

## COMMONWEALTH OF MASSACHUSETTS

## CITY OF CAMBRIDGE

IN RE: LICENSE COMMISSION DECISION HEARING

Michael Gardner, Chairman  
Robert C. Haas, Police Commissioner  
Gerald R. Reardon, Fire Chief  
Gerard E. Mahoney, Deputy Fire Chief

STAFF:

Elizabeth Lint, Executive Officer  
Ellen Watson, License Commission Staff

-- Held At --

Michael J. Lombardi Municipal Building  
831 Massachusetts Avenue  
Basement Conference Room  
Cambridge, Massachusetts

Thursday, August 4, 2011

1:07 p.m.

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**I N D E X****PAGE**

Application: Idenix Pharmaceuticals, Inc. 4

Disciplinary: Whitney's Cafe 20

P R O C E E D I N G S

ELIZABETH LINT: Okay. We are going to begin.

This is the Decision Making meeting of the License Commission, Thursday, August 4, 2011. It is 1:07 p.m. We are here at the Michael J. Lombardi, Municipal Building, 831 Massachusetts Avenue, Basement Conference Room.

Before you for the License Commission is Chairman Michael Gardner, Commissioner Robert Haas, Chief Gerald Reardon, and Assistant Deputy Fire Chief Gerard Mahoney.

We have two matters left to be decided, one is the Idenix matter and the other is Whitney's Café.

MICHAEL GARDNER: Thank you, Ms. Lint.

So when we had the Idenix matter scheduled for the decision hearing originally for July 7th, we had a conversation about

whether or not it would be useful for the Commission to go into Executive Session with the law department to discuss the matter of litigation potential.

And at that point, I believe what we did was, we agreed to extend the variance at the 55 decibel level until the date of that hearing, which was originally scheduled for July the 28th of 2011; and because of some unanticipated notice issues, we had to postpone that hearing until today.

So I would entertain a motion from the either Commissioner Haas or Deputy Superintendent Mahoney, who was present for the Idenix matter originally in late June, to adjourn the Public Meeting and go into Executive Session for the purpose of discussing the Idenix application and the litigation potential.

GERARD MAHONEY: So moved.

ROBERT HAAS: Seconded.

MICHAEL GARDNER: Motion having been made and seconded to adjourn to an Executive Session for the stated purpose, all those in favor signify by saying "aye."

ROBERT HAAS: Aye.

GERALD REARDON: Aye.

GERARD MAHONEY: Aye.

MICHAEL GARDNER: None opposed.

So it's now approximately 1:10 in the afternoon of August 4, 2011, and we'll suspend the Public Session to go into the Executive Session.

And for members of the audience who are here, we'll return at the conclusion of the Executive Session both to address the Idenix matter and also to address the other item on the agenda, which is Whitney's disciplinary hearing.

ELIZABETH LINT: Yes.

MICHAEL GARDNER: Thank you. And I appreciate your patience. We are now going

into the other room for the Executive Session.

(Whereupon, the Public Hearing was suspended pending meeting with the Executive Session discussion.)

\* \* \* \* \*

ELIZABETH LINT: Back on the record.

MICHAEL GARDNER: It is approximately 2:15 in the afternoon of August 4, 2011, and we'll entertain a motion to go back into our Public Meeting, the Executive Session having closed.

GERALD REARDON: So moved.

ROBERT HAAS: Seconded.

MICHAEL GARDNER: Motion having been made and seconded, I'm reopening the Public Hearing. All those in favor say "aye."

ROBERT HAAS: Aye.

GERALD REARDON: Aye.

GERARD MAHONEY: Aye.

MICHAEL GARDNER: So we are back in our Public Session.

The first matter before us now is the application for Idenix to extend the existing variance for an additional year. The Commissioners who heard this matter originally on the 2011 extension are Commissioner Haas and Deputy Chief Mahoney and myself, and I just now open it up for conversation among the Commissioners on that point.

GERARD MAHONEY: Mr. Chairman, my thoughts on this, based on the testimony given on the 28th of June by Idenix consultants that had been retained as well as their legal counsel, my feeling is that they have met the spirit of the variance, so to speak, and that, in fact, the variance should be continued.

I also feel that in light of what steps they have taken and the good of faith efforts that they have shown, that the variance should be continued open-ended.

That is my position.

MICHAEL GARDNER: Do you mean without a one-year or other time limit for review?

