

Memorandum

To: Somerville City Council Land Use Committee, Planning Board and ZBA

Cc: OSPCD, Office of the Mayor, Councilmember JT Scott

From: Bill Valletta, One Fitchburg Street, #C309 (Brickbottom)

Date: 12 July 2022

Subject: **Citizen Comment on Agenda Item #213430, proposed repeal of the Certificate of Zoning Compliance from the Somerville Zoning Ordinance**

Introduction and Summary Conclusion

The City Council and Planning Board are considering an amendment to the Somerville Zoning Ordinance, proposed by the city administration, which will delete from Article 15 the Certificate of Zoning Compliance (“CZC”). City planning staff have explained that this will remove a redundant and time-consuming process without loss of any substantive protections of zoning, planning or code compliance.

I agree with this proposed action and with the rationale that it will help to simplify and speed the process without loss of protections. My opinions are based on the analyses, presented below, in which I have reviewed the zoning text and data on the group of mid-scale residential and lab projects, which have been processed and granted since the start-up of the procedure in July 2020. These analyses demonstrate that the CZC have not served any useful purposes as regulatory or planning tools. Thus it will be a welcome change to spare the city inspectors of redundant tasks and relieve applicants and their architects/lawyers of unnecessary filings and fees.

Despite my positive agreement with the proposed repeal, I think it necessary to put the attached analyses into the record because, looking back, we can recall that the CZC was originally thought to be a significant element of zoning reform. When the idea first appeared in the 2014/2015 draft ordinance, it was called the “zoning permit” and was described as a pivotal tool in the new system of contextual zoning. Subsequently, as the draft text evolved, its role appeared to gain importance. In the 2018/2019 version, the CZC was to be the organizing act that would complete and certify the record of binding standards, conditions and commitments for each approved project. It would fix all these in parallel with code-compliance, and insure their preservation and open access for future oversight and enforcement.

If the CZC mechanism is now recognized as having negligible practical value, then what is left -- legally, structurally and substantively -- of the complex, multi-step process? Does the process of accumulation of site and building design and functional standards and conditions through multiple reviews and negotiations remain a viable and effective system? Or is it merely an illusion of acts, plans and documents that will be ignored and forgotten?

I think it highly significant that, on the same June calendar as this repeal petition, the Council and Planning Board have been asked to remove the mechanism of site plan approval for “backyard cottages” in the NR district. (City Council #2013601) Similarly, the Council has begun to reconsider other zoning provisions, related to multi-family housing, in response to the new law on “Multi-family Zoning for MBTA Communities” (MGL Sec. 40A, Section 3A).

(City Council #213637) These agenda items all recognize in the Zoning Ordinance the redundant mechanisms, which are ineffective for regulatory compliance, are irrelevant for planning quality, and are obstacles to affordable housing.¹

Simplifying the Zoning Ordinance by removing all such complicated and ineffective tools and procedures will be a highly worthwhile effort.

Memorandum: Analysis of the Record of Performance of the Certificate of Zoning Compliance in Somerville

By Bill Valletta (Brickbottom resident, attorney/planner)²

Part 1: How were the role and status of the CZC originally defined?

The idea of issuing a formal document for each project, signed by the Superintendent of Inspection Services or delegated Building Officer and attesting to its full compliance with the Zoning Ordinance, was first proposed in the 2014 draft revised Zoning Ordinance. It was found in the then-numbered *Chapter 10: Administration* and was called the “zoning permit.” The pertinent paragraph read as follows:

Article 10.C.1: Zoning Permit

a: **Purpose:** A zoning permit certifies that development plans conform to the provisions of this Ordinance and that any additional type of development review required by this Ordinance has been completed in accordance with the provisions of this Article.

To understand its intended status and functional purpose we can look at its placement in the draft text and at the language, describing it, parallel with other permits and actions. Article 10.C.1 was placed in Chapter 10:

- following Article 10.B, which described pre-submittal developer meetings with neighbors, city planning staff and the urban design committee;
- alongside sub-sections 10.C.2 and 10.C.3, which described the other administrative actions (building permit, Certificate of Occupancy ...); and
- preceding Article 10.D, which elaborated the discretionary permits under Planning Board and ZBA jurisdiction (special permits, site plan approval, variances ...)

This mid-point placement suggested that the zoning permit would be a “scoping” mechanism, which would work in the following way:

¹ The problem of time-consuming and impotent zoning regulatory mechanisms is regional – see C. Spearance, “All Zoned Out,” Boston GLOBE, Sunday 10 July 22, at page H1.

² The author has been a Brickbottom resident since 1998. He served as Counsel to the New York City Board of Standards and Appeals (1981-1986) and as General Counsel to the New York City Planning Department and Commission (1986-1994). He was manager and consultant to a series of international urban development and urban land tenure projects of USAID, the World Bank and US Millennium Challenge Corporation (1995-2017).

- A developer would submit its applications for the zoning permit and (simultaneously or subsequently) for a building permit or certificate of occupancy, accompanied by the site and building plans and narrative reports on traffic, environment, etc. The submitted plans and reports would contain any adjustments, limitations or conditions already worked out in the preliminary meetings with staff, neighbors and the UDC.
- Within ten days, the Inspection Services staff (“Building Official”) would conduct a technical review to determine all the elements of the plans and narratives that were already in conformity with rules and standards for the zone and for the permitted uses and building types. The Building Official would also identify all elements that would require further definition, refinement, interpretation, approval or variance in a Discretionary review by the Planning Board or ZBA, or a technical sign-off by another city agency (Traffic or Environment and Sustainability...).
- If all the elements were found to be complying at the start, the Building Official would immediately issue the zoning permit. If elements of non-compliance and required reviews were noted, the Building Official would issue a written instruction directing the developer to make conforming changes or to make applications for the required permits, variances or reviews.
- The Inspection Services staff would then wait until all the necessary discretionary actions and technical reviews were complete, their Decisions issued and time for appeals passed, before issuing the zoning permit.
- When the Building Official would issue the zoning permit, it would be valid for up to ninety days. During the first 30-days any neighbor or interested party could appeal to the ZBA with a claim that the zoning permit was issued in error. When this 30 days passed with no appeal, the applicant would request from the City Clerk a certification of this fact of no appeal and would then take the copy of the zoning permit and clerk’s certification to the Middlesex County land registry for recording. In the county land records, the zoning permit would be available for future reference.³

The expected roles of the CZC as the tool of organization for contextual zoning and a tool of enforcement

The above recitation of the placement, context and process of the zoning permit (CZC) helps to reveal the status and role that the drafters of the ordinance foresaw in 2014/2015.

