



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

*PLANNING DIVISION*

**STAFF**

GEORGE PROAKIS, *PLANNING DIRECTOR*

LORI MASSA, *SENIOR PLANNER*

ADAM DUCHESNEAU, *PLANNER*

DAWN PEREIRA, *ADMINISTRATIVE ASSISTANT*

**Case #:** ZBA 2011-22

**Date:** June 22, 2011

**Recommendation:** Applicant withdraw

---

**UPDATED PLANNING STAFF REPORT (Version #4)<sup>1</sup>**

---

**Site:** 343-349 and 351 Summer Street

**Applicant Name:** Strategic Capital Group, LLC

**Applicant Address:** 1264 Main St., Waltham, MA

**Property Owner Name:** George Dilboy VFW Post #529 and The Dakota Partners LLC

**Property Owner Address:** 371 Summer Street., Somerville, MA

**Agent Name:** Richard DiGirolamo, Esq.

**Agent Address:** 424 Broadway, Somerville, MA

**Alderman:** Gewirtz

Legal Notice: Applicant, Strategic Capital Group, LLC and owners George Dilboy VFW Post #529 and The Dakota Partners, LLC, seek a Special Permit with Site Plan Review under SZO §7.11.1.c to establish a 31 unit residential use, a special permit under §7.11.5.B.6 to establish an approximately 8,400 gross square foot private club, and a Special Permit under §9.13.b to modify parking dimensions and access.

Zoning District/Ward: CBD and RA / Ward 6

Zoning Approval Sought: Special Permit with Site Plan Review under SZO §7.11.1.c.; §9.13b and §7.11.5.B.6.a

Date of Application: March 14, 2011

Dates of Public Hearing: April 20, 2011, continued to May 5, 2011 to May 19, 2011 to June 8 2011 prior to any public testimony; continued to June 22, 2011 after public testimony

---

<sup>1</sup> Submitted to the ZBA on Thursday, June 16, 2011.



## I. PROJECT BACKGROUND

1. Subject Property: The subject property consists of two parcels on Summer Street between Cutter and St. James Avenues totaling 40,341 s.f.. 343-349 Summer Street is a 16,769 s.f. lot owned by The Dakota Partners that contains a vent shaft for the MBTA Red Line. This property is zoned Residence A (RA). The shaft is surrounded by an 8 inch concrete wall and an 8 foot high chain link fence. The parcel is covered with concrete between the sidewalk and the shaft and the remainder is covered in grass and weeds. 351 Summer St is a 23,547 s.f. parcel owned by George Dilboy VFW Post #529 and is used as an accessory parking lot. This lot is essentially paved from end to end. This parcel is zoned Central Business District (CBD). The properties are located adjacent to the existing building shared by the Post and the Winter Hill Bank in Davis Square. It is approximately ¼ mile (less than 1,500 feet) from the MBTA Davis Square Station.
2. Site History: The first parcel (hereinafter the “shaft site”) was the site of three three-family residential structures (9 units) and a large garage that once held a milk company. These structures were on the site until the start of construction of the MBTA red line. The MBTA determined that the site was required for a vent shaft and an emergency egress stairway from the Red Line tunnel. The property was taken by the MBTA and the vent structure was built on the site. In 2002, the MBTA sold the parcel to The Dakota Partners LLC, retaining easement rights to use the shaft and emergency egress stairs. The second parcel (hereinafter the “parking lot”) has been serving as an accessory parking facility for the adjacent Dilboy Post, located at 371 Summer Street,. The Post has been located at its existing facility since 1941. OSPCD has limited permit history on the 351 Summer Street site, and while it once probably held automotive garages and a gasoline service station in the 1920’s, it appears to have been only a surface parking lot for many years.
3. Recent Applications: The Dakota Partners, after purchasing the shaft site in 2002, proposed to construct a 14 unit structure on the site. While various versions of this application were submitted, the approved project was an L-shaped building that wrapped around the vent structure, and provided an underground parking structure that came close to lot lines and filled the majority of the lot. After approval, the project was appealed and has subsequently been the subject of three separate appeals. The substantive project was appealed and was affirmed by the Appeals Court. The Massachusetts Supreme Court denied an application for further appellate review. In order to provide access to the property, the applicant then sought permission from the City to have a public shade tree removed. The City did not give permission to remove the tree and the developer filed an appeal in the Superior Court which is still pending. Meanwhile, the developer was granted a time extension on the original approval, and neighbors filed action in Superior Court challenging the ZBA finding on the time extension, and this item is also still pending.

