

BOARD OF ZONING APPEAL FOR THE
CITY OF CAMBRIDGE GENERAL HEARING
SEPTEMBER 30, 2010 7:00 P.M.

in

Senior Center
806 Massachusetts Avenue
Cambridge, Massachusetts 02139

Constantine Alexander, Chair

Timothy Hughes, Vice Chair

Brendan Sullivan, Member

Tad Heuer, Member

Thomas Scott, Member

Sean O'Grady, Zoning Specialist

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I N D E X

<u>CASE</u>		<u>PAGE</u>
9924	--	3
9926	--	30
9973	--	37
9880	--	32
9992	--	79
9993	--	128
9994	--	172
9995	--	201
9996	--	235
9997	--	246
9998	--	256
9999	--	311

(7:00 p.m.)

(Sitting Members: Constantine Alexander, Timothy Hughes, Brendan Sullivan, Thomas Scott.)

CONSTANTINE ALEXANDER: The Chair will call this meeting of the Zoning Board of Appeals to order. And as is our custom, we're going to start with the continued cases. And the first case I'm going to call is case No. 9924, 24 Decatur Street. Is there anyone here wishing to be heard on that matter?

Are either of you the Petitioner?

KATHRYN PODGERS: No, I'm not.

CONSTANTINE ALEXANDER: Let me explain that we have a letter from the counsel for the Petitioner requesting a further continuance. It is a letter dated September 23rd, addressed to Maria Pacheco our secretary from Mr. James J. Rafferty, Esquire of Cambridge. "Please accept this

correspondence as a request to continue the above-captioned case that's currently scheduled for Thursday, September 30, 2010, to October 28, 2010."

I know you people have been here before for this case. It's not the first time. But it is our custom for the most part to recognize requests for continuances. But I will hear you out only on whether to continue the case not on the merits.

KATHRYN PODGERS: I know.

CONSTANTINE ALEXANDER: As to one, should we continue it. And two, does October 28th present a problem for either of you in terms of being able to attend the meeting? One at a time. You can go first if you don't mind, and just give your name and address for the stenographer.

SEAN O'GRADY: Gus?

CONSTANTINE ALEXANDER: Yes.

SEAN O'GRADY: October 28th?

CONSTANTINE ALEXANDER: Jim's request is October 28, 2010.

SEAN O'GRADY: Yes, we don't have open there.

CONSTANTINE ALEXANDER: Then he's not going to have the case continued on that date.

ATTORNEY JAMES RAFFERTY: Did you call this case?

CONSTANTINE ALEXANDER: Yes, we did. Let me just bring you up to speed.

KATHRYN PODGERS: By all means I will refer to the master.

CONSTANTINE ALEXANDER: I've read into the record your request for a continuance. The date, by the way, you asked to continue to is not a meeting date. We're not meeting on the 28th of October, but that's a side issue. But there have been people here in the audience who wish to be heard on this case. I said I would hear them only on

the question of continuance. And this is the first person to speak in the matter of a continuance. Would you like to speak at this point?

ATTORNEY JAMES RAFFERTY: I would just to give some clarity and explanation. James Rafferty, thank you, Mr. Chairman on behalf of the Applicant. I selected the date and I apologize --

SEAN O'GRADY: I apologize. I misspoke. We had agreed on the 28th.

CONSTANTINE ALEXANDER: It is a good date.

SEAN O'GRADY: It is a good date.

ATTORNEY JAMES RAFFERTY: The relevance of the 28th is that I have filed on behalf of this property owner a separate Petition for this property that seeks to authorize the construction of a single story addition at the rear. And to avoid the potential issues associated with a

repetitive petition, what we have done here and we're requesting the Board to continue this Petition to that date.

CONSTANTINE ALEXANDER: That's the date you're going to be on our regular agenda?

ATTORNEY JAMES RAFFERTY: That's the date we're already on the regular agenda with the other Petition with the expectation that upon the disposition of the other Petition we would withdraw that Petition and not have to go through the two-step process of a repetitive petition and all that. But, it has -- the nature of the change is so substantial, I think it was concluded correctly I believe, that it wasn't enough to amend the early Petition. The Petition for which it's being continued would seek to subdivide the lot and create a second structure to the rear of the lot. The new application, nothing like that.

CONSTANTINE ALEXANDER: I think it

would be useful for you for the benefit of the people who are here, who took the time to come down, to just briefly describe what the new petition, the relief you will be seeking under the new petition.

ATTORNEY JAMES RAFFERTY: Sure.

The new petition, the Applicant -- it's a single-family home which is already renovated, and he's looking to construct a single-story addition to the rear of that property.

CONSTANTINE ALEXANDER: It would be attached and still be a single-family?

ATTORNEY JAMES RAFFERTY: Yes, it's still a single-family. It's attached. The rear setback will be in excess of 50 feet. A lot of issues of putting a lot of second home back there. No change to the parking requirement. The driveway would remain the way it is. It's a one-story addition with a conforming setback, stepping it in on both

sides. And it's a -- it accommodates a, probably what would be considered a family room type structure coming off of the back of the kitchen.

CONSTANTINE ALEXANDER: So you're going to be seeking a Variance because of FAR issues?

ATTORNEY JAMES RAFFERTY: Actually, no. We're seeking the Variance because we're well below the FAR for the lot, but we are -- because it's a non-conforming structure, we'll be seeking to add more than 25 percent than the existing GFA. So it essentially is what the Board sees on a frequent basis a conforming addition to a non-conforming structure which exceeds the 25 percent limitation.

CONSTANTINE ALEXANDER: Thank you.

Do you understand what Mr. Rafferty has described to you and what's likely to happen? So the continuance tonight is probably going

to be a mere formality. In other words, we're going to continue to the 28th. On the 28th this case will be withdrawn. But we will hear on the 28th the case Mr. Rafferty said is coming down the road, and that is for that one-story addition.

ATTORNEY JAMES RAFFERTY: And the only reason we're doing that, Mr. Chairman, is because there are implications for a withdrawal at this time.

CONSTANTINE ALEXANDER: Oh, I understand. I think it's for the benefit --

ATTORNEY JAMES RAFFERTY: I wanted the public to understand that. I believe my client has communicated through e-mails and others, that there is a new plan. There will be a new sign going up. It will be a whole new case, but this case needs to remain out there.

CONSTANTINE ALEXANDER: And let me just elaborate on what Mr. Rafferty said,

again, for your benefit. If someone brings a Petition before us and withdraws that Petition, that's deemed to be like a denial. You can't bring that same case or a substantially similar case before the board for two years. That's what's called a repetitive petition and our Zoning By-Law prohibits that. So his concern is that if he withdraws this case tonight, there could be an argument that his new case would be deemed to be a repetitive petition and he can't bring that new case for two years. So to protect his ability to bring the new case, he is seeking just to continue this case to see how the new case goes. And if the relief is granted as hoped for him, by him, not by us but by him, then this case will be withdrawn. If not, then he has his choice as to whether to pursue this case after having lost on the new case or not. That's for the decision on the 28th of October. I hope I've explained

it to you.

KATHRYN PODGERS: Yes.

CONSTANTINE ALEXANDER: Okay.

Now, all this talking, do you want to be heard on the motion to continue?

KATHRYN PODGERS: I do.

CONSTANTINE ALEXANDER: Okay.

KATHRYN PODGERS: Kathy Podgers, I live at 146-148 Pearl Street and I'm one secondary abutters. And I abut the condos at 142, 140, and 144 Pearl Street which are direct abutters to 24 Decatur Street.

I did run into Attorney James Rafferty at the City Council meeting Monday night, and he asked if his client had sent an e-mail, and I said No. But I did receive an e-mail the next day. And I do want to thank Mr. Rafferty for encouraging his client to send the e-mails.

FROM THE AUDIENCE: We can't hear back here.

CONSTANTINE ALEXANDER: If you can't here, then come up forward.

BRENDAN SULLIVAN: Kathy, is that on?

KATHRYN PODGERS: Can you hear me now? Can I say that again?

TIMOTHY HUGHES: No.

KATHRYN PODGERS: Well, did you get it so that you can understand.

CONSTANTINE ALEXANDER: Well, it's important for the audience to hear it. If you can repeat since they haven't heard.

KATHRYN PODGERS: Right. I'm a secondary abutter at 148 -- 146-148 Pearl Street and I abut the property at 140, 42 and 44 which is a direct abutter. And that Monday evening at the City Council meeting I ran into Attorney James Rafferty who asked if I received an e-mail from his client at 24 Decatur. I said I had not. He then wrote out what the plan was and gave it to me. The

plan for this continuance and that new idea. And the next day I did get an e-mail from his client. And I appreciate. It's the first e-mail communication I received from the client. So I see that as progress considering my other testimony regarding -- I supported the continuance if there was going to be communication. So, this is the first communication. But I don't support continuing this anymore. I do understand -- I appreciate your clarifying for me, because I just had like some gut or instinctual feeling, you know, what do you say, something stinks in Denmark.

