

Madalyn Letellier

From: Jonathan Silverstein [REDACTED]
Sent: Wednesday, May 1, 2024 11:59 AM
To: Planning1; All City Council
Cc: City Clerk Contact; Public Comments; Willie Burnley, Jr.; Wilfred Mbah; [REDACTED]; Jake Wilson; Matthew McLaughlin; JT Scott; Ben Ewen-Campen; [REDACTED] Naima Sait; Lance Davis; [REDACTED] Cindy Amara; David Shapiro; Sarah Lewis; Daniel Bartman; Thomas Galligani
Subject: Ordinance 24-0416 - Comment Letter
Attachments: Comment Letter re Ordinance 24 0416.pdf
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Good morning,

Attached please find a comment letter with respect to the above-referenced proposed Zoning Amendment, which is scheduled for a joint public hearing tomorrow evening.

Thank you for your attention and please do not hesitate to contact me if you have any questions.

Best regards,

Jonathan M. Silverstein
Blatman, Bobrowski, Haverty & Silverstein, LLC

[REDACTED]
Concord, MA 01742

[REDACTED]
jms@bbhslaw.net

View my [bio](#)

BLATMAN, BOBROWSKI, HAVERTY & SILVERSTEIN, LLC
— ATTORNEYS AT LAW —

9 DAMONMILL SQUARE, SUITE 4A4
CONCORD, MA 01742
PHONE 978.371.2226
FAX 978.371.2296

JONATHAN M. SILVERSTEIN
JMS@bbhslaw.net

May 1, 2024

BY ELECTRONIC MAIL - [REDACTED] and [REDACTED]

City Council Land Use Committee and
Planning Board
City Hall
93 Highland Ave.
Somerville, MA 02143

Re: Ordinance #24-0416 – Proposed Amendment of Zoning Ordinance to Eliminate Density Bonus for Net Zero Buildings

Dear Members of the City Council Land Use Committee and Planning Board:

This office represents Eaglebrook Capital (“Eaglebrook”), which is the owner of property located at 82-86 Prospect Street (“Property”). Since June 2022 (nearly two years ago), Eaglebrook has been diligently pursuing a building permit for a by-right, 29-unit development of the Property. Eaglebrook purchased the Property June 21, 2022, and has spent in excess of \$500,000 on designing and permitting costs, all in reliance upon the density bonus afforded to “net zero” building projects under the Zoning Ordinance.

On April 23, 2024, Eaglebrook learned for the first time of a proposed amendment of the Zoning Ordinance, which would include elimination of the net zero density bonus. For the reasons set forth below, Eaglebrook respectfully requests the Land Use Committee and the Planning Board recommend disapproval of the portion of Ordinance 24-0416 that would eliminate the net zero density bonus. Alternatively, Eaglebrook submits that elimination of the density bonus should not apply to projects for which a building permit application was initiated prior to July 1, 2023.

1. Elimination of the Density Bonus is not Necessary for the Ordinance to be Consistent with State Law

The stated purpose of Ordinance 24-0416 is to eliminate conflicts between the Zoning Ordinance and state law. However, there is no provision in any state law or regulation that requires elimination of the density bonus for net zero buildings.

As noted in the presentation entitled, “Sustainable Zoning 2024: What’s next for Somerville,” which has been submitted in anticipation of the joint public hearing scheduled for May 2, 2024, the Attorney General’s office has opined that local zoning ordinances and bylaws may not regulate building materials, construction methods and energy efficiency. However, though state law may preempt the City’s ability to prescribe building construction methods and materials, there is no prohibition on the City incentivizing developments that meet certain sustainability standards, as it has (without challenge) with respect to the net zero density bonus.

The same presentation notes (slides 13-14) that the state Building Code will now require all new buildings to qualify as net zero ready buildings.¹ It further states that “Density bonus is no longer a reward – all new buildings in relevant districts will now qualify.” What is not explained is why the density bonus should be eliminated rather than retained as the appropriate density standard for all buildings. Clearly, the City previously made a policy determination that the density allowable pursuant to the bonus is appropriate and sustainable for buildings that meet the net zero standards. In the face of the Commonwealth’s existential housing crisis, reducing allowable density at this time is neither necessary nor consistent with the goal of producing more housing.

Eaglebrook recognizes and appreciates the stated intent of the City to pursue grants and explore ways to update the Ordinance in ways that will promote additional best practices for sustainable development. However, the presentation suggests that “priority recommendations” will not even be submitted to the Council (let alone incorporated into the Zoning Ordinance) for another year. In the meantime, Eaglebrook and other property owners and developers, who have made substantial investments in property acquisition and permitting based upon current zoning, will be forced, at a minimum, to completely redesign their projects and to recommence the City’s lengthy and costly permitting process, all with the knowledge that the City intends to amend the Zoning Ordinance again next year, which could require permit applicants to start over for a third time. The delay, expense, uncertainty and density reduction that would result will, in many instances, leave applicants without economically viable projects. In the meantime, projects proposing the creation of desperately needed housing units will be delayed or canceled altogether.