Subsequent to the initial approval, the Board of Aldermen, at the request of abutters, changed the shaft site zoning to the RA district, thereby limiting development capacity to a rate of 1 unit per 2,250 square feet of land area<sup>2</sup> (allowing 7 units with the required affordable housing), and/or other uses allowed in the RA district. The parking lot site is in the CBD district, where it has been for many years. OSPCD has no record of recent development applications for this site prior to 2009.

In 2009, Strategic Capital Group proposed a development that incorporated both lots (Case ZBA 2009-67). This application, submitted in the fall of 2009, would place residential units on the parking

<sup>2</sup> See table, Section 8.5 of the SZO for lot area per dwelling unit information, and SZO Section 7.3 for affordable housing requirements for projects with more than two units in the RA district.

lot site and a new VFW post on the shaft site. The initial proposal called for a subdivision of land from the adjacent VFW right of way and access to the site via the driveway shared with the Winter Hill Bank. This plan created numerous traffic challenges and was modified to remove the subdivision, reduced from 32 to 31 units to reflect the total residential development allowed on the lot, and reconfigured to reduce curbcuts. The updated plan was subsequently reviewed and modified again and was finally completed in September 2010 in preparation for hearings before the ZBA in the fall of 2010. This plan included a 4-story 31 unit building along Summer Street and a new VFW post in the rear of the shaft site lot, with associated parking. Despite meeting the zoning requirements for a special permit, (except that the applicant did not apply for a required special permit for tandem parking in 2009) concern was expressed by community members on this application.

In the fall of 2010, Mayor Curtatone expressed a desire to explore mediated discussion about the future of the site. The City engaged a mediator to assess the potential for additional dialogue, first by holding conversations with key stakeholders, including abutters, city representatives and project representatives. Based on these conversations the mediator encouraged the developer to enter into a mediation process with concerned neighbors to see if an alternative plan could alleviate concerns about the project. At the request of the developer, the project was therefore not scheduled before the ZBA, and entered into the mediation process.

4. Mediation: The developer entered into six mediation sessions that were facilitated by the Consensus Building Institute (CBI), and attended by representatives from the neighborhood, the development team and City staff.<sup>3</sup> The final report of the mediator is attached to this document. The CBI led sessions that begun on November 15, 2011 and continued for five weeks, and included a joint site tour. Issues were identified, including noise, parking, traffic, aesthetic impact, building size, pedestrian safety, stormwater, financial viability for the development and the VFW, VFW operations and the desire for transit-oriented development.

By the third meeting, the developer was able to provide three sketches of new project designs that addressed a number of the concerns expressed by abutters. The group reviewed these alternatives and provided feedback, resulting in a refined design that would provide for the building configuration that is in the current plan. The developer and the neighbors had discussions about the advantages and disadvantages of providing first-floor commercial units on the residential building, and the developer continued to provide a design that had a small fourth floor on the building as well.

In December, the mediation ended, without agreement on a final proposal. The developer's final presentation to the mediation was a 31-unit three-story building with a fourth-floor exercise area and the neighbors requested a reduction of six units and removal of the fourth floor. Since that time, the developer did remove the fourth floor before applying to ZBA, but is still proposing a 31 unit project. While this has not created a consensus for support amongst the participating neighbors, there was general consensus that this plan was an improvement from the plan submitted in 2009.