CONSTANTINE ALEXANDER: Okay.

KATHRYN PODGERS: Now I know that we can't say why there's a problem. But the only reason that James Rafferty is here, his client is here, is because they have a problem. And so the issue is these continued continuances.

Now tonight I'm opposing the continuance because I believe the last time we were here, we were promised we were gonna see the new plans in advance so there wouldn't be this last minute confusion. So I got an e-mail a couple days ago saying that they didn't think the plans would be available tonight, but he'd be glad to show them to me.

CONSTANTINE ALEXANDER: Well, what Mr. Rafferty is telling you is that those plans are probably not relevant any longer because his client doesn't plan to proceed.

KATHRYN PODGERS: I understand that. But it's difficult for me to support or not support a continuance, because as you so brilliantly explained, what happens is they withdraw one but then they want to substitute another. Obviously knowing what the plans are in advance would have something to do with whether or not I would support or not support a continuance.

CONSTANTINE ALEXANDER: Well, Mr. Rafferty, can I ask that in advance of the October 28th hearing of this case, that you share the plans that your client would pursue?

ATTORNEY JAMES RAFFERTY: Absolutely. And those plans actually are on file now in the BZA office. That case has been filed. And --

CONSTANTINE ALEXANDER: Could you also make a point to have it delivered to this individual?

ATTORNEY JAMES RAFFERTY: I will.

KATHRYN PODGERS: Well, they're actually going to invite us over and show it to us.

ATTORNEY JAMES RAFFERTY: Well, that's what I understand. I think he sent out a pretty broad e-mail inviting people to come in --

KATHRYN PODGERS: Yeah, two days

ago.

CONSTANTINE ALEXANDER: Okay.

KATHRYN PODGERS: So my point is --

ATTORNEY JAMES RAFFERTY: The hearing is a month from now.

CONSTANTINE ALEXANDER: Okay.

KATHRYN PODGERS: My point is that I thought we agreed the last time we were here, that any changes in the plans they were proposing on which they based the past continuance would be that the plans would be available in advance of this hearing tonight.

TIMOTHY HUGHES: I think what we said was the plans would be available in advance of the hearing for those plans.

KATHRYN PODGERS: Correct.

TIMOTHY HUGHES: We're not going to have a hearing on those plans tonight.

KATHRYN PODGERS: Exactly.

TIMOTHY HUGHES: So they don't need to be available for today. They need to be

available in plenty of time for the 28th of October.

KATHRYN PODGERS: Exactly. Except the very important point that Constantine Alexander brought to our attention, as he should because we should have disclosure, and it's for that reason that I'm opposing a continuance. It's not as though they're going to agree with me. I'm just going on record with my reasoning.

And I want to tell you that I do like James Rafferty, and I think he's the best attorney that his client could have obtained.

ATTORNEY JAMES RAFFERTY: Get all this down now.

KATHRYN PODGERS: I met him -- no, this is very important.

ATTORNEY JAMES RAFFERTY: I couldn't agree more. I don't want to interrupt you.

KATHRYN PODGERS: I met him ten

years ago when the Condo Conversion Act was in front of City Council. So he knows I'm not against property owners doing what they want to do with their property. But there's something else going on here, and if I had got the e-mail in a timely way and if I had seen the plans in advance, then I may feel confident coming in here, I support this extension and this switchover, but that's not what happened. Now, they might have very good reasons for why that didn't happen, but that's also not something they really should be presenting here. So -- and I don't necessarily blame the client here. Part of it is our problem as a city. But I appreciate your disclosure and I'm going on record to oppose a further continuance.

CONSTANTINE ALEXANDER: Your opposition is duly noted.

KATHRYN PODGERS: And I thank you for hearing me and also for hearing my reasons

to my opposition. And I thank you all very much. And at some point perhaps we can get to the merits of this issue.

CONSTANTINE ALEXANDER: No one would like that more than us.

Thank you very much.

KATHRYN PODGERS: Good evening.

CONSTANTINE ALEXANDER: Is there anyone else wishing to be heard on this matter? Ma'am.

MARY WELSTEAD: Thank you. My name is Mary Welstead. I live at 20 Decatur Street which is -- I'm the next-door neighbor of 24. And all I want to ask this evening is -- and I don't know whether this is going to be possible because you're going to submit a new application for the continuance. There was a condition attached to the continuance that the plans would be available two weeks before the hearing. Could we have that same condition?

CONSTANTINE ALEXANDER: I don't think two weeks. Our rule is usually --

ATTORNEY JAMES RAFFERTY: No, I raised the ante.

CONSTANTINE ALEXANDER: I'm sorry. My memory is faulty.

ATTORNEY JAMES RAFFERTY: I said two weeks.

MARY WELSTEAD: It's actually on record --

KATHRYN PODGERS: That's right.

CONSTANTINE ALEXANDER: Please. You had the opportunity to speak.

MARY WELSTEAD: Could we have the same condition.

CONSTANTINE ALEXANDER: With regard to the new plans.

MARY WELSTEAD: So that two weeks before the next hearing, whatever date it is, that the plans are not just circulated informally but they are formally submitted to

City Hall.

CONSTANTINE ALEXANDER:

Mr. Rafferty, do you have any problem with complying with that?

ATTORNEY JAMES RAFFERTY: Well, as far as submitted to City Hall. They've already been filed, sure. I have a BZA case number, a new file that was filed this week.

MARY WELSTEAD: It wasn't filed two weeks ago though when --

CONSTANTINE ALEXANDER: No, no, no. What he's saying as of right now and earlier, there is on file in the BZA offices across the street, the plans for the Petition that we're going to hear on October 28th, the new plans, those are there now. So you don't even need your two weeks, you've got four weeks if you will. Actually, it's not quite four weeks. But anyway, they're on file right now. So your concerns or your request has already been satisfied.

MARY WELSTEAD: Except they're allowed to change them up to that date, aren't they?

CONSTANTINE ALEXANDER: We have a rule that if the plans are going to be changed from what has been filed with the initial application, that those changes have to be in the public file by no later than five p.m. of the Monday before the Thursday hearing.

KATHRYN PODGERS: That's the point.

MARY WELSTEAD: But last time you gave us two weeks because of all the things going on.

CONSTANTINE ALEXANDER: Let me finish. Let me just finish.

Mr. Rafferty, would you have a problem, since you were so kind the last time, to be so kind this time and to put a two week requirement for any modifications to the plans for the October 28th hearing? We would impose this as a condition to continuing this

case?

ATTORNEY JAMES RAFFERTY: Generally no, but the only caveat is what's going to happen -- there's already been an e-mail sent out in an attempt to schedule a meeting with the neighbors. And part of the process is there could be some feedback as a result of those exchanges that do suggest a change in the spirit of responsiveness. Now, if I accept a two week constraint on that, it does somewhat tie their hands.

CONSTANTINE ALEXANDER: Good point.

ATTORNEY JAMES RAFFERTY: But having said all that, sure. I think the one week -- I was so confident because the undercurrent here is my client really -- he now lives in the home. He really values communication. There's this list serve in Cambridge Board. He has reached out to people far and wide on this. He wants to do that. So I would say yes, that we could

easily say that -- the only exception being if there was a change made, suppose this abutter wanted him to do something so she could support the application, and I was beyond the two week period. Beyond that, sure.

CONSTANTINE ALEXANDER: I gotcha.

MARY WELSTEAD: So may we have that condition?

CONSTANTINE ALEXANDER: I'm going to make a motion. Is there anything further you want to add?

MARY WELSTEAD: No, that's it.
Thank you very much.

CONSTANTINE ALEXANDER: All right, thank you.

Is there anyone else wishing to be heard?

(No response).

CONSTANTINE ALEXANDER: The Chair notes no one else wishes to be heard. I'm

going to make a motion and then members of the Board --

THOMAS SCOTT: Can I ask a question?

CONSTANTINE ALEXANDER: By all means.

THOMAS SCOTT: So, in this case are there going to be revised plans put on file for this case?

ATTORNEY JAMES RAFFERTY: No.

THOMAS SCOTT: So no. If the new case is denied, we're going to open this case as is?