First, at the interim point in the multi-stage process of technical and public review, it would be the tool of organization by which the Inspection Services would summarize and consolidate all the outcomes of the preliminary meetings and tie them to the subsequent formal procedures.

³ In Appendix 1, below, the text of the 2014/2015 version of Article 10 is shown and compared to the 2018-2019 version.

Second, at the final stage, it would be the document of proof that the whole process was complete and the Building Official had concluded that all elements of plans, reports and Decisions were fixed and complying. Recording of the zoning permit in the land records would provide legal notice of this complete and complying status and it would be available for future reference in the “chain of title,” along with the other Decisions and conditional acts (covenants, deed restrictions...) if needed in monitoring or enforcement.

It should be noted that nothing in the 2014/2015 text, in the contemporary Council or Planning Board meeting minutes, or in notes taken at the time, suggested that the zoning permit would be useful as a document of proof for the property owner as a future seller or mortgagor, to use for transactional due diligence. This, however, is the role that the similarly named “certificate of zoning compliance” now has in other cities.⁴ We have not asked the Middlesex County Land Registrar whether any title searchers have been taking copies of the Somerville CZC since their first recording in July 2020. The City Council should find out.

The CZC as the tool of organization and enforcement that would make the system of contextual zoning workable

Looking back to 2014/2015, it appears that the drafters foresaw the role of the zoning permit (CZC) as a key element in their overall reform of the system of zoning.

Previous versions of the Zoning Ordinance, dating back to 1929 and revised in 1990, embodied the traditional “Euclidean” zoning system, based on the constitutional law interpretation of property rights and municipal regulatory power.⁵ The Zoning Ordinance could impose limits on land use and development rights only in minimal ways and by four permissible methods. First, the rules and standards had to be defined and applied uniformly to all parcels in a given zone. Second, prohibitions of certain uses and limitations of building dimensions could be imposed only to protect public health, safety and welfare, or to prevent nuisances and environmental harms. Third, for a small number of particular uses or building types, site specific conditions or limitations could be imposed using the mechanism of the special permit. Fourth, variances could be given to allow adjustments for the few parcels with hardship conditions.

In practice under Euclidean zoning, the inspectors and planners made their decisions by using “check-list” methods – that is, comparing each element of an applicant’s proposed plans to the standards and rules stated in the ordinance for the given zone.

In 2014/2015 the drafters of a new Somerville Zoning Ordinance intended it work in a very different way and to accomplish very different goals. Contextual zoning and the processes of public participation rested on the idea that the rules and standards of land use, development

⁴ In Chicago and Washington DC, any party in a transaction can ask the Planning Department or Inspection Services for a form letter that certifies the compliance of the property with zoning. A small fee is paid and the letter issues administratively. See for DC, <https://dcoz.dc.gov/service/zoning-certifications>. In Chicago, the certificate is only issued for one-to-five unit residential properties; www.chicago.gov/city/en/depts/dcd/supp-info/certificate_of_zoningcompliance.html.

⁵ Zoning was upheld as constitutional by the US Supreme court in the case of *City of Euclid v. Ambler Realty Co*, 272 US 365 (1926).

scale, design, and building functions could be defined positively as elements of collaborative community planning and “vision,” rather than negatively as limitations of property rights to prevent harms to health, safety, welfare and environment. They would not be pre-defined by technical experts and fixed uniformly for large zones. Instead, they would be discovered for each parcel and project in its neighborhood/block and street context, relying on the insights of neighbors and negotiated process. In this theoretical framework, the zoning permit (CZC) would be needed because, unlike the past Euclidean zoning, it would not be sufficient to simply open the Zoning Ordinance to the proper pages for the zone to check the standards and requirements. Instead, under “contextual” zoning the questions could be answered only by finding all the aggregated board Decisions, recorded documents and the CZC.

Given this explanation of the original, expected role of the CZC, what has subsequently changed to make the instrument ineffective and redundant?

At the joint hearing on June 16, 2022, Somerville’s senior city planner Dan Bartman stated that removal of the CZC today will reduce the time periods and make the process of review less complex, without hindering the keeping of accurate records for future monitoring and enforcing of project terms and conditions. However, Council Member Davis recalled that the drafters of the revised Zoning Ordinance had in mind certain past instances when developers were suspected of failing to comply with the standards, conditions or limitations of their permits, and when neighbors found themselves frustrated because actual developments did not appear to conform to what they believed had been agreed and required. Council member Davis, therefore, questioned whether an enforcement tool was being lost by the CZC repeal.

The answer to Councilmember Davis question was not addressed directly by Bartman, but as shown in the following sections of this memo, the answer appears to be yes in theory but is no in reality. This memo presents, below, several factual analyses are the basis for this conclusion. First, it looks at the changes that were made to the draft zoning text between the original 2014/2015 version and the 2018/2019 version (the adopted version). Second, it looks at the substantive content of the CZC form and the other related decisions and documents in a sampling of typical projects. It asks: What is the linkage or relationship of the CZC to the full documentary record of each project? Did the act of issuance and recording the CDC add anything for practical strength, substantive clarity, or enhanced legal status, which can help ensure compliance and enforcement?

Part 2: Change of the “zoning permit” to the certificate of zoning compliance (CZC) as the drafts evolved

Between 2014/2015 and 2018/2019, the draft text of the Somerville Zoning Ordinance (SZO) grew in length, detail and complexity. Chapter 10 was renumbered as Chapter 15 and the three-part structure of pre-submittal, administrative and discretionary actions of Chapter 10 became a four-part structure with the addition of the umbrella concept of a “development review application” (SZO Art. 15.1.5). This new structure encompassed:

- Pre-submittal planning staff and neighborhood meetings and Urban Design review;

- Development Review Application with Building Official, technical agency staff and planning staff reviews and Staff Report;
- Discretionary Permits of the Planning Board, ZBA;
- Administrative permits of the Planning Board, ZBA, and Inspection Services;
- Certificates of the Inspection Services.