5. Subsequent submittal: The applicant submitted a new application in March 2011 and was scheduled for the April 20, 2011 ZBA meeting. The applicant has withdrawn the 2009 application.

---

<sup>3</sup>An abutter to the site has filed a claim that the mediation process, which was conducted using a standard mediation strategy of involving representatives for different interest groups, was a violation of the Massachusetts Open Meeting Law. The City of Somerville has responded that, while this mediation provided guidance to the developer on this new application, the mediator did not report to the ZBA or any other city body, and therefore these sessions were not Public Meetings under the Open Meeting Law. The appeal is being reviewed by the Massachusetts Attorney General's office.

6. General Description: The March 2011 submittal proposes two buildings on a single lot that lies in two zoning districts. The first building (hereinafter the “residential building”) is a three-story building with 31 residential units and underground parking. The second building is a two-story structure containing approximately 8,400 (7,944 net) sq. ft. to be used for a new VFW Hall for the George F. Dilboy Post #529 (hereinafter “the post building”). Both buildings are of wood-frame and masonry construction (Type 5A). The below-grade parking garage in the residential building is concrete and steel, classified as a Type 2 construction. The applicant proposes to construct a three-story, 31 unit residential building including an underground parking garage and first-floor at-grade parking in the back. Of the 31 units, 4 will be affordable in perpetuity under the City’s Inclusionary Housing Ordinance. Pursuant to the Affordable Housing Implementation Plan, the affordable units will consist of 1 studio, 2 1-bedrooms, and 1 2-bedroom. The proposed George F. Dilboy Post #529 would be a two-story structure. The proposed site design wraps the Post within the L-shape of the residential building. The first floor of the Post includes a 2478± sq. ft. hall with a bar, one men’s restroom, one women’s restroom, a storage room, a kitchen, and a lobby. First floor windows will be 7 ft. above grade for privacy. To reduce noise emanation, the only first floor windows are located in the front of the building away from the main hall. At 2 ft. x 4 ft. in dimension, they are quite small and will be inoperable. The second floor includes an office, a bar, gaming area, card room and lounge, as well as storage and cooler areas and the mechanical room. The bar connects to a kitchen. The gaming area is located in the center and adjoins the lounge area in the front center of the building. Windows on the front of the second floor enter the office, lounge and mechanical area. Windows on the right side enter into the kitchen and stairway, while the card room has three small windows on the rear of the structure. There are no second floor windows on the left elevation. The proposed VFW Post would offer the same activities as the existing post at 371 Summer Street. As a part of this application, the Post has indicated that they are applying to continue to use 15 parking spaces for commercial off-site parking. Commercial spaces will be used weekdays from 6am to 6pm. After 6pm, all commercial parking will end, and these spaces will be available for use for the Post. The commercial parking spaces have been identified, and all are under the residential building, closest to Davis Square. A walkway along the left side of the residential building provides access from the commercial lot to Summer Street and Davis Square.
7. June 8, 2011 Hearing: Planning Staff accepted the March application and followed the standard procedures outlined in the Rules and Regulations<sup>4</sup>. The application was reviewed, additional information was requested, and when that information was provided in a timely fashion, the Planning Staff scheduled a hearing for April 20, 2011. At that hearing, the applicant requested a continuance<sup>5</sup> to wait to present their application to the full ZBA. A further continuance was requested by the applicant at the May 4, 2011 ZBA meeting, and the staff requested that the applicant also continue the hearing from May 18, 2011 to June 8, 2011 so that staff could provide an updated staff report to address and clarify some of the items that were raised by the applicant and in community comments. The hearing was therefore scheduled for June 8, 2011, and the staff issued an updated staff recommendation on June 2, 2011 which improved upon proposed findings and conditions and clarified issues that were still in need of being addressed.