ATTORNEY JAMES RAFFERTY: Well, Mr. Scott, if we can't get the Variance on the new case, I'm not going to waste anyone's time with this case. This case in all likelihood will never get heard. It is a proposal that involves putting a second dwelling unit, a second structure. That has been poorly received by abutters. So it is not going to be a case that I can say confidently that I

would ever see bringing to completion here. And the only reason I'm not withdrawing it now is for the issue cited by the Chair, to avoid a potential issue involving a repetition. But if the second case doesn't prevail, that certainly wouldn't bode well for this case. So I don't think we would see that case.

CONSTANTINE ALEXANDER: The Chair moves that this case be continued until seven p.m. on October 28th. This being a case not heard, and a waiver of time for decision already on record.

This continuance will be on the condition that the Petitioner further modify the sign on the property to indicate the time -- the hearing will now be on this Petition, on October 28th at seven p.m. Make sure that the time is changed.

On the further condition that with respect to the related case, the new case is going to be heard by us on October 28th. That

the plans for that case be in the BZA office no later than two weeks prior to the October 28th meeting, unless those plans are modified and taken into account comments from neighbors and interested parties. If that be the case, then the modified plans must be in the public file by five p.m. on the Monday before the hearing.

So on your own if you want to modify them, you can't do it within two weeks.

ATTORNEY JAMES RAFFERTY:

Understood.

CONSTANTINE ALEXANDER: For the benefit of everybody else. If you modify them for whatever issues you've reached with the neighbors, you have a right to put those modified plans the Monday before the hearing date.

ATTORNEY JAMES RAFFERTY: To quote Ms. Podgers, brilliant.

Can I only say this, though, on the

timing of it, just to avoid further confusion, could we -- is it too bold -- if we come up for seven and the other case is on at 8:30, could there be some coordination of the time of the continued case and the other case?

CONSTANTINE ALEXANDER: We always do that when we have companion cases. Yes, we'll do that.

And people have comments on the motion or ready for a vote? All those in favor of continuing the case on the basis so moved, say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Four in favor. Thank you very much.

(Alexander, Hughes, Sullivan, Scott.)

(7:25 p.m.)

(Sitting Members: Constantine Alexander,

Timothy Hughes, Brendan Sullivan, Tad Heuer, Thomas Scott.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9926, 22 and 27 Cottage Park Avenue. Is there anyone here wishing to be heard on this matter?

ATTORNEY JAMES RAFFERTY: Good evening, Mr. Chairman, James Rafferty. This case is a withdrawal with all the implications that flow from that action.

CONSTANTINE ALEXANDER: Very good. Brief and to the point.

I move that we accept the Petitioner's request to withdraw this case.

All those in favor say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. Case withdrawn.

(Alexander, Hughes, Sullivan, Heuer, Scott.)

ATTORNEY JAMES RAFFERTY: Thank you

very much.

(7:25 p.m.)

(Sitting Members: Constantine Alexander,

Timothy Hughes, Brendan Sullivan, Tad Heuer, Thomas Scott.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9880, 148 Larch Road. Is there anyone here wishing to be heard on this matter? Please come forward. Are you the Petitioner?

UNIDENTIFIED MALE: No, I'm not.

CONSTANTINE ALEXANDER: Okay. No need to come forward. We have a request from the Petitioner to continue this case. A night for continuances. I will read into the record, we have a letter from Joellen Gavin. It's addressed to this Board received on September 28th. "After speaking with Ranjit about our case, he has sent our application to your Legal Department. We have not heard back from them as of yet. Therefore, at Ranjit's suggestion, I respectfully request to move our hearing to a later date. We are hoping that you might have a space for us in

November 2010 which I believe will give us legal ample time to review our documents. I will call you later to confirm."

So we have a request to continue this case until November. Now --

UNIDENTIFIED MALE: November what?

CONSTANTINE ALEXANDER: We haven't set the time yet.

UNIDENTIFIED MALE: Oh.

CONSTANTINE ALEXANDER: I'm going to do that in a second. I'll give you an opportunity to speak if you wish only on the matter of continuing the case, not on the merits.

UNIDENTIFIED MALE: No, I'll wait until they come.

CONSTANTINE ALEXANDER: Thank you. What's the date?

SEAN O'GRADY: November 18th.

CONSTANTINE ALEXANDER: November 18th. The Chair moves that this case be

continued until --

BRENDAN SULLIVAN: Is that an okay date for you?

CONSTANTINE ALEXANDER: I'm sorry?

BRENDAN SULLIVAN: Is that an okay date?

CONSTANTINE ALEXANDER: That date work okay for you, November 18th?

UNIDENTIFIED MALE: November 18th, yep.

CONSTANTINE ALEXANDER: The Chair moves that this case be continued until seven p.m. on November 18th on the condition that the Petitioner sign a waiver of time for decision.

Sean, has the Petitioner signed one?

SEAN O'GRADY: Yes.

CONSTANTINE ALEXANDER: We have one. So a waiver of time is already in the record.

And on the further condition that the

sign announcing this case be modified by the Petitioner to reflect the new time and date. So with a magic marker, just for your benefit, today's date will be scratched out and November 18th at seven p.m. should be written in.

All those in favor of --

BRENDAN SULLIVAN: Any modifications to be in the file?

CONSTANTINE ALEXANDER: Oh, yes. Thank you.

And further on the condition that if the Petitioner plans to modify the plans that are now in our files with respect to the relief being sought, that those revised plans must be at the Zoning office no later than five p.m. on the Monday before that November date.

That gives you the opportunity to go down and look at them. Gives us the opportunity as well. Understood?

All those in favor of continuing the

case on this basis, please say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. Case continued.

(Alexander, Hughes, Sullivan, Heuer, Scott.)

(7:25 p.m.)

(Sitting Members: Constantine Alexander,

Timothy Hughes, Brendan Sullivan, Tad Heuer, Thomas Scott.)

CONSTANTINE ALEXANDER: The Chair will now call case No. 9973, 1432 Massachusetts Avenue. Is there anyone here wishing to be heard on this matter? Please come forward.

ATTORNEY JAMES RAFFERTY: Good evening, Mr. Chairman, members of the Board. For the record, James Rafferty on behalf of the applicant, Mashed Potato, LLC. And seated to my far right is Anthony Allen. He's the one of the principals of the LLC. To Mr. Allen's right is Michael --

MICHAEL KEON: Keon.

ATTORNEY JAMES RAFFERTY: I can't do the spelling on that.

MICHAEL KEON: Keon, K-e-o-n.

CONSTANTINE ALEXANDER: Thank you.

ATTORNEY JAMES RAFFERTY: This is an application for a fast order food Special

Permit in Harvard Square. The location is currently the location of existing fast food use. It's Finagle-a-Bagel. It's on the Mass. Ave. block between Church Street and Brattle Street just in a little bit from the Church Street corner. Literally opposite one of the entrances from the Harvard Square T Station across the street from Harvard Yard. It's a not a particularly large location. Its footprint is fairly small. The operators operate a successful enterprise in Portland, Maine, it's proven to be very popular, called Otto. And it is a distinctive restaurant serving --

CONSTANTINE ALEXANDER: Is this the only other restaurant you have, is Otto's?

ATTORNEY JAMES RAFFERTY: Yes.
This would not be a chain.

CONSTANTINE ALEXANDER: Makes no difference to us legally.

ATTORNEY JAMES RAFFERTY: I'm just

telling you it's not a chain. I appreciate that.

So this would be the second operation. It's as I noted, in a location currently served by fast food. It is well suited I would suggest to meet the criteria set forth in the fast food ordinance, particularly when one looks at its location with regard to the level of pedestrian traffic that occurs on that block. In addition to the block, the entire Harvard Square is probably a place that sees more activity in the nature of visitors than any other location in Cambridge, if not in Greater Boston.

The Board might recall when we were here last, there was not a report from the Harvard Square Advisory Committee, and there is, deep in the language of the Harvard Square Overlay Committee there is a reference to that committee. And as a result I took the application and forwarded it to Community

Development and I'm sure the Commission has seen the report from the Advisory Committee.

CONSTANTINE ALEXANDER: Which I will read into the report at the appropriate time.

ATTORNEY JAMES RAFFERTY: Fully anticipated.

So, we find ourselves with a location which has a fast food use already. I'm sure the Board knows that the unique nature of the fast food Special Permit, is that unlike most other Special Permits it is particular to the operator and the use. So if these gentlemen were in the bagel business, they wouldn't be here. But they're in the pizza business, and that's a change in food product and it's a change in operator and thus the Ordinance requires them to come back here and make this case once again.