¹ As noted below, the presentation acknowledges that projects for which building permit applications were filed prior to July 1, 2023, will not be subject to these new provisions. Eaglebrook applied for a building permit for its Project in January 2023.

Eaglebrook submits that, rather than eliminating the current net zero density bonus with the intent of replacing it in a year (or more), the City should retain the current density structure until substitute language is adopted, in order to: (a) protect the reasonable investment-backed expectations of property owners and applicants; and (b) continue to promote the construction of desperately-needed housing in the City.

2. At a Minimum, the Density Bonus for Net Zero Buildings Should Not Be Eliminated for Projects that are the Subject of Building Permit Applications Submitted Prior To July 1, 2023

In the event the Committee and Planning Board decide to recommend approval of the proposal to eliminate the density bonus for net zero buildings in anticipation of some future amendment to replace it, Eaglebrook urges that such amendment only apply prospectively. A brief summary of Eaglebrook's permitting efforts will be helpful to demonstrate why it would be patently unfair to eliminate the density bonus for projects already under review by the City.

Eaglebrook purchased the Property in June 2022 and immediately proceeded to have development plans prepared. In October 2022, Eaglebrook commenced Development Review Application ("DRA") and submitted its initial plans. In January 2023, after being informed that the City was eliminating the DRA process, Eaglebrook submitted its application for a building permit and paid a plan review fee of \$18,880.

During the course of the next six months, Eaglebrook made more than a dozen attempts to contact City staff to obtain comments on its submission, but no review or comments were provided until July 27, 2023. On that date, six relatively minor comments were received from a zoning reviewer. Eaglebrook responded to those comments and provided updated plans two weeks later, on August 14, 2023. Again, Eaglebrook received no further review or comments for over two months, despite weekly calls and emails.

On October 25, 2023—over a year after initiating the application process—Eaglebrook received further comments from a different zoning reviewer. Since that time, Eaglebrook has been working with this second zoning reviewer to address his remaining comments, and it is very close to resolving the last remaining comment for zoning compliance. On April 23, 2024, Eaglebrook received an email from the second zoning reviewer, who mentioned a few final plan details that needed to be added (e.g., the height of a proposed fence).

The zoning reviewer concluded his April 23, 2024, email by mentioning the fact that the City has proposed a zoning amendment to eliminate the density bonus for net zero buildings. This was the first and only notice that Eaglebrook was provided regarding a proposed amendment that would prevent Eaglebrook from proceeding with its Project as proposed.

Eaglebrook has spent more than two years and over half a million dollars designing and permitting the Project. These costs have included approximately \$75,000 on design, energy

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modeling and pre-certification expenses to ensure that the Project would meet passive house and net zero standards. It undertook these efforts and incurred these costs, without any obligation to do so under the Building Code, in reliance upon the density bonus contained in the Zoning Ordinance. And it has diligently pursued its permits throughout this period, responding as quickly as possible to any comments it received. Through no fault of its own, Eaglebrook has been unable to obtain a building permit, though it appears it is finally close to doing so.

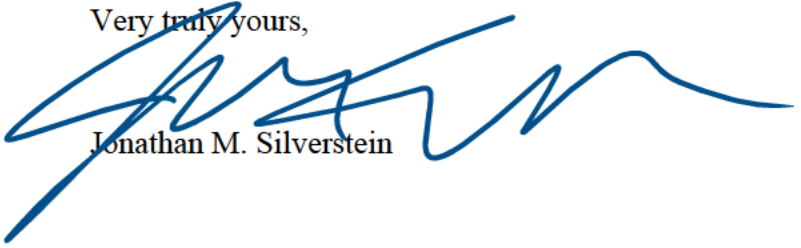
Applicants, such as Eaglebrook, who reasonably relied upon existing zoning and have spent substantial time and resources pursuing permits in good faith should not be subjected to zoning amendments that would so fundamentally alter the economic viability of their projects, particularly when there has been no determination (or even suggestion) that doing so is necessary to prevent any adverse impacts or promote any legitimate planning objective.

The only justification offered in the presentation submitted to the Committee and the Planning Board for eliminating the density bonus is that buildings are now required to meet net zero standards under the Building Code. However, the presentation explicitly acknowledges (slide 14) that: "Projects [such as Eaglebrook's] that have applied for a Building Permit on or before June 30, 2023, will not need to adhere to the Specialized Code." At a minimum, therefore, elimination of the density bonus should not apply to such projects.

For the reasons set forth above, Eaglebrook respectfully requests that the Land Use Committee and Planning Board recommend against eliminating the density bonus for net zero buildings. Alternatively, in order to protect the reasonable investments made by applicants prior to the proposed elimination of the density bonus, such elimination should not apply to projects for which a building permit application was submitted prior to July 1, 2023.

Thank you for your time and attention to this matter.