GERARD MAHONEY: That is correct. I would suggest that it be open-ended without expiration; with some stipulations, if you will, that they continue to make good faith efforts in this particular regard.

MICHAEL GARDNER: Commissioner, any reaction?

ROBERT HAAS: Mr. Chairman, on the original vote, I had voted against it for a variety of reasons, and one principally was the negotiations going on at the time. I think we started at 60 decibels. We had some deliberance (sic) and it went up 7 decibels and then (inaudible) and, quite honestly, I felt that, given that conversation, that Idenix was not going to be able to live up to the spirit of that special variance and, therefore, decided to vote against it.

I've since looked at the efforts they

have made to consolidate units, out-source some of their operations which were noise producing, and they also reconfigured some of the units where they actually were able to move them on the roof.

And for all intents and purposes, the roof is a lot cleaner than it was back a year ago; I think they made significant efforts in terms of doing that.

And I would differ from the Deputy Chief in the sense that I think there has to be some time limit set with respect to the duration of the special variance to give the Commission an opportunity to continue to evaluate the situation and to continue to encourage the applicant to make strides and efforts to maintain and further reduce the noise, if at all possible, in going forward. And I think (inaudible) there is an obligation to kind of verify and check on that as opposed to having a special variance.

MICHAEL GARDNER: For purposes of today's meeting, I want to just read into the record an excerpt of a letter received and signed by a Kevin S. Prussia from the law firm of WilmerHale in connection with this application. A copy of the full text of the letter is part of the public record on the matter.

But I think this relates to what I regard as some unfinished business out of the June 28th hearing, and the subsequent conversation that we had on July the 7th prior to the decision to postpone it for an Executive Session.

And it had to do with whether or not there were one or more units on the roof which were substantially noisier than others, and whether or not those could be identified. I mean, this is coming from the assertion from one member of the public that one of the units in particular was quite a bit noisier or was

very noisy, and our efforts to try to see if that could be verified.

So this letter says, in part: "After the two recent hearings, Idenix determined that it would be useful to reevaluate each unit individually.

"Idenix did so during the night of July 14, 2011. Based on those tests, Idenix identified three units that appeared to be producing higher sound levels; HVAC units RTU-4 and RTU-17 and the combined exhaust fan unit EF-1A/EF-1B.

"Idenix is consulting with its acoustical experts to identify additional feasible remediation efforts that potentially may reduce the sound levels emitting from those units."

I thought that was important to get into the record.

I guess I'm not persuaded that an open-ended variance is in the interest of the

city myself, and believe that the history that the Commission has learned or from the experience of the past year, shows that when we are trying to balance these interests between commercial and residential use that the variance tool which is included in the ordinance has some positive value, but that having a variance that is time-limited is also essential.

I think what we've heard from the June 28th hearing was that Idenix had felt it had basically done what it could, given the existence of current technology, to mitigate the noise, and that they had been successful in staying within the 55 limit.

And at that point, I understood them to be saying that they didn't really think there was particularly additional steps that could obviously be taken at that point.

I think that the two hearings have moved the matter somewhat with respect to

they're now considering individual units and testing individual units, which sounds to me like a reasonable and appropriate thing. And I am pleased that they have committed to at least the consulting with their acoustical experts to identify whether there are additional feasible remediation efforts that could be taken based on this new data that they have.

But that's part of the power of a time-limit variance with respect to making sure that the company understands that we are not at all happy about having to issue a variance at all; but if a variance is to be issued, for the reasons that were both articulated in 2010 and I believe continue to exist now, that we should still insist that the company continue to explore whatever additional feasible remediation steps might be taken in the hope that in the future either no variance would be required or a variance with

a lower dBA level.

I am also, I guess, myself particularly persuaded that the problem of the background or ambient noise, being just at the existing level now, creates a substantial burden for the newest user or even the user who has been identified as the potential source of the complaint, and believe that the -- that at least in this instance -- a high level of the ambient noise argues in favor of the continuance of the variance.

So what I would like to do is make a motion for the consideration of the Commission that we grant a one-year extension of the variance at a dBA level of 55; that the variance run to Idenix only and not to the building; and that should Idenix leave the location, the variance would cease to exist; that readings are to be done during the course of the year by Idenix, and that Idenix is to report those readings to us in a timely manner

after they are taken; that Idenix continue to explore additional feasible remediation efforts that may potentially reduce the sound levels coming from their operation; and that they report back to us on any -- on their findings and on any progress they have made; that measurements be taken in the same manner as was set forth in the earlier variance; and that the Commission considers this matter again at one of our meetings in May of 2012.