On the afternoon of June 7, 2011 a member of the public requested that the Planning Staff provide environmental reports that were submitted with the application. Upon a review of the application file, no reports were found. Seeing that this site likely had undergone some environmental testing, staff asked the development team if any reports had been produced, and the developer provided the staff with copies of a Phase II report cover letter for the shaft site (dated 2002) and a Phase I initial study

<sup>4</sup> The Rules and Regulations of the Special Permit Granting Authorities as amended March 17/18, 2011.

<sup>5</sup> As has been noted in some abutter comments, this request was made just a few hours prior to the hearing.

cover letter for the parking lot site (dated 2009). While the 2002 report was in the file for previous submittals on this project, there was no copy of the 2009 letter that staff could find in existing files. Planning Staff passed along these documents to the resident who requested the information, and placed copies in the project file.

After receiving extensive feedback from neighbors about a number of issues that were still considered by some to be unclear in the staff report (including the late submitted environmental report) the Planning Staff updated the report with a third update, and provided this report to the ZBA and the public at the meeting on the evening of June 8.<sup>6</sup>

At the hearing, after an extensive agenda of other items, the applicant presented the case and the staff explained the position of the City. This was followed by comments from members of the Board of Aldermen and then the public. Public comment was limited in time and each member of the public was limited to two-minutes speaking time due to the late hour.

During the public comment, a number of issues were raised, many with the technical issues of zoning interpretation and the review process itself. Maybe due to the late hour and limited time for discussion, there was far less discussion about the site, the building design, and the impact of the project design on the neighborhood (although this issue was addressed in many written comments to the Board). Staff compiled a long list of questions to be addressed, but, in the interest of time, did not comment at this meeting and instead sought to provide an additional updated staff report.

A few concerns were raised about the late arrival of the environmental reports, the scheduling of the meeting without a complete application, the status of the application paperwork at the City Clerk's office and the possibility of additional environmental reports being completed but not available to the public.

8. Follow up to June 8, 2011 meeting: After the first hearing, staff compiled a list of questions to address and begun work on providing more information about these questions, with the intention of encouraging the ZBA to take more public testimony at the June 22, 2011 meeting. Then, on June 15, 2011 one of the abutters indicated in a letter to OSPCD that he had indeed seen an additional environmental report (dated 2010) that was not provided to Planning Staff and/or the Board. Furthermore, information was provided that establishes that the Licensed Site Professional (LSP) that completed these studies has had his license suspended early in 2011. A search of internet research determined that DEP reviewed four separate locations where this LSP had failed to perform to standards required by DEP.<sup>7</sup>

## II. BACKGROUND ON PROCESS AND PROCEDURES

While there were substantive questions about the zoning process, and to a lesser extent, about the project design, raised at the June 8, 2011 meeting, the Planning Staff will seek to ensure that those issues are addressed. Of more immediate concern are the questions regarding the application acceptance and review procedures. In this area, some immediate clarification is required:

---

<sup>6</sup> As noted in the Rules and Regulations, "additional application materials submitted within 19 days of the first scheduled hearing will not be incorporated into the Planning Division's recommendation to the SPGA except at the discretion of the Planning Staff." In this case, Planning Staff updated the report to address a number of questions asked by abutters, including the status of environmental reports.

<sup>7</sup> See: <http://www.mass.gov/lsp/files/boardmin/bm1102.pdf> See also case 06C-08 at <http://www.mass.gov/lsp/files/news/0211susp.pdf>

1. Application acceptance: As required by state law, applicants for special permits from the ZBA must file with the City Clerk. Chapter 40A § 15 of Massachusetts General Law states: "An application for a special permit or petition for variance . . . shall be filed by the petitioner with the city or town clerk, and a copy of said appeal, application or petition, including the date and time of filing, certified by the city or town clerk, shall be transmitted forthwith by the petitioner to the Board of Appeals . . ."