The criteria set forth in the fast order food establishment are guidelines that we

know are intended to assist the Board to make a determination under Article 10 that the fast food use is essentially compatible with surrounding uses. Harvard Square certainly has a variety of restaurant and food uses both in the retail and the dining side, and Otto seeks to become a part of that community. And particularly with its orientation on selling an economical product at a reasonable price. It's unique in its emphasis on slices, and I think if you had just a moment, Mr. Allen might like to just share with you a little bit about the establishment itself because some Board members have a criteria that the establishment fulfills a need for such a service in the neighborhood or in the city, and what is being proposed here will serve that need in a unique way and Mr. Allen might take a minute to tell what makes Otto so special.

ANTHONY ALLEN: Anthony Allen.

Thanks for hearing us.

We opened in Portland with a mission to create a sort of a real spin on the pizza business. I've owned a bunch of pizza shops myself. Mike's a shelf. We've combined forces and came up with a concept that's really resonated with the crowd up there. And our business is about 75 percent slices. When you walk in the shop, we have eight slices, eight different varieties always available. We pull from a pool of about 40 pizzas. And if you walk in, you may see a butternut squash cranberry ricotta pie. Or a mashed potato bacon scallion pizza which we got a five star review for. But they're always moving and always turning and --

CONSTANTINE ALEXANDER: Such a kind of operation is going to create a lot more waste or refuse as people take -- walk out with their presumably paper plate and tissue and then walk onto a busy street. What are

you going to do to make sure that the cleanliness of the Harvard Square area is maintained?

ANTHONY ALLEN: We police the area where we are on a regular basis.

CONSTANTINE ALEXANDER: Do you have receptacles on the outside?

ANTHONY ALLEN: Inside and outside, we do. And we also go up and down the block. We do send people out with a paper plate and usually a napkin. We have seating outside of Otto's so often they'll sit outside and finish there and --

CONSTANTINE ALEXANDER: Will there be seating outside your establishment in Harvard Square? I wouldn't think so.

ANTHONY ALLEN: We haven't applied for it.

ATTORNEY JAMES RAFFERTY: We have not applied for it.

CONSTANTINE ALEXANDER: Would you

like to?

ANTHONY ALLEN: We'd like to.

CONSTANTINE ALEXANDER: You haven't done that yet?

ANTHONY ALLEN: We haven't, correct. So policing has not been an issue in Portland. People seem to have a respect for the area there. And I think the same is here.

CONSTANTINE ALEXANDER: And I take it the materials you use are biodegradable?

ANTHONY ALLEN: They are.

CONSTANTINE ALEXANDER: These are some of the requirements as Mr. Rafferty knows of our Zoning By-Law with regard to the Special Permit.

ANTHONY ALLEN: Yeah, we have no Styrofoam in our shop or operation at all. But the nature of it is we produce a really high quality ingredient product. With the best ingredients we can source. A lot of it

local to Maine. And it's just an exciting concept. People like coming in and always seeing a variety.

CONSTANTINE ALEXANDER: So the need that you're going to fulfill is a need for fresh, high quality product that places like the Upper Crust don't comply?

ANTHONY ALLEN: No, I didn't say that. But we have a variety of slices that Upper Crust or some of the other places may not have, and that's really what our concept is.

ATTORNEY JAMES RAFFERTY: Just to move it along. I do know we're going to wind up on focus of need. I just want to remind the Board of two things:

First of all, of course, a pizza cafe or any restaurant cafe is allowed as of right. And the history of the fast food use really has evolved. And up until about 1981 we didn't even have a fast food Special Permit.

And I would say based on my personal experience that there's lots of focus on the vehicular traffic and the extent to which there would be disruption to other retail uses.

The rule of thumb as you know, is that if more than 20 percent of the product goes out the door, one should get a fast food Special Permit. So the types of questions about how the type of the product as the product lends itself to portability and what's the likelihood that we can have increased trash and litter is an appropriate concern. I don't think, however, the fact that there might be other places that serve a product similar or not would suggest that one establishment serves the need. And we could spend a lot of time on defining need. And it's a term somewhat vague that I would suggest in interpreting the term need, it would be a -- an interpretation that would

lead to the creation of a moratorium in a district where there is not a moratorium on fast food use or a cap on fast food use. I would suggest is not an appropriate interpretation.

By contrast, the Central Square Overlay District has a limitation. I believe it's no more than 14 fast food uses. And that was put in in the mid-eighties when fast food had a whole different understanding. There were a plethora of McDonald's and Burger Kings, and not to knock any particular fast food, but it was, you know, the food market, the food -- everything has changed in a large way. So we see a spectrum now of uses, food service uses from Crema Cafe to Flat Patties to a Starbucks to cafes where people can eat. And going back to the days of a Tastee, a place that was not much bigger than this, 650 square feet. These are part of the life of Harvard Square. Smaller places where people can eat

and leave in a hurry. And I do think when the Ordinance talks about a need in the city or in the neighborhood or in the city, in Harvard Square I think there should be a recognition by the Board in analyzing the need and understanding of the volumes of people that are in Harvard Square on a daily basis that want a reasonably priced meal for lunch, for dinner, for snack, for late night dining. We have a thriving undergraduate population that I respectfully suggest we shouldn't turn our back on. This is the heart of their community as well as the residential community. This is a food product that they find quite appealing, and that need is a legitimate a need as any other need that exists. And in this neighborhood that need is pronounced. This location which is served as a fast food use I think will be able to continue to do that. Perhaps with an emphasis away from the morning and towards

later in the day. But I would urge the Board in analyzing the issue of need here to be mindful of this location and the population that is within yards of this, merely yards of this, whether or not they would -- their needs could be served by this. I think frankly that there's lots of practical real life experience that everyone has that would suggest the population that is in close proximity to this location would be well served and their needs could be met by this. In addition to the range of other demographics that will be served.

So having said that, I thought we could go long and long in this and it wouldn't change what the math on this, so I'll just leave it to say that I know there is a representative from the Harvard Square Business Association -- having Harvard Square here tonight, and I believe she wishes to be speak tonight. But to have Harvard

Square be a success, to have good quality operators, owner/operators here, I recognize that the Ordinance is silent as to chains, but I do think that the other criteria that looks here, when someone who owns the place tells you we pay attention to trash and we are going to be here everyday, I think that is worthy to analyze in the context of the obligations and requirements associated with this. Both of these gentlemen will be on the premises. They understand the importance of this. And their commitment is that they can meet these requirements. And of course ultimately the License Commission will make additional requirements if this were to be approved in the context of the Common Victualer License. So, I won't take up any more time, and I appreciate the opportunity to be heard.

I don't know if you would like anything to add?

MICHAEL KEON: No.

ATTORNEY JAMES RAFFERTY: Okay.

Thank you.

CONSTANTINE ALEXANDER: Well said. You know my views on this issues. I'm not going to bore you, I'm not going to bore the audience. I'm certainly not going to bore my fellow Board members, particularly Mr. Hughes on my views. I said it before and I won't say it again, well said.

Ma'am, you wanted to speak?

TIMOTHY HUGHES: I have a question.

CONSTANTINE ALEXANDER: You'll have your opportunity. Let her have her time to speak.

KATHRYN PODGERS: I'm Kathy Podgers, 148 Pearl Street. I'm also a trained community access monitor trained by Mass. Office on Disability. In case you don't know what that is, is we're trained both in federal civil rights law, the Americans with Disabilities Act, and Chapter 11 of the

State Building Code, the access law. I have taken hundreds of photographs of litter in Central Square and the surrounding area. And Harvard Square and the surrounding area. And the litter in Harvard Square is nothing compared to the litter in Central Square. I've thought about that for a while, because we have a litter problem right behind City Hall when you go in the disability door. And the litter is a problem for people with disabilities, which is why my testimony tonight is based on my training as a community access monitor. Because the litter ends up collecting at those ramps. And we think well, gee, people will call and complain to the City Council or the ADA coordinator or whatever, that they can't get up and down the ramps. Imagine you're in a wheelchair and you're rolling through all this garbage.

People with disabilities that own their own homes are required to keep the sidewalks

and the public way in front of their home clear of snow and ice and litter. Disabled people can't do that. In the winter we can qualify to have the city shovel our snow, but we can't get help clearing up the litter.

On Pearl Street there was litter --

CONSTANTINE ALEXANDER: Please keep it --

KATHRYN PODGERS: Right. I'm trying to explain. I'm in support of this.

On Pearl Street where I live there was litter from McDonald's all the way down to my house in the gutters and on the sidewalks and in the people's yards. That's not the case in Harvard Square. That's not to say there's no litter. And especially in that little park, you might help me with the address there. Next to Staples.

ATTORNEY JAMES RAFFERTY: Winthrop Park.

