improved and used in accordance with the terms of the original building permit issued by a person duly authorized to issue such permits." Being that actions can be taken within these statutory timeframes, Staff sees no timeframe violation if the ZBA determines that this appeal, which was filed within a year of the initial building permit, is valid.

- B. The appeal was filed many months after the building permit was issued and after construction began, in violation of SZO 3.2.3.2

It is the understanding of the Planning Staff that the provisions of SZO 3.2.3.2 reflect the provisions of MGL noted above. The appeal was filed many months after the building permit was issued, but was filed soon after realization of the permits by the appellants. The appeal to the ZBA was a timely appeal of the decision not to enforce the action requested on October 28, 2013. That decision is dated November 14, 2013 and the appeal was filed on November 19, 2013.

- C. The appeal was filed in violation of the condition that future owners do not object to this construction, as stated in the condominium Master Deed.

While the Staff has noted that the appeal filed is a direct violation of this provision of the Master Deed of the Condominium, it is not the role of the ZBA to serve as the enforcing authority of the Master Deed.

- D. The 16 South Street lot is a conforming lot, owned by right without easements and the proposed building satisfies all zoning requirements for this lot.

As a freestanding lot, the Planning Staff has seen no evidence presented that disputes this, unless the lot merged for zoning purposes with the adjacent lot at 18 South Street.

- E. The lots did not merge for zoning purposes, as the definition of a 'lot' under the Somerville Zoning Ordinance is different than the definition in other communities, and therefore claims of invalidity are not relevant to this case.

This issue is discussed extensively earlier in the staff report.

- F. The six points raised by the appellant (noted above as a part of the October 28th complaint) are not valid (the owners provide specific reasoning for these items that will be discussed below).

These points are discussed previously in the staff report

- G. The owners raise a concern about an incident on December 14, 2013.

Nothing about this incident is even remotely relevant to the zoning appeal filed by the appellant.

- H. The owners provide a 'concluding remark' regarding geotechnical studies.

ISD has established an opinion that there is no code violation at 16 South Street regarding geotechnical soil conditions and their impacts on the adjacent properties.

RECOMMENDATION

Planning Staff has investigated this case to the best of their ability. Staff has collected property deeds, case law, and the proposed plans for 16 South Street. Staff has reviewed this case extensively, including documents submitted by both sides. Staff has reviewed these materials with the City's legal department and reviewed relevant statutes and case law.

At this time, Staff believes that all of the claims of the appellant, other than those related to the doctrine of lot merger and infectious invalidity are not valid, and based upon those claims alone there is no basis for overturning the building permit issued by ISD.

In order to make a determination about lot merger, the ZBA must apply an interpretation of the SZO and determine if a lot merger occurred when these lots were in common ownership. As noted above, while the staff believes that there is evidence to suggest that lot merger does not apply, the Staff is also aware that this complicated area of law may be interpreted differently by others.

This interpretation is important, as it will impact how other Somerville lots can or cannot be divided when they contain multiple non-conforming parcels on a single deed.

This particular case includes a definition for 'lot' that is different than others that have been addressed by courts in the past. Therefore, the significant volume of case law on this issue in Massachusetts leaves this determination inconclusive, and essentially up to the interpretation of the ZBA, at this time.