ROBERT HAAS: Is that a review in May 2012?

MICHAEL GARDNER: I'm suggesting a review if -- you know, at that point we don't know whether anybody will be thinking they need to extend the variance or not, and they may come back and report to us that a variance isn't required.

So I'm not presuming anything there other than a review. And I guess what I would suggest is that if Idenix thought they needed

a variance extending beyond August 4th of 2012, that that would be an appropriate time for them to raise the matter.

GERARD MAHONEY: I have a question. This is with regards to your motion. The periodic readings by Idenix, should there be a frequency established on that or leave that up to --

MICHAEL GARDNER: I'm not sure what was done before --

ROBERT HAAS: I think there are certain times during the year that we know that the noise is going to increase. And I would imagine we probably would want to have some readings in around that time just to verify that the measurements are within the allowable limit.

MICHAEL GARDNER: I think since it's summertime, maybe we should --

GERARD MAHONEY: So, say, readings taken during the month of April?

ELIZABETH LINT: It kicks on in the summer.

GERARD MAHONEY: Right. But they are coming back in May.

MICHAEL GARDNER: Well, I guess, I'd like to have some summer readings. So that would indicate at least -- and if it would be possible, I'd like a reading before Labor Day or right around Labor Day. In part, because this is -- if this, in fact, ends up being the action that the Commission takes, I would like the confirmation from the company that they are, in fact, in compliance with the variance. And the time to do that is, I think, during the summer.

So August and -- I guess -- I suppose, I'll amend my motion to say readings in August and I believe at the review meeting it was scheduled for May.

MICHAEL GARDNER: Is there any discussion that -- although, I don't have a

second for that --

GERARD MAHONEY: I'll second the motion.

MICHAEL GARDNER: Any discussion?

ROBERT HAAS: No discussion.

GERARD MAHONEY: I don't have anything else.

MICHAEL GARDNER: Well, I guess I will say for the record that I'm appreciative of the difficulty of the conflict in having a commercial enterprise with a high energy of needs to do the important work that Idenix does in the areas that they are focusing on, and trying to be respectful of the needs of the neighbors and the neighborhoods.

But I appreciate the work that Idenix has done to try to mitigate and meet the terms of the variance, and I appreciate the information supplied by the neighbors to help us understand the impact of having such a neighbor.

All those in favor signify by saying "aye."

ROBERT HAAS: Aye.

GERALD REARDON: Aye.

GERARD MAHONEY: Aye.

MICHAEL GARDNER: None opposed. The "ayes" have it.

So the variance, subject to those conditions, will be granted through August 4, 2012.

The next matter, Ms. Lint.

(Discussion off the record.)

MICHAEL GARDNER: We are going to take a five-minute recess. Ms. Lint has a prior commitment, and so we are going to get in additional staff support here.

And in the next hearing, Fire Chief Reardon will participate, and Deputy Fire Chief Mahoney will be on the Board.

(Brief Recess.)

MICHAEL GARDNER: It's approximately

2:45 in the afternoon of August 4, 2011, and we are going to reconvene after recess.

And Fire Chief Reardon, who was present but did not participate in the last matter, is present and will participate in this matter.

Deputy Mahoney is an observer.

And my understanding, Commissioner Haas, that on this matter you have recused yourself; is that correct?

ROBERT HAAS: That's correct.

MICHAEL GARDNER: And we've been now joined by Ellen Watson. And, Ms. Watson, could you just call the matter.

ELLEN WATSON: Thank you.

This is a continuation of a disciplinary matter continued from July 19th, it is Whitney's Cafe, 37 JFK Street.

MICHAEL GARDNER: Chief, any points you'd like to make?

GERALD REARDON: Based on the

evidence, it would appear that there were people in the establishment after hours; whether or not there were people still drinking at that particular time remains to be seen, but there were people in the establishment after the closing hours.

I understand the owner was not present but, obviously, again, under the regulations of the License Commission, the owner is responsible for his employees and their actions and so forth.

And so to that end, I believe that from the evidence we have, it looks as though there were some people in the area afterwards; and that from the evidence we have, that at least one of those people was intoxicated, and whether or not that was as a result of the extra hours there or not, I can't say. But I will say that apparently there is fault for having people in the establishment after the hours established by the License

Commission.

MICHAEL GARDNER: Thank you. I have a couple of concerns as well.