CONSTANTINE ALEXANDER: Oh,

Winthrop Park.

KATHRYN PODGERS: So there's litter next to the bins, like behind City Hall. So the people in Harvard Square seem to know they should put the litter in the bins, there just aren't enough bins. It appears the people that do business in Harvard Square, like these gentlemen, unlike the people in Central Square, go out and clean-up litter not only from their own establishment but any other litter that's around. They seem to understand the idea that people don't like to come to the area if they have to wade through ankle deep litter. Now, I can't overrule Ordinances. I'm simply testifying as somebody who is trained and an advocate for people with disabilities. I don't seem to have a problem using curb ramps on Harvard Square because of litter, that's going on in Central Square. So the question comes to you how to enforce the Ordinances and these

issues equally in the two different areas? I can't answer that for you. All I can do is testify to you. I can't give legal advice. I'm not allowed to do that. But our problem as people with disabilities with access based on litter isn't in Harvard Square, it's in Central Square.

CONSTANTINE ALEXANDER: Thank you very much.

KATHRYN PODGERS: You're welcome.

CONSTANTINE ALEXANDER: I inadvertently -- thank you very much. I'm talking to members of the Board and the audience.

I should have allowed Board members to ask questions before, because the questions may affect the comments that are going to be made. So I'll ask the Board members, does anybody have anything to say?

TIMOTHY HUGHES: I'm good.

TAD HEUER: Are there any other -- I

know you mentioned other pizza restaurants in Harvard Square. Do you know how many of those restaurants are actually fast food establishments and how many are just restaurants that would kind of differentiate between the need that your clients are looking to fulfill and just this general pizza category? Because I understand that there might be a distinction.

CONSTANTINE ALEXANDER: I can name two that were before us: Upper Crust and the one in the Holyoke Center across the street from -- no, that's a sub shop. I take that back.

ATTORNEY JAMES RAFFERTY: Right.

CONSTANTINE ALEXANDER: But we do have Upper Crust that came before us. And that was considered a fast food establishment. And we granted them a Special Permit. And the as long as I've been on the Board the pizza places --

ATTORNEY JAMES RAFFERTY: As part of my land use practice I make it a point to frequent food establishments in Harvard Square. And I'm as diligent about that element of my practice as any other. So I can tell you that Bertucci's serves a pizza, but I would suggest not in the style of these people, a sit down restaurant. Pizzeria Uno similarly serves pizza, but not by the slice or catering to a lunch or quick in or out. The average experience here is in the 10 or 15 minute range. So, I imagine there's maybe --

CONSTANTINE ALEXANDER: There's Pinocchio's.

ATTORNEY JAMES RAFFERTY: Oh, Pinocchio's.

CONSTANTINE ALEXANDER: They didn't need to get a Special Permit from us. I assume they're grandfathered.

ATTORNEY JAMES RAFFERTY: Yes, they

probably predate the Ordinance. And I think they're probably half and half. There's a fair amount of people that eat in there and there's a good number that goes out.

TAD HEUER: And you have no seats, right? Or there are a few in the window?

ATTORNEY JAMES RAFFERTY: There's a handful of seats. I think three or four seats.

ANTHONY ALLEN: Three seats.

TAD HEUER: Okay.

In terms of presuming you're successful and you have a volume. In your Portland location, do you have the same size? And I guess what I'm thinking about is in terms of traffic coming out that door and forming a line at lunchtime across that sidewalk which is the main thoroughfare in Harvard Square. Do you have considerations or thoughts about that?

ANTHONY ALLEN: A similar

footprint, 340 square feet in Portland and we have about 310 square feet here. So, very similarly we have one door narrower in Portland. And a line does tend to form at lunchtime but rather cross the sidewalk, it goes outside our storefront and bends down and it doesn't obstruct anybody.

CONSTANTINE ALEXANDER: The area that you're located in Portland, is it similar to Harvard Square in terms of the pedestrian traffic and the demographics of the people that go by or is it a different kind of neighborhood?

ANTHONY ALLEN: Relative to the city of Portland, it's heavy pedestrian traffic but it's not -- obviously it's not Harvard Square. In the City of Portland, no.

CONSTANTINE ALEXANDER: I mean in terms of congestion.

ANTHONY ALLEN: Yes.

ATTORNEY JAMES RAFFERTY: I would

note as to the line, it's an exceptionally wide sidewalk there. And there are a range of uses going on the sidewalk from street entertainers to people soliciting for a variety of causes and personal and otherwise. But it is a generous sidewalk. And I think -- a line at lunchtime is sometimes, I think, a sign of a thriving urban city. If one of the more successful enterprises, I don't know if you had an opportunity to be here is the new Flour Bakery that has opened in the Novartis. And the first time I went by, I assumed there was a fire in the building because there was a line out the street. And it's popular and it would suggest that some type of a need is being serviced in some fashion I would suggest when you see that type of volume.

TAD HEUER: And in terms of your hours, you know, you're suggesting that this is probably moving from an early morning into

a not early morning. Are you looking to -- how late are you planning to open? What's your general hour time frame?

ANTHONY ALLEN: I think on our application we went from 10:30 a.m. until midnight.

CONSTANTINE ALEXANDER: That's your application with the Licensing Commission?

ANTHONY ALLEN: Yes.

ATTORNEY JAMES RAFFERTY: I believe so.

TAD HEUER: In terms of delivery, I see that in your Portland location you have predelivery in the neighborhood. Are you planning to do delivery services in the Harvard Square area? And if so, how are you planning, are you planning on doing that with automobiles, bicycles, with runners?

ANTHONY ALLEN: Yeah. The wording in that is deliberately loose. We run it around on foot.

TAD HEUER: Okay.

ANTHONY ALLEN: It's just if we can get out the door and get back quickly, we'll deliver it.

TAD HEUER: So you won't have a need for standing drivers in that taxi stand and other places?

ANTHONY ALLEN: No.

ATTORNEY JAMES RAFFERTY: No vehicle delivery at all.

TAD HEUER: Okay.

CONSTANTINE ALEXANDER: What about delivery of raw materials, products. Given where you're located, where are the delivery trucks going to --

ATTORNEY JAMES RAFFERTY: Loading takes place in the rear of the building. It's a multi-tenanted building. I believe it's on Palmer Street that they have access at. Am I correct?

ANTHONY ALLEN: Yes.

CONSTANTINE ALEXANDER: So Palmer Street is the street where you have access?

ANTHONY ALLEN: It is, yes.

TAD HEUER: So you don't need access off of Church Street to the front door?

ATTORNEY JAMES RAFFERTY: No, not for loading. No.

TAD HEUER: Does CVS also have access to Palmer Street?

ANTHONY ALLEN: Yes.

ATTORNEY JAMES RAFFERTY: They do.

TAD HEUER: Yet they still use Church Street?

BRENDAN SULLIVAN: Not as a rule.

TAD HEUER: Right.

ATTORNEY JAMES RAFFERTY: Yes. A store like CVS gets lots of different vendors bringing a range of different product throughout the day. These gentlemen really get delivery three days a week and with a very regularly scheduled delivery. Most of which

occur at the seven a.m. range. They don't take deliveries in the middle of the day because that's when they're doing their business.

TAD HEUER: Okay. Thank you.

CONSTANTINE ALEXANDER: Further questions?

TAD HEUER: No.

CONSTANTINE ALEXANDER: Further questions?

Anybody else in the audience wishing to be heard on this matter? We have some letters in the file which I will read. Please come forward.

DENISE CHILSON: Good evening.

CONSTANTINE ALEXANDER: Good evening.

DENISE CHILSON: Denise Chilson with the Harvard Square Business Association. We would be in overwhelming support of this Petition. And just to name

a few more pizza joints in Harvard Square: You have Crazy Dough, Pizza OG, Veggie Planet, and Cambridge One. But we receive --

ATTORNEY JAMES RAFFERTY: That's not helping.

DENISE CHILSON: Yeah, sure it is. We receive about 8 million visitors to Harvard Square every year, and that's according to the Boston Globe and heavens knows they're the paper of record. Right, Jim?

So, you know, we're delighted to have another pizza option in the square. And I think more interesting besides the 8 million people, would be that, you know, a couple years I had a conversation with the folks at CVS, and CVS is just a couple doors down from this site, and they told me that they received 27,000 people through that CVS store every single week. So it's an extraordinary number of people. And there are a couple of

things, we would love to see a line because I do think is a very generous sidewalk. And we would also encourage outside seating. And I think the reason for that, there are several. But one is that, you know, there's a real problem with other enterprises in that area. And the outside seating really does seem to discourage loitering. And it's been a persistent problem for all of the tenants.