There is nothing in the statute which requires that all documents and papers submitted to the SPGA, after the application for special permit is filed, be filed with the City Clerk. Planning Staff confirmed this with the Law Department. This supports a policy that has a long-standing history in many Massachusetts communities, allowing applicants to update applications in response to staff and board concerns as issues arise in preparation for and during the public hearing. The purpose of submitting an application with the Clerk is to establish the start time for a statutory requirement to schedule a hearing. It is not to provide the Clerk with a replica copy of the entire project file that is held in the Planning Division office.

The Planning Division office keeps the complete application file for all ZBA applications, and all the information in that file is always available for public review. Furthermore, key elements of the application are posted on the City's website. The staff is available to help the public understand the contents of the file.

2. Application completion: When the Board of Aldermen passed the streamlined board review process in February of 2011, the effective date was set for April 7, 2011. On March 17 and March 18, 2011 the ZBA and Planning Board adopted amendments to their Rules and Regulations to clarify the steps to accept applications and certify them as complete. At that time, Planning Staff recommended that the Boards establish a process whereby applications would be reviewed upon submittal to the City Clerk for completeness. The applicant is given ten days after submittal of the initial application to provide any additional information requested to the staff in order to complete their application. The staff issues a checklist to the applicant indicating what items still need to be provided. If an application is still incomplete after ten days, the staff can hold the application for one single meeting before scheduling before the ZBA. After this time, any additional continuances require the support of the applicant, and a submittal of a request to extend time. It is important to note that Planning Staff CANNOT hold back an incomplete application indefinitely. This has been reiterated by the Massachusetts Attorney General's (AG) office<sup>8</sup> that has struck down new zoning amendments that attempt to reject incomplete applications. The AG has noted that "Chapter 40A, Section 9 makes it clear that the special permit granting authority shall hold a public hearing . . . on ANY APPLICATION for a special permit within sixty-five days from the date of filing of such application." The AG's office reminds communities that "failure by the special permit granting authority to take (action) . . . shall be deemed to be a grant of the special permit." With this in mind, the AG suggests that "to avoid constructive approval, the (ZBA) might wish to consider holding the public hearing on applications for special permit, and then possibly citing the submittal of an incomplete application as the basis for denying the special permit or continuing the hearing." Such a continuance would presumably be for the applicant to provide supplementary information to staff prior to a future hearing. The language in the updated Rules and Regulations reflects this advice.<sup>9</sup>

<sup>8</sup> See Massachusetts Attorney General rulings on Groton Annual town meeting 4/28/03 and Northbridge Special town meeting 9/23/03.

<sup>9</sup> According to the Rules and Regulations: "If an application reaches the SPGA and the SPGA deems it incomplete, the SPGA shall have full authority to deny the petition or relief sought due to an insufficient level of information in which to conduct a fair, complete analysis, but shall specify the incomplete components of the application in accordance with the requirements of the SZO. Notwithstanding their right to disapprove an incomplete application,

3. Role of environmental reports: The Planning Staff requested, and the ZBA and Planning Board agreed to add the specific request for environmental reports to the combined application in 2010. This was provided as a service to the Boards and the abutters so that they could understand the status of environmental testing for projects before the Boards. Furthermore, in many cases, staff has recommended, and the ZBA has included, a condition for project approval that would require applicants to provide updated reports as additional testing and/or cleanup is completed prior to construction. It should be noted that none of this information is required to meet any special permit finding<sup>10</sup>, and furthermore the Commonwealth of Massachusetts DEP is responsible for ensuring that sites remain in compliance with the regulations regarding environmental reporting, testing and clean-up. Nonetheless, if an early phase environmental report indicates that a site needs no further investigation, these reports are not typically filed with DEP, and it is helpful to have these reports filed with the local agencies to ensure that the public has the opportunity to know what sort of testing has been complete.

In Somerville, some sites outside of core residential areas will have a level of environmental clean-up required. The Planning Staff is interested in ensuring that this work is complete to the satisfaction of DEP and its standards. But, most applicants and their lenders also require significant scrutiny of the environmental status of sites upon which construction is to take place.