In the 2018/2019 version of Chapter 15, the paragraphs describing the CZC were no longer placed at the pivotal interim stage between the preliminary meetings the formal reviews. Instead, scattered references to the CZC were made in various places at the beginning (Art. 15.1.1), within the Development Review section (Art. 15.1.11 and 15.1.12), and in a full section on Certificates at the end (Art. 15.4).⁶ (See Appendix 1 with the full text, below)

Under this more complex structure, the CZC appears to have lost its role of interim scoping – summarizing and organizing the already agreed-upon elements with the elements that would require subsequent board/commission/agency actions. Instead, its role at the final stage appears to have formalized and strengthened. Several new discretionary and administrative reviews and permits were added in 2018/2019 – thus the need to consolidate and clarify the status and outcome of multiple actions would be more important.

This change in focus to the final stage is evident in the chronological list of steps that are spelled out for each discretionary and administrative permit. For example, the CZC is Step 8 in the special permit procedure of Article 15.2.1(d). It is Step 12 in the chronology of actions for a Site Plan approval of Article 15.3.2(d), etc.

According to the City Council hearing testimony of Dan Bartman, there has been confusion among citizens and applicants about the status and role of the CZC – many people have misunderstood it as equivalent to a building permit or special permit. It is likely that this confusion has arisen from the complex structure and convoluted grammar of the 2018/2019 text. In particular Article 15.1.5 (describing the umbrella process of Development Review) and Article 15.1.6 (describing the Application Review and Staff Report) are obscure. These paragraphs spell out a chronology of:

- a “Development Application” which must lead to
- a public hearing by one or more of the Boards or Commissions (called generically the “Review Board”).

The Board then produces

- a “Decision” – not the CZC itself – which can give rise to
- an appeal to the ZBA within 30 days of its issuance.

After 30 days,

- a certification of the City Clerk must be obtained and then
- the Decision must be recorded in the land records.

A stamped and verified copy of the recorded decision is returned to the Buildings Officer at the Inspection Services, who then issues

- the CZC.

⁶ See Appendix 1, below for a comparison of the 2014/2015 and 2018/2019 texts.

Finally, in Article 15.4.1 (h), the CZC description ends with the following:

Art.15.4.1: Certificate of Zoning Compliance

h. Appeals (i) Administrative appeal

a) An aggrieved party may appeal the decision of the Building Official according to the procedures of 15.5.2 ...

Thus, while the various paragraphs of Article 15.1, 15.2 and 15.3 appear to fix the CZC as a summary and certifying document, which issues after the 30 days for appeal of the Board/Commission Decisions; the quoted paragraph of 15.4 appears to put the CZC back into the parallel status of an appealable Building Inspector's action.

Note that so far there is no record of anyone, who has tried to bring a ZBA appeal of a CZC during the two years that the documents have been issued.

Part 3: Analysis of the CZC procedure in practice

In 2022 we now have two years of evidence of the practical functioning of CZC, which first began in July 2020. What evidence does this experience offer that can support or refute the assertion that repeal of the CZC will reduce the time periods for review without hindering the keeping of accurate records for future monitoring and enforcement?

In order to provide answers, we present two analyses of data, drawn from the city's building permit database and zoning records. The first analysis looks at the chronologies of a sample of development permit applications in order to identify the weeks or months that may be saved. The second analysis looks at the substantive content of the Reports and Decisions, issued for these sample projects in order to determine whether any standards, conditions or limitations are likely to be forgotten or become unenforceable as a result of CZC removal.

Identification of project data for analysis

Inspectional Services began classifying the applications for development review under a CZC coding number system in July 2020 and, during the subsequent two years it has received just over 700 projects. The building permits database up to 30 June 2022 shows 446 project reviews and 451 CZC issued:

City of Somerville Statistics on CZC Applications

Source: <https://data.somervillema.gov/City-Services/Permits>

	Applications numbered	Certificates Issued	Withdrawn/ withheld	
2020 (Q3,4)	134	389		
2021	431			
2022 (Q1,2)	153	62		
TOTAL	708	451	5	

From this dataset we have selected the eight mid-scale residential projects, proposing apartment houses or general buildings with nine or more dwelling units, which have moved fully through the procedure between January 2020 and July 2022. We have also added one large lab/office building to the sample. For the first analysis, we have noted for all nine projects the

chronology of actions, shown in the Building Permit dataset and the archive of Planning and Zoning Reports and Decisions. For the second analysis of substantive content, we have identified five of the group of eight residential projects plus the lab/office, which had full Planning Board or ZBA documentation.

Analysis of the time periods for review

The following Table contains the chronological data for the eight residential projects and the lab/office facility:

Chronology of actions for projects that received CZC between July 2020 and July 2022

Sources: <https://data.somerville.gov/City-Services/Permits...> and [www.somerville.gov/departments/ospcd/...](http://www.somerville.gov/departments/ospcd/)

Address	Prelim. meetings	CZC app. submitted	Plan Board or ZBA			CZC Issued	Build permit	
Project description			Applica.	Hearings	Decision			
<i>Residential projects</i>								
13 Warwick St CZA#20-000044 28 units in UR zone	01/01/20	10/15/20	Multi-family by right			06/16/22	06/--/22	
			--	--	--			
379 Somerville Ave CZC#20-000104 10 units in MR5 zone	10/13/20	12/03/20	SP household living; SPA			05/26/22	--	
			04/02/21	04/29/21 05/20/21 06/10/21	07/09/21			
3 Hawkins CZC#20-000060 59 units in MR5 zone	11/25/19 02/20/20 03/06/21	10/27/20	DRA#2020-0018 Site plan approval SP for household living			03/25/22	03/25/22	
				05/06/20 02/--/21	04/29/21			
115 Thurston CZC#20-000112 9 units in UR zone	--	12/07/20	Multi-family by right			04/01/22	--	--
			--					
152-158 Broadway* CZC#20-000059 45 units in MR5 zone	07/29/20 08/27/20 09/29/20	10/27/20 11/21/21	SP for Multi-family use SP for parking, SPA			07/19/21 06/08/22	--	--
			02/01/21	02/18/21	03/18/21			
24 Mt. Pleasant CAC#20-000121 12 units in UR zone	--	12/11/20	Multi-family by right Lot merger			05/17/21	--	
24/28 Mt. Pleasant CZC#21-00387/0429 32 units in UR zone		11/16/21 12/27/21	--	--	--	06/24/22 06/14/22	--	
31 Tufts St CZC#21-000342 16 affordable units in UR zone	12/--/18 11/--/19 03/10/20 02/23/21 03/30/21	10/06/21	Multi-family by right Rezone UR P&Z#20-004, SPA park P&Z#22-033, lot split			05/12/22	05/12/22	06/21/22
			Rezone 06/07/21	05/28/20 06/17/21 04/15/22				
73 Summer Street CZC#21-000045 27 units in MR3 zone	08/26/20 03/06/21 04/07/21	02/08/21	P&Z#20-003 – SP household/SPA			02/25/22		
			07/21/21	08/19/21 10/07/21	12/16/21			
<i>Office/lab project</i>								
28 Chestnut CZC#21-00019 200,000 ft2 lab in CI zone	12/01/20 01/11/21 02/--/21 03/22/21	01/19/21	P&Z#21-006 and 007 ZBA site plan approval			11/23/21 05/06/22	05/09/22	
			06/04/21	07/15/21 08/04/21	08/18/21			

