



CITY OF SOMERVILLE, MASSACHUSETTS
ZONING BOARD OF APPEALS
JOSEPH A. CURTATONE
MAYOR

MEMBERS

Herbert F. Foster, Jr., Chairman
Orsola Susan Fontano, *Clerk*
Richard Rossetti
T. F. Scott Darling, III, Esq.
Danielle Fillis
Elaine Severino (Alt.)
Josh Safdie (Alt.)

Case #: ZBA 2002-23-R0109
Site: 343-349 Summer Street
Date of Decision: February 18, 2009

Decision: Extension Granted
Date Filed with City Clerk: February 23, 2009

ZBA DECISION

Applicant Name:	Marc Daigle, Mgr., The Dakota Partners, LLC
Applicant Address:	1264 Main Street, Waltham, MA 02451
Property Owner Name:	The Dakota Partners, LLC
Property Owner Address:	1264 Main Street, Waltham, MA 02451
Agent Name:	Richard G. DiGirolamo, Esq.
Agent Address:	424 Broadway, Somerville, MA 02145

Legal Notice: Applicant: Marc Daigle & Owner: The Dakota Partners, LLC seek a time extension (SZO §5.3.10) to Special Permit #2002-23 for a multi-unit residence. RA/CBD zone. Ward 6.

<u>Zoning District/Ward:</u>	RA/CBD zone/Ward 6
<u>Zoning Approval Sought:</u>	Seek a time extension to Special Permit #2002-23
<u>Date of Application:</u>	January 12, 2009
<u>Date(s) of Public Hearing:</u>	2/4 & 2/18/09
<u>Date of Decision:</u>	2/18/09
<u>Vote:</u>	5-0

Appeal #ZBA 2002-23-R0109 was opened before the Zoning Board of Appeals at Somerville City Hall on February 4, 2009. After two hearing(s) of deliberation, the Zoning Board of Appeals took a vote.

DESCRIPTION:

On July 2, 2002, the applicant was granted a Special Permit with Site Plan Review (SPSR) to establish a 14-unit dwelling on a then-CBD-zoned site containing 16,796 s.f. located at 343-349 Summer Street.

The applicant is requesting a Special Permit Extension of the maximum one year in order to extend the life of the original approval until March 1, 2010.

Section 5.3.10 of the Somerville Zoning Ordinance provides that:

“A special permit or a special permit with site plan review shall lapse two years from the granting thereof, or such shorter time as specified in said permit, if a substantial use thereof has not sooner commenced, except for good cause or, in the case of a permit for construction, if construction has not begun by such date except for good cause. Good cause shall be determined by the SPGA, and only upon a finding of demonstrated hardship (e.g. financing

problems, labor strike, bad weather conditions, or act of God) and that there has been good faith effort to overcome the hardship and expedite progress. The period of extension of the life of a special permit or special permit with site plan review shall be, at minimum, the time required to pursue or await determination of an appeal, but the maximum extension shall not exceed one (1) year beyond the original permit life.”

The Applicant has submitted documentation of several steps taken in order to “expedite progress” of the project’s construction.

FINDINGS FOR SPECIAL PERMIT REVISION

Demonstration of Hardship

SZO §5.3.10 cites four examples of “hardship”: financing problems, labor strike, bad weather conditions, and act of God. In addition to these examples, litigation and other obstacles related to obtaining a permit may be considered a hardship.

In addition to 4 years and 7 months of litigation following an appeal of the SPSR’s issuance, the Applicant has been unable to obtain permits necessary to begin construction under the original approval. Specifically, a prerequisite of construction under the SPSR is the establishment of a fire lane, which, as shown on the plans, requires the removal or relocation of a public shade tree. The Applicant has sought to relocate the shade tree through prescribed channels (request to the Department of Public Works, public hearing to remove the tree, and request to Mayor) but each request has been denied. The Applicant has also sought to establish an alternative fire lane, but was unable to secure an easement over all necessary properties. The Applicant is now in litigation with the City attempting to compel removal of the street tree.

The Board finds that the permitting obstacles to establishing the required fire lane constitute a legitimate hardship to commencing construction under the permit. In addition, the Board finds litigation related to that request to be a hardship. The Board makes no representation that the outcomes of these permit requests and litigation should favor the Applicant, but that they have certainly impeded the Applicant’s ability to obtain building permits and commence construction.

Good Faith Effort to Overcome Hardship and Expedite Progress

The Applicant submitted construction drawings for a building permit five months after the appeal was dismissed. Many applicants require more time than this to finalize construction drawings, particularly for projects of similar scale and complexity. Approximately simultaneously, the Applicant proceeded to address other items critical to commencing construction, including continuing to collaborate with the MBTA on details of construction around the shaft, preparing a construction management plan for review and acceptance, and seeking to remove and relocate the public shade tree in order to establish the fire lane. The public shade tree has become a critical impediment to moving forward with the project, and the Applicant is therefore pursuing a remedy that would enable them to proceed with the project.

Based on the above, the Board finds that the Applicant has made good faith efforts to overcome the demonstrated hardships and to expedite progress.

DECISION:

Present and sitting were Members Herbert Foster, Orsola Susan Fontano, Richard Rossetti, Danielle Fillis and Scott Darling. Upon making the above findings, Susan Fontano made a motion to approve the request for an extension. Scott Darling seconded the motion. Wherefore the Zoning Board of Appeals voted 5-0 to grant the special permit extension to March 1, 2010.

Attest, by the Zoning Board of Appeals:

Herbert Foster, Chairman
Orsola Susan Fontano, Clerk
Richard Rossetti
T.F. Scott Darling, III, Esq.
Elaine Severino, (Alt.)

Attest, by the Zoning Board of Appeals Administrative Assistant:

Dawn M. Pereira

Copies of this decision are filed in the Somerville City Clerk's office.
Copies of all plans referred to in this decision and a detailed record of the
ZBA proceedings are filed in the Somerville Planning Dept.

CLERK'S CERTIFICATE

Any appeal of this decision must be filed within twenty days after the date this notice is filed in the Office of the City Clerk, and must be filed in accordance with M.G.L. c. 40A, sec. 17 and SZO sec. 3.2.10.

In accordance with M.G.L. c. 40 A, sec. 11, no variance shall take effect until a copy of the decision bearing the certification of the City Clerk that twenty days have elapsed after the decision has been filed in the Office of the City Clerk and no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied, is recorded in the Middlesex County Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title.

Also in accordance with M.G.L. c. 40 A, sec. 11, a special permit shall not take effect until a copy of the decision bearing the certification of the City Clerk that twenty days have elapsed after the decision has been filed in the Office of the City Clerk and either that no appeal has been filed or the appeal has been filed within such time, is recorded in the Middlesex County Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The person exercising rights under a duly appealed Special Permit does so at risk that a court will reverse the permit and that any construction performed under the permit may be ordered undone.

The owner or applicant shall pay the fee for recording or registering. Furthermore, a permit from the Division of Inspectional Services shall be required in order to proceed with any project favorably decided upon by this decision, and upon request, the Applicant shall present evidence to the Building Official that this decision is properly recorded.

This is a true and correct copy of the decision filed on _____ in the Office of the City Clerk, and twenty days have elapsed, and

FOR VARIANCE(S) WITHIN

_____ there have been no appeals filed in the Office of the City Clerk, or
_____ any appeals that were filed have been finally dismissed or denied.

FOR SPECIAL PERMIT(S) WITHIN

_____ there have been no appeals filed in the Office of the City Clerk, or
_____ there has been an appeal filed.

Signed _____ City Clerk Date _____