One, is that from the hospital records or medical records that we were able to obtain, there was apparently an extreme level of intoxication of the female who was there after hours. But to the point, it is hard to believe that anybody would be served if approaching that level of intoxication.

And from the documentary evidence of the security cameras, it being clear that both she and her male friend were in the establishment for a substantial period of time and with no leaving to get food at the close of business, as was in the original report, which I understand was a report to the owner from the bartender.

The fact that the bartender has since been dismissed, I am pleased to note,

but it does not alleviate the owner of the premises from the responsibility for the matter.

And it is just through no actions of anybody involved, but apparently fortuitous fate, we don't have a fatality here, which we certainly could have had.

I'm wondering, Ms. Watson, what recent disciplinary history, if any, there has been at this establishment?

ELLEN WATSON: None in the last ten years.

MICHAEL GARDNER: Any general sense of what punishment, if any, you think is appropriate?

GERALD REARDON: I would recommend the suspension and possibly, in light of the fact that there's been a clean record, this will be held in abeyance with a follow-up.

MICHAEL GARDNER: What I would be inclined to support is a three-day suspension,

with the suspension to be held in abeyance with no time limit; and which is to be served if there are any additional service violations of our regulations. And that would be based upon the permitting two persons to remain in the premises after hours, and I believe the record will show to have over-served, if not served, during the period of after hours, after the bar was supposed to be closed.

This is -- at least in my time here -- one of the most serious offenses that I have encountered would only support that holding it in abeyance based on the record of the establishment's lack of prior violations, and the fact that they have taken at least some management action to correct the matter in the future.

So I'll move for a three-day suspension to be held in abeyance, with no time limit, and to be served if there are additional substantial violations in the

future.

ROBERT HAAS: Seconded.

MICHAEL GARDNER: Motion having been made and seconded. All those in favor signify by saying "aye."

ROBERT HAAS: Aye.

GERALD REARDON: Aye.

GERARD MAHONEY: Aye.

So that's the decision of the Commission.

Do you have any other business before us, Ms. Watson?

ELLEN WATSON: I don't think so. I don't see anything here.

Did you vote on the ratifications? Did you ratify them?

MICHAEL GARDNER: I don't --

ELLEN WATSON: Why don't we ratify them just in case.

MICHAEL GARDNER: If you have some ratifications -- well, do we have any notice

issues with them? Because my memory is there were no ratifications on the agenda.

ELLEN WATSON: They would have been on the two agendas previously.

ROBERT HAAS: At meeting I was here for, we did vote on ratifications.

ELLEN WATSON: Okay.

ROBERT HAAS: But I wasn't here for the last meeting, so I'm not sure if there was any --

ELLEN WATSON: If we ratified them at that hearing?

MICHAEL GARDNER: I didn't think we had any ratifications on the agenda, as I recall.

ELLEN WATSON: Okay. She didn't leave me the agenda so --

MICHAEL GARDNER: So why don't we just defer that until our next meeting?

ELLEN WATSON: Okay.

ROBERT HAAS: The last meeting was

what, the 28th?

MICHAEL GARDNER: Yes, the 28th of July. The last meeting was the 28th of July -- no, it wasn't --

ELLEN WATSON: It would have been the 26th, Tuesday, the 26th.

MICHAEL GARDNER: I think it was the 19th. That was an extremely long meeting.

ELLEN WATSON: The 19th?

ROBERT HAAS: I have the agenda, there were no ratifications on that.

ELLEN WATSON: Okay. So we are all set on that.

MICHAEL GARDNER: So the motion to adjourn is always in order.

ROBERT HAAS: Seconded.

MICHAEL GARDNER: All those in favor, signify by saying "aye."

ROBERT HAAS: Aye.

GERALD REARDON: Aye.

GERARD MAHONEY: Aye.

MICHAEL GARDNER: Okay. We'll adjourn at 2:55 on the afternoon of August the 4th, 2011. Thank you very much.

(Whereupon, the Hearing was adjourned at 2:55 p.m.)

## C E R T I F I C A T E

COMMONWEALTH OF MASSACHUSETTS  
SUFFOLK, SS.

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I am not related to any of the parties in this matter by blood or marriage and that I am in no way interested in the outcome of this matter.

I further certify that the testimony hereinbefore set forth is a true and accurate transcription of my stenographic notes to the best of my knowledge, skills and ability.

**IN WITNESS WHEREOF**, I have hereunto set my hand this 8th day of August, 2011.

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