This chronological data enables the calculation of the number of months, required to move each project through the stages of (a) preliminary meetings, (b) application and technical review for the CZC, (c) discretionary or administrative review at the Planning Board/ZBA, and (d) the final stage of issuance of the CZC. All nine projects have run through the full process and have received their CZC by 30 June 2022. Two of the residential buildings plus the laboratory building have moved forward and received their building permits and are now under construction. The calculations of the time periods are shown in the following chart:

Calculations of Time Periods for Stages of Development Review – Sample CZC 2020-2021

	Prelim. Meeting	months	CZC app. submitted	Months to hearing	PB/ZBA hearing Decision	Months decision to CZC	CZC issued	Total CZC	Total	*
13 Warwick St 28 units in UR	01/01/20	9 mo.	10/15/20	--	--	--	06/16/22	20 mo.	29 mo.	
379 Somerville 10 units in MR5	10/13/20	2 mo.	12/03/20	5 mo.	04/29/21 07/09/21	13 mo.	05/26/22	18 mo.	22 mo.	
3 Hawkins St 59 units in MR5	11/25/19 03/06/21	11 mo.	10/27/20	6 mo.	05/06/20 04/29/21	11 mo.	03/25/22	17 mo.	28 mo.	*
115 Thurston St 9 units in UR	--	--	12/07/20	--	--	--	04/01/22	16 mo.	16 mo.	
152 Broadway 45 units in MR5	07/29/20	3 mo.	10/27/20 11/21/21	4 mo.	02/18/21 03/18/21	4 mo.	07/19/21 06/08/22	9 mo.	23 mo.	
24 Mt. Pleasant 32 units in UR	--	--	12/11/20 11/16/21	--	--	--	05/17/21 06/24/22	6 mo. 7 mo.	18 mo.	
31 Tufts St 16 units in UR	12/---/18 11/---/19 03/10/20	23 mo.	10/06/21	-- 6 mo.	06/17/21 04/15/22	-- 1 mo.	05/12/22	8 mo.	41 mo.	*
73 Summer St 27 units in MR3	08/26/20	6 mo.	02/08/21	6 mo.	08/19/21 12/16/21	2 mo.	02/25/22	12 mo.	18 mo.	
28 Chestnut 200,000 ft2 lab	12/01/20	2 mo.	01/19/21	6 mo.	07/14/21 08/18/21	3 mo.	11/23/21 05/06/22	10 mo.	27 mo.	*

*Note: Asterisk denotes project with Building permit and under construction on 1 July 2022

Time periods for Preliminary Meetings

On the chart under the column heading “Preliminary Actions,” the dates are given for neighborhood and city staff meetings and Urban Design Commission meetings that occurred before the applicant formally submitted its plans. The Zoning Ordinance does not fix a schedule or deadline for these actions and the dates of meetings and submissions are not always reported. The length of time at this stage appears to depend mostly on the complexity of necessary actions, community reactions to the proposals, the strategies of the developers, and the convenience of city staff and Ward Councilmembers (who are the organizers of the public meetings). The longest time period of preliminary activity is seen at 31 Tufts Street because this project required a disposition of city owned land through RfP bidding, in addition to complex financing for 100% affordability. Attention of the community during this period was directed toward a “pocket park” that subsequently required additional ZBA applications.

Another protracted preliminary stage can be seen at 3 Hawkins Street, where the project was originally filed in 2019 but could not proceed before the adoption of the new Zoning Ordinance in December. Subsequent adjustment and re-presentation of the plans were delayed in the pandemic months of spring 2020.

By contrast, the technically sophisticated laboratory building at 28 Chestnut Street in the Fabrication zone of Brickbottom moved through its preliminary period in only 2 months. In part, this was due to the compliance of the use, building type and building dimensions with the existing zoning. Another factor was that an earlier proposal to modernize the former warehouse on the site had gone through ZBA variance in 2018, so that the major issues of local resident concern -- traffic and parking, building dimensions and shadows – had already been aired and solutions were worked into the lab project design at the start.

Time periods for full CZC review

On the chart, the two columns “CZC Application” and “CZC Issued” show the start and finish date of the development review, under control of Inspection Services. The number of months has varied significantly with no obvious co-relation to either the size of projects, the complexity of issues or the number/variety of special permits, variances or other actions. Among the nine projects, only one completed its CZC application review in less than a year – the first application for 24 Mount Pleasant Street, which was a by-right 12-unit building in the UR zone. But this project then subsequently expanded with a lot merger and, ultimately, the combined CZC review has taken 18 months.

The project with the longest CZC review time period has been 13 Warwick Street, which has taken 20 months from plan submission to CZC issuance. Because this project has proposed a residential use and apartment building type that are both complying, it has not required any Planning Board or ZBA actions. Thus there are no published documents to reveal why so many months have been required for technical review. An additional nine months of preliminary meetings took place but, again, there is no public record of the issues or problems encountered.