CONSTANTINE ALEXANDER: We don't know that we're going to have outside seating.

DENISE CHILSON: But anyway, we're encouraging that. But our support for this petition is overwhelming and I thank you.

CONSTANTINE ALEXANDER: Question: Have these gentlemen joined your organization?

DENISE CHILSON: Yes, they have.

CONSTANTINE ALEXANDER: Thank you very much.

DENISE CHILSON: You're welcome.

CONSTANTINE ALEXANDER: Is there anyone else wishing to be heard?

(No response.)

CONSTANTINE ALEXANDER: The Chair is in receipt of two letters. One is from the Harvard Square Advisory Committee. As Mr. Rafferty pointed out, our Zoning By-Law requires that we ask the committee to express an advisory opinion which we take into account to control our decision. The letter is dated September 29th addressed to the Board. It's actually signed by Lester Barber, Community Development Department for the Harvard Square Advisory Committee. "The application documents to the above-referenced case were distributed to the committee members on Thursday, September 23, 2010. The Board is currently not at full membership. Three of the nine present members of the committee responded with

comments.

One member felt strongly that there was no need that could be demonstrated for an additional enterprise in the square, and that this busy location was not an appropriate location for a high traffic generating facility. For this member the requested permit should be denied.

Two members had no objections to the issuance of the permit. One member felt strongly this was a good location for such a use. The space is small and not well suited to other uses. It is a food service clearly in demand and serving a need as demonstrated by the number of such enterprises found throughout the square. The location is populated by a large number of visitors and students who would benefit -- would be fit -- I think the word was intended to be benefit -- from a well-run operation of this kind. The third member had no comment and no

objection."

And we also have an e-mail from a John P. Digiovani of Trinity Property Management. And it's actually addressed to Les Barber. "Les, thank you for your e-mail. I did receive the application for a fast food permit in the mail yesterday. The applicant seeks to operate a fast food use in a location that has been occupied as a fast food use for several years. The location is small. It would not be practical for many other kinds of retail uses. As I understand, the operator enjoys a fine reputation in Portland, Maine. The use will satisfy a need in Harvard Square for high quality, well-maintained economical food service uses. The need, criteria and the fast food criteria was not intended and should not be applied to create a moratorium on fast food uses in Harvard Square. The need for the service is evidenced by the amount of

activity in a particular area. The highest concentration of visitors to Cambridge is in Harvard Square. It also has the greatest concentration of young people in Cambridge, and food uses such as need provide an important service to them. The reasons stated, I am in support of this application."

Is there anyone else wishing to be heard on this matter?

(No response.)

CONSTANTINE ALEXANDER: The Chair notes no one else wishes to be heard.

Members of the Board, further questions?

There are a few more points we have to cover with regard to the application, but no questions yet.

We have to address, as you know, Mr. Rafferty, things like does the establishment comply with all state and local requirements applicable to ingress, egress

and use of all facilities on the premises for handicapped and disabled persons?

ATTORNEY JAMES RAFFERTY: Yes, it does.

CONSTANTINE ALEXANDER: Okay. It's at street level, there are no steps.

ATTORNEY JAMES RAFFERTY: And it's currently in its current configuration as a fast food use. It does that, and we'll keep those -- that infrastructure doesn't change.

CONSTANTINE ALEXANDER: Thank you. And you've already dealt with waste receptacles. You're going to maintain waste receptacles inside and outside the premises.

And encourage patrons to properly dispose of all packaging materials in the disposal bins.

I think you've addressed whether the establishment will attract patrons primarily from walk-in trade. And I think you've indicated, it's your belief and I think it's

well founded, that your customer base is going to be walk-in trade.

You talked about the establishment fulfilling a need for such a service in the neighborhood.

The physical design including color and use of materials in the establishment shall be compatible with and sensitive to the visual and physical characteristics of other buildings, public spaces, and uses in the particular location. Why don't you just -- we have a set of plans, but maybe you just want to touch on that.

ATTORNEY JAMES RAFFERTY: Right. I think there's minimal change to the existing condition. It's on a particularly broad street front, it has glass. And I don't know if you anticipate --

CONSTANTINE ALEXANDER: What about the color scheme? I mean, are you going to have purple and green? I'm being facetious.

ANTHONY ALLEN: No. It will be consistent with some of the photographs you saw in that brochure.

ATTORNEY JAMES RAFFERTY: They have a high design finish in their Portland store.

CONSTANTINE ALEXANDER: It will be like that?

ANTHONY ALLEN: Yes.

CONSTANTINE ALEXANDER: Except it's not going to be Otto's.

What's the name?

ANTHONY ALLEN: It will be Otto's.

ATTORNEY JAMES RAFFERTY: Otto's.

CONSTANTINE ALEXANDER: Even though the name is Mash something.

ATTORNEY JAMES RAFFERTY: That's the LLC.

CONSTANTINE ALEXANDER: We have to talk about will the operation of the establishment create traffic problems, reduce available parking, threaten the

public safety in the streets and sidewalks or encourage or produce double parking on the adjacent public streets.

Clearly on the parking issues you touched on the fact that there should be a walk-in trade, particularly given its location.

Traffic problems, if you're talking about automotive traffic, there should be none. And I guess you're saying that given the broad sidewalk any pedestrian traffic is going to be able to be accommodated. Even if there are lines stretching out the door.

And I trust you're not going to threaten the public safety. You have healthy food, right? No trans fats?

ANTHONY ALLEN: Healthy food. No trans fats.

CONSTANTINE ALEXANDER: Okay.

I think we've touched all the things that are required by the Special Permit

besides usual general stuff. Ready for a vote?

The Chair moves that the Petitioner be granted a Special Permit to operate a fast food establishment at 1432 Massachusetts Avenue on the basis of the following findings:

That the Petitioner has satisfied all of the requirements that are identified in Section 11.31 of our Zoning By-Law, including but not limitation with regard to the operation of the establishment, the design, fulfilling a public need, complying with waste disposal and complying with ingress and egress for handicapped persons.

And also on the basis that the Petitioner meets the further requirements for a Special Permit that are set forth in our Zoning By-Law generally. Not just for fast food enterprises but for all Special Permit cases.

That the first one is whether you're going to cause congestion, hazard or substantial change in established neighborhood character. It is your position that you will not. You will not create congestion, even though you may have lines out the door, given the nature of the sidewalk and the area immediately around the restaurant.

That you're not going to affect adjacent uses. You're not going to adversely affect adjacent uses by the nature of your business. You're going to basically -- a different kind of fast food enterprise that was there before. And there has been testimony by the Harvard Square Business Association that businesses in the area would generally welcome your business.

That there will be no nuisance or hazard created to the detriment of the health, safety and welfare of the occupant or the

citizens of the city.

And that what you would do is not going to impair the integrity of the district or adjoining district or otherwise derogate from the intent and purpose of this Ordinance.

So on the basis of all of these findings, the Chair would move that a Special Permit be granted to the Petitioner to operate this fast food establishment on the condition that the work proceed in accordance with the floor plan. It's one page submitted by the Petitioner. It's been prepared by JGA Architecture and it's been initialed by the Chair.

All those in favor of granting the Special Permit say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Four in favor.

(Hughes, Sullivan, Heuer, Scott.)

CONSTANTINE ALEXANDER: Opposed?
And I expressed my opposition for it before.
I won't bore people as to why I oppose. I
don't think you satisfy a need for this
neighborhood. But anyway, Special Permit's
been granted.

ATTORNEY JAMES RAFFERTY: Thank you
very much.

ANTHONY ALLEN: Thank you.

(8:00 p.m.)

(Sitting Members: Constantine Alexander,

Timothy Hughes, Brendan Sullivan, Tad Heuer, Thomas Scott.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9992, 45 Foster Street. Is there anyone here wishing to be heard on this matter?

For the record, name and address.

GEORGE KENT: Good evening. My name is George Kent. I live at Two Foster Place in Cambridge.

CONSTANTINE ALEXANDER: Mr. Kent, before you get into your presentation, one thing. I'm sorry, there are basically two issues in case.

One issue is whether we can even hear your appeal. In other words, was it timely filed? This issue comes from an Appeals Court decision in Massachusetts. And then the second issue, assuming that we find that you can hear the appeal, is the merits of the case. Whether you're correct in giving your

appeal.

And what I would propose to do tonight, is I want to start with the procedural issue and --

GEORGE KENT: Okay.

CONSTANTINE ALEXANDER: And this is just to benefit everybody. For you to talk to that. We'll ask questions. Members of the audience can comment, and we'll take a vote. The vote is, the appeal is not timely filed, then the case is over. If the vote is that the case was timely filed, then we'll go on to the merits and we'll follow the same procedure. We'll hear your presentation on the merits, we'll hear from people in the audience, and we'll take a vote on that.