The application, as currently worded, only requires applicants to submit reports that they have. Because of this, there is no requirement in the current application to indicate if there are reports that are not being submitted. There is an expectation that if reports are not submitted, they have not been done. For this reason, staff that reviewed the initial application did not list these reports on the list of items necessary for completion of the application. Only after the staff directly asked about reports on June 7, 2011 were they provided in this case. Staff has now learned that there are additional reports that were not provided when the initial request was made.

4. Process moving forward: At this point the applicants have informed the staff that they have additional environmental information that has not been presented to the Board. Certainly, it is within the purview of the ZBA to accept this information at the June 22, 2011 hearing and continue to take testimony and address concerns about the project going forward. To collect the additional report as well as the other information that has previously been requested by staff would likely allow the Board to move forward with the case. If the Board chooses to take this strategy, the staff will update the previous staff report, findings and conditions to address the concerns about the zoning ordinance and the concerns about the project design.

But, at this point much of the testimony has centered upon the credibility of the process as it relates to the environmental reporting. It is of paramount importance to the staff that all of the parties in any case are able to provide testimony to the ZBA working from the same set of facts. While applicants and abutters often disagree about the impacts of a particular project, the entire discussion before the

---

the SPGA may allow the Applicant to choose one of the following options: 1) Withdrawal of the application, and re-filing when sufficient information is available and application materials are complete; a second filing fee will be required and the withdrawal and re-filing shall be subject to the provisions of "C" below; or 2) Mutual Agreement between the Applicant and the SPGA to waive the time requirements for public hearing and SPGA action, and to extend these to allow the Applicant to complete his/her application and allow the SPGA sufficient time to review the application and reschedule the meeting and/or public hearing.

<sup>10</sup> While Section 5.2.5(g) does allow the Board to consider environmental impacts of projects, it can be determined that a project deemed by DEP to be compliant would not violate this condition.

ZBA is more productive and complete when there is not confusion about the items that are included in an application. Therefore, while there is no requirement in the Somerville Zoning Ordinance or the Rules and Regulations that would demand a re-start of this process, the staff is nonetheless recommending that the applicants take that step at this time, and thereby establish the opportunity for all participants in this process to have adequate time to review a complete case file and provide substantive feedback on the merits of this particular project.

### III. RECOMMENDATION:

Based upon the information presented above, the Planning Staff is recommending that the Zoning Board of Appeals encourage the applicant to **WITHDRAW WITHOUT PREJUDICE** at this time.

The Planning Staff continue to believe that this site is an appropriate location for this type of a project, and that the extensive benefits to the veterans of Somerville through the establishment of a better VFW Post, and to the citizens of Somerville through the development of additional transit-oriented units of housing within close proximity to Davis Square.

Nonetheless, in the interest of clearing up any confusion about the status of this project and its impacts on the neighborhood, and in order to allow all parties to discuss and debate the merits of this project before the ZBA without the distractions that originate from confusing procedural issues, the staff is recommending that the applicant re-apply for a project on this site after a withdrawal. This reapplication should include<sup>11</sup>:

All pertinent requirements that have been provided in the past to make a definitive staff recommendation, as well as,

- a. The project shadow study.
- b. The view of the condenser units on the roof of the residential building.
- c. The view of the structures from Hawthorne Street.
- d. Corrected bedroom count for each unit.
- e. An application for the off-street commercial parking use under the SZO.
- f. Any and all environmental testing reports that have been conducted on either site. These reports should be certified by a Licensed Site Professional with a current updated license.

Should the applicant chose to withdraw and reapply, the Planning Staff also recommends that the ZBA select a special meeting date for this project so that parties may be heard on a night that does not also require review of the significant heavy caseload that the Board has been handling in recent months.

---

<sup>11</sup> Planning Staff notes that the applicant did submit, via e-mail, items a and b on June 16, 2011, and has indicated that they are in the process of completing item c and submitting item e.