379 Somerville Ave and 3 Hawkins Street have required a similar 17 and 18 months from plan submission to receipt of their CZC – despite the difference in size of the projects – 379 Somerville will be a small building with only 10 units; while 3 Hawkins will have 59 units. As multi-family residential projects in the MR5 zone, both have required Planning Board special permits for household living as well as site plan approvals, and both have followed the same pattern of Planning Board hearings and decisions over a period of 11 months. One significant difference in timing between the projects is that the 379 Somerville Avenue preliminary time period was only 2 months, while the larger project at 3 Hawkins took 11 months of neighborhood meetings and UDC review. Presumably, therefore, the larger project had more complex issues to be worked out by neighbor and technical agency negotiations.

Timing between CZC application and Planning Board/ZBA application and hearing

The Zoning Ordinance, Articles 15.1.5 and 15.1.6 describe in great detail the actions that the city Inspection Services and Planning staffs are supposed to take whenever they have received a submission of project plans for “development review.” They must initially determine whether the set of plans/narratives are complete to address all the issues of zoning/planning and code compliance, and when they deem the plan package to be complete. Then they must efficiently begin the review by directing the application to all pertinent city technical agencies

and, if necessary, directing the applicant to file with the Planning Board, ZBA and/or UDC. Article 15.1.7 provides the rules for public notice in all cases where the city staff will anticipate a public hearing or public meeting under any of the administrative and discretionary permit requirements. Article 15.1.8 continues with the statement:

(a) Procedure:

(i) A public hearing must be held within 65 days after receiving a completed development review application that requires a Special Permit, Master Plan Special Permit, Hardship Variance, Site Plan Approval, or Subdivision Plan approval.

(ii) A public hearing must be held within 90 days after receiving a completed development review application that requires a Neighborhood Development Plan Approval.

Among the nine projects, shown in the Table above, five of the residential projects required the types of special permits/variances that are specified in Article 15.1.8.a. In none of them was the time period of 65 days from CZC application to public hearing met. This is not surprising because the actions that are needed in preparation for the board hearings are, in part, dependent on the developer and its professional consultants, who must complete all necessary plans and narrative submissions for the boards. In addition, the boards must maintain orderly calendars, so some projects may need to wait for space on the calendar if there is a queue.

Time period for Planning Board, ZBA and/or UDC actions

In Somerville it has long been the practice of the Planning Board and the ZBA to allow items on its agendas to roll over multiple times either before the public hearings are held or after a first hearing, while alterations or new information are prepared for subsequent sessions. Frequently, the board chair makes clear in his/her statement of continuance that the board will wait for the developer and neighbors to reach a consensus before it will close the record and take a vote. This passive stance has always seemed contrary to the legally-mandated roles of the board members, as well as a waste of their professional expertise. Nevertheless it reflects the underlying philosophy of zoning in Somerville as a negotiation, rather than a regulatory process.

In the column of “PB/ZBA Hearings and Decisions,” in the Table above, none of the projects show extremely prolonged time periods for Planning Board or ZBA review. This suggests either that the practice of the boards has become more disciplined or that, since the new Zoning Ordinance, their calendars have been greatly reduced by the elimination of many applications for minor alterations and non-complying houses.

Time period from Planning Board or ZBA Decision to CZC issuance

Once the Planning Board or ZBA has issued a decision, the time period of 30 days for appeal should run and the applicant is then supposed to apply to city clerk for the certificate of no appeal and go to the land registry to file the documents. The return of the copy with registry stamp enables the Inspection Services to issue the CZC and move forward to the Construction permit whenever the parallel Code compliance documentation is complete. Thus, we would expect to see at this stage time periods of one and half to 3 or 4 months for all projects. Repeal of the CZC as a required document should eliminate this time, allowing the Inspection Services

to move from Planning Board or ZBA decision to construction permits directly after the 30-day appeal period ends.

On the chart above, three of the residential projects and the lab building show the expected time period of one to four months for CZC issuance after Planning Board/ZBA decision. Three “by right” residential projects did not need Planning Board or ZBA decisions. However, for two projects – 3 Hawkins and 379 Somerville Ave. -- this time period stretched to 11 and 13 months. It is unclear from the published documentation why these long delays were encountered.

The Building Permit archive notations for 3 Hawkins Street and 379 Somerville Avenue do not signal any difficulties. In fact, for both sites, the records show that site preparatory and foundation work went forward during the period between the Board decisions and the CZC issuance. One possible explanation is that the Inspection Services withheld the CZC (or the applicant held off asked for it) while various conditions, attached to the Planning or ZBA decision were undertaken. (This question of the impact of conditions, mitigation and amenities is discussed in Part 4 of this report, below.) Another possibility is that the Inspection Services delayed the CZC while working out problem elements of the parallel Building Code review.

Cumulative totals of months and years for project permitting

The chart above shows two cumulative totals of (i) time between CZC application and issuance; and (ii) total time of review, including preliminary meetings, up to construction permits. Among the nine sample projects, above, the shortest total review periods appear to be 16/18 months and the longest has stretched to 41 months. For all projects we can expect another 18 months or more of construction, so that a three to five year range of project start to project completion and occupancy would be expected.

Based on these sample data and the broad array of earlier city building permit and zoning data, a two to 4 year time period for zoning and permitting seems to be the average for any project of new construction, larger than a three-family dwelling, in the city.⁷ This might be considered a necessary burden on developers, city staff and the public if there were evidence that Somerville projects were achieving some significantly higher levels of building design and environmental or functional quality, compared to what is normal around the region.

It is appropriate, therefore, to undertake a final analysis of the content of the Decisions and Reports, approving projects and imposing conditions on their design and function. This analysis would help to determine whether the CZC is providing some significant added value in project quality or neighborhood quality, or in certainty of compliance and enforcement, despite its added burden of time and complexity to the process.

Part 4: Analysis of the substantive content of development review

⁷ This same range of time seems to be common around the Boston metropolitan region. See MARPA, 2007, A best practice model for Streamlined Local Permitting. Surprisingly, the COVID pandemic has not disrupted most projects.

As stated above, the purpose of the CZC has been to make workable the system of contextual and neighborhood/community defined site specific zoning regulation. Therefore, this final analysis compiles data on the substantive outcomes or “products” of development review – that is, the decisions of the Planning Board, ZBA, UDC and planning staff, which define the permitted uses, dimensions and design elements, along with imposed or negotiated terms, conditions, limitations, linkages and commitments.