So let's start by addressing the question of the timeliness of the appeal. And let me just, for the benefit of the audience, because I know there are members in the audience here to try to explain just

briefly what we're talking about. In 2008 there was a decision by the Massachusetts Appeals Court dealing with when an appeal construing our statutes with the Commonwealth, Massachusetts Statute as to when an appeal must be filed from a decision by the Building Commissioner with regard to Zoning By-Laws. And in failing to meet that time limit, then the case would not be timely heard. And the case was Gallivan versus the Zoning Board of Appeals in the Town of Wellesley. And very briefly the court held that an aggrieved person, and Mr. Kent would be an aggrieved person in this case, with adequate notice that issuance of a Building Permit will violate a Zoning provision must avail herself -- the case was a female. The right to file a timely appeal from the issuance of that permit. And that deadline is a 30-day deadline. That's in our statute, in the state statute.

So the question was in this case, and the case before us tonight at least is whether Mr. Kent had adequate notice and whether he did not file his appeal within 30 days. I would note for the record that the Building Permit was granted on June 11th. And Mr. Kent filed his appeal on August 11th. So, 60 days, obviously more than 30 days. I'll just say one more thing and then I'll let you turn to the merits on this, I believe my opinion, and I believe my opinion is correct, is that this decision of the Massachusetts Appeals Court is not binding precedent on this Board. That the only thing that is binding on this Board are decisions of the Supreme Judicial Court. So I don't feel that we're obligated to follow that decision if we felt that decision applies to this case or the facts as such. Although I think it is a decision of a court and we're going to pay very close attention to it. But I just want

to make it clear in my judgment at least, is that we're not completely hamstrung in our decision on your case tonight.

GEORGE KENT: Yes, sir. Maria said there wasn't rooms in the file so she asked me to give two more copies of the advanced materials that I had. I don't know --

CONSTANTINE ALEXANDER: Are these dealing with the appeal?

GEORGE KENT: No. This is exactly the same thing that was in the file. She wanted three copies. She said they wouldn't fit in the file. I'm giving them to you.

CONSTANTINE ALEXANDER: Okay.

GEORGE KENT: The first part of my remarks speak to what we talked about. I have copies if you want them to be able to look at some of the words I'm saying. And so I will use the first part of my comments here to answer your question.

First of all, I'm not a lawyer.

Perhaps I don't understand those words, but in my mind, I have not appealed that the Building Permit was issued. I have not appealed a problem with Zoning. My appeal is that there are two supporting documents which you cannot follow both of them completely, at least not without guidance because they conflict. In other words, as those supporting documents are structured, it followed in a way that when I filed an appeal, thought they would be filed. In fact, they have been followed. You run into an impossible situation where not all of the criteria that have been set forward in the Building Permit can possibly be followed. So at some point change is going to have to be made. It's better to do that earlier than later.

CONSTANTINE ALEXANDER: What type of change? Change to the Building Permit?

GEORGE KENT: No. Change to what

is -- what has been constructed.

CONSTANTINE ALEXANDER: Well, let's be very clear, though. If there's change that has to be made to what has been constructed because with the same consistency, you point out and I know it's the merits of your case, that's a problem for -- not for the Petitioner. That's a problem for Mr. Greenup.

GEORGE KENT: Yes.

CONSTANTINE ALEXANDER: He may have to tear down stuff he's done.

GEORGE KENT: Yes.

CONSTANTINE ALEXANDER: It may cost him more money to finish the project. And I suspect that the tearing down and rebuilding is going to cause some disruption to the neighborhood in terms of further construction.

GEORGE KENT: Yes.

CONSTANTINE ALEXANDER: All that

being said, those are not Zoning issues. Those are personal issues to the extent there's a legal issue. It's a building issue. It's not before us tonight. It will never be before us. So, if that is the nature of your complaint, we're getting to the merits rather than to the procedure, I would suggest to you, sir, that this is not a case that we can consider.

GEORGE KENT: Okay. I asked when the issue came up, if this was something that could appropriately be appealed to the BZA for determination? I was told it was something that could be appealed and that's why I filed the appeal.

CONSTANTINE ALEXANDER: Well, as I read your case, and I think I know what you were told because I know the conclusions I reached when I read the file, is I thought you were saying in your written materials, and in your appeal, is that the Building Permit that

was issued is inconsistent with the plans that this Board approved and, therefore, the Building Permit should not have been issued in the form that it was issued in. If that's the case, if that's your position, then you are appealing the decision of the Building Commissioner. Because you're saying the Building Commissioner improperly issued a Building Permit. I think that's what your case is legally.

GEORGE KENT: My case is that if you look at the two sets of plans --

CONSTANTINE ALEXANDER: Yes.

GEORGE KENT: -- if a couple of sections that are shown that don't include doors, are applied to the doors area, a structure of the first floor where the doors are, that then would conflict with the requirement that the exterior to the house looked like the May 8, 2007 plans. At the time I filed the appeal, no construction had

taken place, and I was trying to be proactive and get a decision saying there's a problem here if this is done. Initially the Building Commissioner told me on the 19th of July -- and I didn't get access to the building plans until the 7th of July. Because right after the Building Permits were available, it was almost three weeks before they could assemble all the pieces so they could be reviewed. On the 19th of July, after communication and discussion with Mr. Greenup, and then with the Building Commissioner, I was told by the Building Commissioner, he agreed that the first floor should not be constructed as it was constructed or as it was indicated in the three sections from 2010, plans that Mr. Greenup had. But it should be left at the level indicated in the plans from 2007. That was the 19th of July. On the 4th of August, the Building Commissioner contacted

me and said after further conversations within the city hierarchies, it was determined that Mr. Greenup could raise the first floor as long as the exterior of the building was not affected. The problem is that raising of the first floor, if it raises the doors, conflicts with the 2007.

CONSTANTINE ALEXANDER: Okay. But is that a Zoning issue? We still have to -- I'm trying to make it clear --

GEORGE KENT: I don't know. That's why I contacted ISD and asked is this issue in the sense of the Building Commissioner given that guidance that was determined in the city. He decided not to force the issue at this time. And my question was could that decision not to deal with it now but put it all off to the end be appealed to the BZA? I was told it could. And that's the reason why I filed the appeal.

Now if the advice I got was wrong and

it can't be appealed to you, then it's done.

CONSTANTINE ALEXANDER: No. The question is not whether it can be appealed to us but whether you filed an appeal timely.

GEORGE KENT: The thing that I was --

CONSTANTINE ALEXANDER: Let me finish. Just a minute, please, let me finish.

You can render an appeal from the determination about the height of the first floor. We may not agree with that appeal. That's the merits of the case.

GEORGE KENT: Yes.

CONSTANTINE ALEXANDER: But the question is should we even consider the merits? Or because of this decision that I've tried to explain, the Gallivan decision --

GEORGE KENT: Yes.

CONSTANTINE ALEXANDER: Let me

finish.

That whether we should even hear the case at all or even get to the question of whether the Commissioner was right or not. And what you're telling me is important, to me anyway, is that there's a 30-day period but you were diligent from the outset. That you didn't sit back to be colloquial lie in the bushes and let Mr. Greenup build the house and then said ah-ha and come after him. You did not do that.

GEORGE KENT: No.

CONSTANTINE ALEXANDER: I think you were trying to work with the Building Commissioner with your legitimate concerns, I think with the hope that the Building Commissioner would agree with what you were saying or change or withdraw the Building Permit that was. On July 19th it became apparent to you that this was not going to happen.

GEORGE KENT: Now, it was August 4th.

CONSTANTINE ALEXANDER: August 4th. I'm sorry, August 4th it became clear that this wasn't going to happen. And on August 11th you filed your appeal.

GEORGE KENT: Yes.

CONSTANTINE ALEXANDER: Which is the case before us tonight. So your position is is that the 30-day period really should start to run from when you knew it became a fact that the Building Commissioner's decision was final. Until that time, there was a dialogue going on. Mr. Greenup was aware of the dialogue. So he wasn't prejudiced by going ahead and building not knowing what was going on. And so you have acted diligently. You haven't lied in the bushes and therefore you're saying to us we should consider the case tonight on the merits. Whether we agree with you --

GEORGE KENT: Yes.

CONSTANTINE ALEXANDER: -- is a question we'll get to.