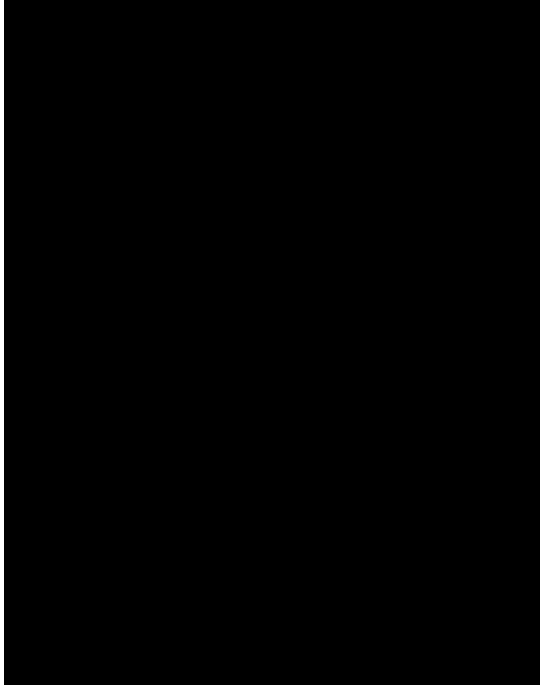
Very truly yours,


Jonathan M. Silverstein

cc: Clients
Email list (to follow)

Land Use Committee and
Planning Board
May 1, 2024

EMAIL LIST



**LAW OFFICES of
RICHARD G. Di GIROLAMO**

Attorneys at Law

424 Broadway
Somerville, MA 02145

Richard G. Di Girolamo
Anne M. Vigorito, Of Counsel

Tel: (617) 666-8200
Fax (617) 776-5435

Breanna Rolland, Of Counsel
Kendall Curro, Paralegal

APR 29 P 3:40
CITY CLERK'S OFFICE
SOMERVILLE, MA

VIA HAND DELIVERY

April 29, 2024

To: The Chairs and Members of the Somerville City Council's Land Use Committee and the
Somerville Planning Board

RE: Proposed Amendment to Article 2, Article 3, Article 4, Article 5, Article 8, and
Article 10, to Eliminate the Net-Zero Density Bonus of the City's Zoning Bylaw

Dear Sir/Madam:

As you know, our office does an abundance of Zoning work in the City of Somerville. I do plan to appear before the Land Use Committee this Thursday, May 2, 2024, to voice my position on the Density Bonus.

I am enclosing a letter from Peter Quinn Architects, which echoes my thoughts on this matter.

Thank you for your considerations.

Very truly yours,

Anne M. Vigorito
Enclosure

28 April 2024

To: The Chairs and Members of the ^{2024 APR 29 PM 3:40} ~~Somerville City Council's~~ Somerville City Council's Land Use Committee and the Somerville Planning Board

RE: Proposed amendment to Article 2, Article 3, Article 4, Article 5, Article 8, and Article 10 to eliminate the Net-Zero Density Bonus of the City's Zoning Bylaw

The proposal to eliminate the density bonus for Net-Zero housing projects is expected. We as design professionals working closely with Somerville's Zoning Bylaw understand the need to eliminate this inconsistency in the Bylaw. However, the proposed implementation is leading to misunderstandings and resentment from our well-meaning developer clients. They embraced the density as a win-win for the City as well as their proforma.

However, the requirement to make the exempt deadline start from the date of Building Permit Application has the effect of making the compliance retroactive. In other words, if one didn't have a BP Application in to ISD before July 1, 2023, the new law already applied across the board and no bonus would be allowed going forward. Regrettably, no notice was given at the time for this across-the-board implementation, nor was it stated to our knowledge by ISD or in any implementation guidelines that were available.

In our case, we have two clients who moved forward with drawings and applications in good faith believing they would receive the density bonus. They made major financial decisions on that basis, and now find out nearly a year later that the bonus had effectively disappeared on July 1, 2023. Every inquiry we made with Planning or with ISD received in the interim, was responded with a well-intended 'we don't know' statement.

In our opinion, the only fair way to set a threshold date is to mandate that the cutoff for the density bonus is 1 July 2024 (or even later) unless a BP Application has been made. This would allow those in interim application to find safe-harbor. The City would continue the reap the additional market and affordable units so badly needed rather than loose those already in process. Developers should not be required bear the expense of returning with altered Permit applications, or in some cases, I am certain, of abandoning their projects. Such an approach of resetting the clock to a future date would emulate the manner in which new components of the State's Building Code are issued, always with sufficient notice and even sometimes with a period of concurrence.

A second threshold issue with the implementation is that it is unclear what point is considered the Building Permit Application. This should be an obvious point in the process, but it is not. Approx. two years ago, ISD changed their approach to obtaining zoning approval to the requirement that one makes a BP Application. However, this set is understood to not require a full set of Permit documents, but should be otherwise sufficient for ISD to evaluate for dimensional and other zoning criteria before a formal full BP

application is made. This system has worked well, albeit it is a very time-consuming process and holds up the submission and review of an actual Building Permit for many months. In our opinion, a fair solution would state that that the initial BP Application for zoning approval constitutes a bona fide BP Application.

We appreciate your consideration of these points and thank you for the opportunity to offer some resolution.

Very Truly Yours,



Peter Quinn AIA
President, PQA LLC