On the following Table we have organized data in a comparative format for the eight recent residential projects plus the lab/office. The data consists of notation of all the site-specific requirements that the Planning Board, ZBA, Urban Design Commission and/or Planning Staff have fixed as conditions of the special permit, site plan and variance approvals. The chart shows the notations of required conditions alongside the chronological data – that is, the time period between the date of the zoning permit/approval Decision and the issuance of the CZC.

Conditions fixed in Planning Board/ZBA Decisions co-related to Timing of CZC issuance

	DU	Time period	Before building permit								Before C of O					Perpetual									
			A	B	C	D	E	F	G	H	H*	I	J	K	L	M	N	O	P	Q	R	S	T	U	A*
379 Somerville A	10	13 mo.	*	*	*	*					*	*	*	*		*	*	*							*
3 Hawkins St**	59	11 mo.		*	*	*	*		*	*		*	*			*	*	*	*	*					*
152 Broadway	45	4 mo.	*	*	*	*		*	*	*		*	*		*	*	*	*			*				*
31 Tufts St	16	1 mo.	*		*		*							*				*			*		*		
73 Summer St	27	2 mo.					*			*	*	*	*		*			*							
24 Mt Pleasant	32	--																							
13 Warwick St	28	--																							
115 Thurston St	9	--																							
28 Chestnut	--	3 mo.	*	*	*		*		*				*		*	*		*	*	*			*	*	*

**Note: The Decision of the Planning Board on 3 Hawkins Street has not been published, so the recitation of conditions appears only in the Planning Staff Report without division of the items into the three timing classifications. *Before a building permit*

<i>Conditions to be fulfilled before the Building Permit</i>	
A	Copy of recorded Plan Board Decision stamped by county land registrar clerk submitted to P&Z Division
B	Step 2 Net Zero (or LEED) documentation submitted to the Office of Environment and Sustainability
C	Submission of outdoor lighting plan and specs. of lighting fixtures complying with SZO Sec. 10.7
D	Formal acknowledgment that future residents will be ineligible for on-street parking, and prior warning to lessees, buyers
E	Submission of copies of all materials of development review submitted to P&Z Department for public record
F	Submit material palate to UDC for review and comment
G	Fenestration glazing materials specs with VLT and VLR ratings
H	Deed restriction prepared and recorded limiting re-sale or rental of affordable units
<i>Before a Certificate of Occupancy</i>	
H*	Deed restriction prepared and recorded limiting re-sale or rental of affordable units
I	Affordable Housing plan (AHIP) submitted to Director of Housing
J	Step 3 Net Zero Ready (or LEED) documentation submitted to Office of Environment and Sustainability
K	Planning Board Decision to be recorded in county land registry
L	Written narrative or check list description identifying completion of all permit conditions submitted to Inspection Services
<i>Perpetual</i>	
M	All future unit owners/tenants will comply with Mobility Management Plan as approved by Director of Mobility
N	All buyers, lessees or tenants shall be prohibited from applying for on-street parking permits
O	No utility meters shall be placed on front façade
P	Construction documents must be substantially equivalent to the approved plans and other materials of development review
Q	Traffic mitigation and street improvement plans final designs submitted
R	3-bedroom affordable units to comply with Director of Housing quality standards
S	Prepare and record easement of public/pedestrian access to open space

T	Comply with neighborhood Development Covenant
U	Property owner responsible for maintenance, security and insurance of street, sidewalk, other civic space improvements
A*	Plan Board/ZBA decision to be recorded in the Middlesex County Land Records

If the CZC were being used as a tool of enforcement or “leverage” to insure that the each developer complies with all the conditions, then we would expect to see that the projects with the most complex and numerous conditions would have longer post-Decision time periods.⁸ But the Somerville CZC and Planning and Zoning Decision data does not show any such correlation.

What the Table does suggest is a contradiction between the reality of development review and the underlying planning theory -- that is, the idea that Somerville is composed of unique neighborhoods, blocks, corridors and zones, which vary greatly in context and character. In theory, the combination of strong citizen engagement with detailed technical work should result in Decisions and Reports that reflect highly specific and sensitive design/functional solutions for each project. What the record shows, instead, is that the same routine findings and conditions are stated for most projects whatever their size, zone location, frontage on a main corridor or side street, etc., or whether the plans and conditions emerge from controversial community discussions or from city-staff technical reviews.

The CZC process appears to run on completely separate track. The actions that the developer/applicant takes to comply with the zoning conditions at each stage are unrelated to anything that the Inspection Services may do, issuing or withholding a CZC. The irrelevancy of the CZC thus seems clear.

⁸ Data from Boston, covering the BPDA Small Project Reviews (BZC Section 80E) seems to reflect this co-relation. Under 80E, a typical residential project of under 50,000 ft2 completes its technical and public reviews and receives BPDA Board approval within 90 days but it then can wait as long as 12 or 18 months until the BPDA issues the Certification of Approval (analogous to the Somerville CZC). During the interim time period, the BPDA completes and receives from the developer the linkage payments, housing deed restriction documents, other negotiated contracts or deed restrictions. The Certificate of Approval then formally closes out BPDA jurisdiction, authorizing Inspection Services to move forward with building permits.

Appendix 1: Comparison of the text of draft Article 10 (2015 version) with SZO Article 15 (adopted 2019 version) and the proposed repeal

