

ROGER & VIRGINIA CERQUA

183 Adams Street
Nonantum, MA 02458
617-332-4155

October 12, 2018

Newton City Council
Newton City Hall
1000 Commonwealth Avenue
Newton Centre, MA 02459

Dear Councilor:

We are writing to ask you to vote NO on Docket #137-18, Petition for 189-193 Adams Street. We are a direct abutter to the property and we object for the following reasons:

First, the Developer needs to use our land to make a driveway. We won't agree unless he reduces the number of units down to 9. When we first met the Developer, he said 9 units. Then he changed it to 18, then 15, now 12. He should have to keep his word. 9 Units.

Second, he has a right to use our land for a passageway but not for a two lane driveway for cars, trucks and vans. If you vote yes, you will make us go to Court to protect our land. We told him we would agree to let him use the driveway if he built 9 units. He said no. He can make a nice profit on nine units without causing trouble for us. Attached is a Memorandum from Peter Harrington explaining the legal points.


Three, the building is too big for the lot. Some of you people say it is a nice building. That may be so, but it is too big to fit on the lot at 189-193 Adams Street. The lot is too narrow and the building is too wide. We are already jammed together because we are an old neighborhood and our lots do not meet modern requirements. Instead of sticking more density in Nonantum, you should be helping us get relief from too much density. One way you can help is by not giving Special Permits for buildings that don't belong.

Fourth, the project has no place for children to play; no place for pets to relieve themselves; and no place for snow storage.

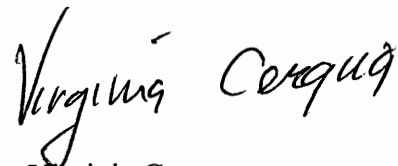
We are also concerned that the project will change from an apartment building to a condominium and create new neighborhood problems.

We are asking for your help. Thank you for your consideration.

Sincerely,


Roger Cerqua

and


Virginia Cerqua

Harrington & Martins

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James P. Harrington
1964-2015

Peter F. Harrington
Adrian P. Martins

MEMORANDUM

From: Peter F. Harrington
Date: May 30, 2018, updated October 12, 20018
Subject: Adams St Passageway between 183 Adams St and 189-193 Adams St

The Developer of 189-193 Adams Street proposes to create access to the rear of the site by use (in part) of an existing passageway. The passageway in question was created in 1867. It is shown on a subdivision of land dated April 13, 1867 and recorded at the end of Book 1606, Middlesex South District Registry of Deeds. Its purpose appears to be to allow limited access to some rear lots on either side of the passageway.

The deed to 183 Adams Street includes the right to use said passageway, in common with others entitled to use, is for all purposes for which said ways are commonly used. See attached Deed #1.

The deed to the property at 189-193 Adams Street does not have similar language. See attached Deed #2. That does not mean that the owners have lost their rights, but it does raise questions that limit any rights they may have had to expand the passageway.

The passageway, as it exists, is too small for the proposed project and the Developer plans to widen the passageway. This is a 15-foot-wide Passageway easement, not a general right of way. It is more a shared driveway than a street in a subdivision.

Each party (Developer and abutter Cerqua) own their share of the passageway. If the passageway ceases to exist, there is not any claim by abutters for ownership of the land within the passageway since they already own it.

In this case it appears that each owner is both the dominant estate for half the width of the passageway and the servient estate for the other half. A **dominant estate** is the parcel of real property that has an easement over another piece of property. The **servient estate** is the parcel over which someone has an easement.

Question: “Does the owner of a portion of a Passageway have the right to expand the passageway without the consent of the other owners of land comprising the Passageway who will be burdened by said expansion?”

The widening of the passageway is desired to allow the 189-193 Adams Street landowner to expand his development plans to create a 3 story, 75-foot-long commercial/housing complex. This will result in an increase of the burden on that portion of the passageway known as the servient estate (Cerqua’s land). The expansion will result in a significant increase in the size of the passageway and a substantial change of the passageway use.

The change in the size and use of the passageway appears to be enough to be considered by the Court to be unreasonable and/or to amount to a nuisance.

The 3 story complex is not an as of right use. This raises the question of the Special Permit Granting Authority (SPGA) issuing a permit significantly increasing the burden on the land of the servient estates without requiring the Petitioner to obtain the assent of the servient estate holders.

There is a valid argument that the proposed expansion was not a contemplated use at the time of the creation of the passageway easement.

The Supreme Judicial Court has said that, a general right of way is available for reasonable uses to which the dominant estate may be devoted, though the extent of travel and size of vehicles employed are not without limits.”

There are also additional questions:

In 1867 a passageway was an urban term used to apply to foot and cart traffic passing between buildings built close to the property line. It was not intended to be a street but was the grant of limited access. It appears that in the matter of this particular passageway the intent was to grant access to rear lots. The questions of rights to expand the passageway to allow for large vehicles not in existence at the time and the rights of an owner of the servient estate portion of the land to object to any such expansion have to be answered.

Another unanswered question is the authority of the SPGA to expand the width and use of a Passageway where an owner of a portion of the “Passageway” is not a party to the Petition nor do they agree to the expansion. There does not appear to be any support for the proposition of SPGA power to create such a change other than its unilateral decision to do so.

Another untested issue is the question of the expiration of “Passageway” rights because of the merger of the rear lots and the acquisition of Quirk Court access.

Peter F. Harrington