2015 draft ZO	2019 adopted ZO	2022 proposed repeal
	Art. 15.1 Review Procedures Sub. 1: General --All development, excluding normal maintenance, requires the submittal of a development review application to the building official and the issuance of a certificate of zoning compliance prior to the issuance of a building permit or certificate of occupancy --Proposed development may or may not necessitate the need for a discretionary or administrative permit based on the nature of the proposal --This section describes the various common procedures...	No change
Art. 10.A: Standard Procedures Sub. 1: Application Submittal ..preliminary review: Prior to formal submittal of an application , an applicant may be required to have a pre-submittal meeting with city staff, neighborhood meeting, design review --submittal	Art. 15.1.2: Pre-submittal meeting (a) Purpose: --To inform applicants of relevant development review application criteria --to examine previous development review applications and permits for the subject property --to identify any potential concerns at the earliest opportunity ...	
	Art. 15.1.2 (b) Procedure --When a pre-submittal meeting is required by this ordinance, development review applications are not considered complete until the pre-submittal meeting has been held with planning staff...	
	Art. 15.3: Neighborhood meeting --To provide the public with an opportunity to review the conceptual design proposal and identify and discuss issues and potential impacts... --Neighborhood meetings are required during the schematic design process to promote the submittal of a development review application that is more responsive to community concerns, expedite the review process, and lessen the cost of development...	
Art.10A Sub.4 Certification and recording --<i>Decisions ... filed with the Office of City Clerk...</i> Para. d: Once the Office of the City Clerk has certified that the decision has not been appealed, the applicant must archive the decision with the property authority as follows – unregistered land to the Middlesex county Registry of Deeds, or to the Land Court for registered land...	Art. 15.1.11 Certification of Decision ...After the time period for an appeal has expired... the applicant must take a copy of the decision provided by the Planning Division to the Office of City Clerk for certification that no appeals have been filed. Para. b: Once the Office of the City Clerk has certified that the decision has not been appealed, the applicant must archive the decision with the property authority as follows – unregistered land to the Middlesex county Registry of Deeds, or to the Land Court for registered land...	

L		
Art. 10A Sub.4(ii): No zoning permit will be issued without physical evidence that a required or requested special permit, waiver and/or variance granted by a review board has been properly filed with the Middlesex Registry of Deeds or land court.	Art. 15.1.12 Certificate of Zoning Compliance --The building official shall grant a Certificate of Zoning Compliance for development that conforms to the provisions and procedures of this Ordinance --No certificate of zoning compliance will be issued without physical evidence that the certified copy of the decision has been properly filed with the Middlesex South Registry of Deeds or Land court.	Repealed
		Art. 15.7.1 Building Officer --a. Responsibilities (ii): The Building Official shall conduct a zoning compliance review of all proposed developments and maintain a public record of the results of each such compliance review.
Art. 10.C: Administrative Development Review Sub. 1: Zoning Permit Para. a: Purpose: A zoning permit certifies that development plans conform to the provisions of this Ordinance and that any additional type of development review required by this Ordinance has been completed in accordance with the provisions of this Article	Art. 15.4: Certificates Sub. 1: Certificate of Zoning Compliance --Purpose: A certificate of zoning compliance certifies that development plans conform to the provisions of this Ordinance and that any additional type of development review required by this Ordinance has been completed in accordance with the provisions of this Article	Repealed
Art.10. C: Applicability: --All development requires a zoning permit	Para. C: Applicability: --All development requires a certificate of zoning compliance Art. 3.5.b – All development, excluding normal maintenance, requires a Certificate of Zoning Compliance prior to the issuance of a Building Permit or Certificate of Occupancy (NR, UR) Art. 4.5.b – All development, excluding normal maintenance, requires a Certificate of Zoning Compliance prior to the issuance of a Building Permit or Certificate of Occupancy (MR3, MR4, MR5, MR6) Art. 5.5.b – All development, excluding normal maintenance, requires a Certificate of Zoning Compliance prior to the issuance of a Building Permit or Certificate of Occupancy (HR) Art. 6.5.b – All development, excluding normal maintenance, requires a Certificate of Zoning Compliance prior to the issuance of a Building Permit or Certificate of Occupancy (Fab, CC, CI, CB) Art. 7.5.b – All development, excluding normal maintenance, requires a Certificate of Zoning Compliance prior to the issuance of a Building Permit or	

	Certificate of Occupancy (Special Dist) Art. 13.1 and 13.2 b – All development, excluding normal maintenance, requires a Certificate of Zoning Compliance prior to the issuance of a Building Permit or Certificate of Occupancy (Civic spaces)	
Art. 10.C: Applicability: --No zoning permit shall be issued for applications that require an additional type of development review until that review has been completed in accordance with the provisions of this Article... --No building permit, certificate of occupancy or construction permit shall be issued until a zoning permit has been issued by the Building Official --In cases where both a building permit and a certificate of occupancy are required, a zoning permit is only required prior to the issuance of a building permit	Art. 15.4: Certificates Para. C: Applicability: --The building official may not accept a development review application that requires a pre-submittal meeting, a neighborhood meeting, or a design review until those review procedures have been completed... --The building official may not issue a certificate of zoning compliance for development that requires a discretionary of administrative permit until that review has been completed in accordance with the provisions of this Article... --The building official shall not issue a building permit, certificate of occupancy or construction permit shall be issued until a zoning permit has been issued by the Building Official --In cases where both a building permit and a certificate of occupancy are required, a zoning permit is only required prior to the issuance of a building permit	Repealed
Art. 10.D: Procedure --The approval or denial of an application for zoning permit is conducted administratively --The building official shall forward applications for zoning permit that require any additional type of development review to the appropriate review board... --Within ten days after receiving a completed application for a zoning permit that does not require any further type of development review, the building official shall issue such permit, or transmit in writing, the reasons for failure to issue such permit to the applicant...	Art. 15.4: Certificates Para. D: Procedure --The building official shall forward development review applications that require a discretionary or administrative permit to the appropriate review board... --Within thirty days after receiving a completed application for a zoning permit that does not require any further type of development review, the building official shall issue such permit, or transmit in writing, the reasons for failure to issue such permit to the applicant...	Repealed
	Art. 15.4: Certificates --A certificate of zoning compliance verifies only that proposed development is conforming to the Somerville Zoning Ordinance at the time it is issued	
Art. 10.C e. Validity i. A zoning permit remains valid for ninety (90) days.		
Art. 10.C f. Review Criteria i. --The Building Official shall approve an application for zoning permit upon verifying the following:	Art. 15.4: Certificates Para. f: Review Criteria The building official shall approve an application for certificate of zoning compliance upon verifying the	

--a. that the submitted plan conforms with the provisions of this Ordinance; --b. the application is consistent with all prior approvals for the subject property; and --c. any additional type of administrative or discretionary development review required by this Ordinance has been completed in accordance with the provisions of this Article.	following: --a. that the submitted plan conforms with the provisions of the zoning ordinance,' --b. that the application is consistent with all prior approvals for the subject property; and --c. any additional type of administrative or discretionary development review required by this ordinance has been completed in accordance with the provisions of this article...	
	Art.15.4: Certificates Para. g: Inspections --submittal of an application for a certificate of zoning compliance provides consent by the applicant for the Building Official to enter upon the private real property to conduct routine inspections as needed...	
	Art. 15.4: Certificates Para. h: Appeals --An aggrieved party may appeal the decision of the Building Official according to the procedures of Sec. 1.5.2 Administrative appeals.	Repealed

Appendix 2: Comparison of Conditions and Commitments, Imposed by Planning Board, ZBA and UDC on the Sample Projects

3 Hawkins Street	73 Summer Street	31 Tufts Street
59 dwelling units in MR5 zone	27 dwelling units in MR3 zone	16 dwelling units in UR zone
Zoning: Special Permit household use Site Plan approval 5-story general building complying	Zoning: Special permit household use Site Plan approval 3-story building complying	Zoning: Multi-family use by right Apartment house by right Minor site plan approval of lot separation SP for civic space/pocket park
Unit mix: --24 studios --25 one-bed ---7 two-bed ---2 three-bed -- 11 affordable units (18.6%) --three-bed units to conform to standards for ADU	Unit mix: ---3 studios --10 one-bed --11 two-bed ---3 three-bed	Unit mix: --100% affordable
Site and Building Conditions: --6 bicycle spaces --Green score of 0.23 --no utility meters on front façade	Site and building: --18 parking spaces underground -- --no utility meters on front facade --any alteration of transformer vault will be major amendment	 --any alteration of transformer is a major amendment; --5,000 ft2 pocket park to be developed with full --Easement across residential lot to connect to civic space lot; --Right to name the park given by first refusal to the Somerville Memorialization Committee --pocket park signage subject to state Division of Public Spaces Handbook...
Urban Design Recommendations: --front facade to appear as two contemporary buildings; --side façade to look like three townhouses; --remove projecting box windows facing park; --rough texture for lower level of cast stone; --highlight main building entrance and downplay corner intersection entrance; --highlight pedestrian design for side walkway rather than as driveway; --native species of trees for street plantings ;	 --selection of materials and colors submit to Director of Planning	Urban Design recommendations: --15 shade trees to be provided; --5,000 ft2 publicly accessible open space under pocket park standards; --location of space, orientation to maximize sunshine; --Trees and landscape areas for shade and seasonal interest'; --bike racks and drink fountain; --Pervious paving; --Green score beyond required; --UDC and community choice among options of park design
Unresolved issues for Planning Board: --requirement of developer to improve		

pedestrian movement at intersection; --adjustment of sidewalk design to put landscape area abutting building rather than on island closer to curb;		
Conditions for Inspection Services, city Environmental or Traffic sign-off: --Net Ready Zero requirements --LEED requirements submitted to Office of Environment; --plan for improvements to sidewalks and curb extensions; --materials spec's from suppliers submitted to city for public record; --outdoor lighting plan and standards for visible light transmittance and reflectance (VLT and VLR)	--Net Zero Ready --LEED Certifiability Requirements Stage 2; --outdoor lighting plans and standards for VLT and VLR ...	--Net Zero Ready --outdoor lighting plan submitted to insure compliance with zoning ordinance standards...
Conditions of legal documentation: --AHIP plan to be submitted to Director Housing before CoO; --deed restriction limiting re-sale/rental of affordable units to be recorded; --Plan Board decision to be recorded; --compliance with Mobility Management Plan; --3 parking spaces offered to ADU tenants; --acknowledge no on-street parking permits for tenants and recording of this prohibition; --notice in writing to all future tenants of on-street parking permit prohibition; --submission for publishing of all decision documents; --materials spec's from suppliers submitted for public record	Conditions legal documentation: --AHIP plan to be submitted to Housing before CofO; --deed restriction limiting re-sale or rental of affordable units; --Plan Board decision recorded; --4 parking spaces offered to ADU tenants; --acknowledge no on-street parking permits for tenants and record this prohibition; --notice to all future tenants of street parking permit prohibition; --submission for publishing of all decision documents; --materials spec's from suppliers submitted for public record;	ZBA Decision to be recorded; --Submission for publication of all decision documents;
		Land Disposition conditions: --Contribution of \$2.40 per ft2 to city MBTA Green Line Station payment;
<i>Source of documentation</i>	<i>Plan Board Decision 12/16/21</i>	<i>Developer selection Zoning change to UR ZBA Decision ZBA Decision 04/15/22</i>

3 Hawkins Street	28 Chestnut/28 Fitchburg
59 dwelling units in MR5 zone	Lab/office in Fabrication
Zoning: Special Permit household use Site Plan approval 5-story general building complying	Zoning actions: Site plan approval Land parcel re-platting 4-story with mechanical penthouse
Unit mix: --24 studios --25 one-bed ---7 two-bed	n/a

---2 three-bed -- 11 affordable units (18.6%) --three-bed units to conform to standards for ADU	
Site and Building Conditions: --6 bicycle spaces --Green score of 0.23 --no utility meters on front façade	
Conditions for Inspection Services, city Environmental or Traffic sign-off: --Net Ready Zero requirements --LEED requirements submitted to Office of Environment; --plan for improvements to sidewalks and curb extensions; --materials spec's from suppliers submitted to city for public record; --outdoor lighting plan and standards for visible light transmittance and reflectance (VLT and VLR)	
Conditions of legal documentation: --AHIP plan to be submitted to Director Housing before CoO; --deed restriction limiting re-sale/rental of affordable units to be recorded; --Plan Board decision to be recorded in the county deeds registry --compliance with Mobility Management Plan; --3 parking spaces offered to ADU tenants; --acknowledge no on-street parking permits for tenants and recording of this prohibition; --notice in writing to all future tenants of on-street parking permit prohibition; --submission for publishing of all decision documents;	
UDC Recommendations --building front to appear as two contemporary facades --side frontage look like three townhouses --reconsider projecting box windows --texture of lower level cast stone band --highlight main building entrance and downplay corner intersection entrance; --pedestrian design for walkway rather than appear as driveway --tree planting on street with native species.	
Unresolved issues for Planning Board: --requirement of developer to improve pedestrian movement at intersection;	

--adjustment of sidewalk design to put landscape area abutting building rather than on island closer to curb;	
---	--