GEORGE KENT: Yes, sir. That's my position that what I am appealing was the information on the 4th of August that the earlier statement that the Building Commissioner agreed that the first floor shouldn't be raised at all was revised within the city. And the way he communicated to me indicated that nothing would be done at this time. And that communication from the 4th of August is what I appealed with the appeal filed a week later.

CONSTANTINE ALEXANDER: Thank you.

Questions from members of the Board at this stage?

BRENDAN SULLIVAN: So that the initial conversation with the Commissioner you received an answer that would not have triggered an appeal?

GEORGE KENT: That's correct. He told me the first floor should not be raised at all.

BRENDAN SULLIVAN: Right. Okay.

CONSTANTINE ALEXANDER: That's what I was trying to point out.

TAD HEUER: Is there anything in the Building Permit as issued on June 11th that is inconsistent with the ultimate answer you received on August 4th? In other words, is that permit the same and the Commissioner really said I'm not doing anything to that Building Permit?

GEORGE KENT: It wasn't so much that he wasn't doing anything to the building permit, but that he was not doing anything to emphasize to Mr. Greenup that in fact he couldn't have floors raised where the doors are, because if you raise the floors where the doors are, the doors don't work. They open in. If you have a floor -- a door here and

you raise the floor behind it, you can't open the door, you can't get in and out of the house. That was the point I was trying to make that we shouldn't be constructing a higher floor in the area of the doors given that there's a requirement for the exterior of the house to look like the 2007 plans. Doors, four doors to the outside from the first floor, they all open in. If you raise the floor behind them, it doesn't work. Sooner or later that's going to get ripped out. It ought to be done sooner.

BRENDAN SULLIVAN: Okay. So going back to your original question on timely filing of the appeal? Okay.

CONSTANTINE ALEXANDER: Yes. Further questions? You still have an opportunity to ask questions. You want to hear Mr. Greenup first and then you want to ask more questions or not?

TAD HEUER: I guess and I apologize

because I'm not understanding completely. Has anything been changed in the Building Permit issued on June 11th? Is that permit entirely in every word still in effect without any change from the Department?

GEORGE KENT: Yes.

CONSTANTINE ALEXANDER: From my understanding, yes.

TAD HEUER: So it's only an interpretation from the Department as to what the permit allows him to do that's been created?

CONSTANTINE ALEXANDER: No, what happened is -- correct me if I'm wrong, Mr. Kent. Is that Mr. Kent took the position that the Building Permit as granted was as consistent with the plans that we had previously approved by this Board. And therefore the Building Permit should not have been granted in the form that it was granted.

TAD HEUER: Right.

CONSTANTINE ALEXANDER: And the issue -- the reason wasn't consistent, it's a height issue. And that dialogue went back and forth. And on August 4th it became clear to Mr. Kent that Mr. Singanayagam was not going to change his Building Permit.

TAD HEUER: So what is the issue about the exterior not changing and the floors being raised or not raised, when did that occur?

GEORGE KENT: That existed. That's what's there. The plans that show a building height in the new plans that were created in 2010, are in a couple of cross sections. And they -- none of those cross sections go through a door.

TAD HEUER: Okay.

GEORGE KENT: I was trying to get out ahead of the problem that if he wants to build a floor higher where there aren't doors, that doesn't affect the outside, but if you -- if

you do that same construction where the doors are, that's what creates a problem. So, literally there's not a problem with plans unless you say that those couple of cross sections are applied in the entire first floor as constructed in the same manner with the floor raised.

TAD HEUER: Okay.

GEORGE KENT: So if the floor's raised behind the doors which you can't tell whether it's going to be or not, and I was trying to get somebody to say the floors where the doors are can't be raised like that.

TAD HEUER: Right.

BRENDAN SULLIVAN: Your front door, you open up your front door and you step into an entry foyer. If that entry foyer is raised five inches then something's got to give.

TAD HEUER: But that's, I guess when we hear from Mr. Greenup, if he wants to build

a house with doors that enter into areas that don't exist, that's his right.

CONSTANTINE ALEXANDER: That goes to the merits. That's the point I was trying to make earlier, too, as well.

BRENDAN SULLIVAN: Right. That's another issue.

CONSTANTINE ALEXANDER: Let's wait on that one.

TAD HEUER: Okay.

CONSTANTINE ALEXANDER:
Mr. Singanayagam, do you want to add anything to what Mr. Kent --

RANJIT SINGANAYAGAM: The 30-day appeal?

CONSTANTINE ALEXANDER: Talking about the appeal.

RANJIT SINGANAYAGAM: It's a legal issue that I cannot speak for.

CONSTANTINE ALEXANDER: Okay.
Ma'am, I saw your hand up.

DEBRA MASTERSON: To the procedural issue or are you taking comments?

CONSTANTINE ALEXANDER: Would you please come forward.

DEBRA MASTERSON: My name is Debra Masterson and I'm an abutter.

CONSTANTINE ALEXANDER: Would you please come forward.

DEBRA MASTERSON: So, I live at 53 Foster Street.

CONSTANTINE ALEXANDER: Yes.

DEBRA MASTERSON: On the other side of Foster Place. So I have wanted to speak to the procedural issue.

CONSTANTINE ALEXANDER: Yes, please.

DEBRA MASTERSON: Which I'm lawyer also, and my office is in Cambridge. But I don't specialize in land use.

CONSTANTINE ALEXANDER: Neither do I.

DEBRA MASTERSON: But I do have some experience with regard to Appeals Court cases and not SJC cases. And my experience is that they're not precedential. They're persuasive. So I would suggest that perhaps it makes sense to hear the merits, because I think that it's within your discretion to go forward. So I would urge you to do that. I would say that I think it would be inappropriate to dismiss this just on purely procedural grounds.

CONSTANTINE ALEXANDER: Let me take issue with that. I think we may not dismiss this case on procedural grounds because of Gallivan. But we certainly can take the position that the case has not been timely filed. So I think we have to reach a decision on that.

DEBRA MASTERSON: Well, okay.
But --

CONSTANTINE ALEXANDER: And if we do

favorably to Mr. Kent, then we will hear the merits. But I don't think we can get to the merits. I want to be very clear. This is an important case from a procedural point of view and I want to get it on the record.

DEBRA MASTERSON: Right. So, it sounds like it's a two part -- well, just as to Gallivan, I would say it's persuasive. But as to whether or not it's been timely filed, I would say that I think that it has been because I don't think he really knew or should have known. He could not have been charged with that until he knew for sure what Ranjit's position was. And to me that didn't take place until August 4th so your 30 days should start from then.

CONSTANTINE ALEXANDER: Thank you.

DEBRA MASTERSON: Thank you.

CONSTANTINE ALEXANDER: Ma'am.

You'll have a chance, Mr. Greenup.
Don't worry, don't go away.

JOHN GREENUP: Thank you.

MARY ELIZABETH FIELD: Hello. My name is Mary Elizabeth Field and I live at 39 Foster Street. And you're talking now about the permit.

GEORGE KENT: Just the procedure.

CONSTANTINE ALEXANDER: Not on the merits. I don't want to hear about whether the permit was properly issued or not. The question is whether Mr. Kent timely appealed Mr. Singanayagam's decision to grant the Building Permit.

MARY ELIZABETH FIELD: Well, I think so definitely because he didn't -- he wasn't alerted -- we have gone to see Mr. Ranjit quite a few times, and we've been telling him and asking about problems we've had with the house at 45. And we knew about Mr. -- excuse me, Kent's appeal. And Ranjit has known about Mr. Kent's appeal. And nobody has said ever that he did it with a time frame that

was gonna be too -- that the procedure was too late. Nobody has ever said that well, maybe there's going to be a question. Maybe he's not going to be able to come before you with the appeal.

CONSTANTINE ALEXANDER: We're going to get to that in a minute. Thank you.

But I think the record should be clear that Mr. Kent and the neighborhood knew about the issuance of the building permit on June 11th. What you may not have known --

MARY ELIZABETH FIELD: We did not know.

CONSTANTINE ALEXANDER: Well, Mr. Kent knew. He was down there right away. But, the question is whether knowing of it, you didn't necessarily know you -- you may only have 30 days to.

MARY ELIZABETH FIELD: That's what I meant.

CONSTANTINE ALEXANDER: -- to make

your appeal. That's a separate issue which we'll get to.

MARY ELIZABETH FIELD: May I say one thing?

CONSTANTINE ALEXANDER: Only on the procedure not on the merits. You'll have your opportunity if we say this appeal has been timely filed.

MARY ELIZABETH FIELD: Then I can come back? Because I have a few questions. Thank you very much.

CONSTANTINE ALEXANDER: Thank you. Is there anyone else who wishes to speak in support of Mr. Kent's position that the appeal has been timely filed?

(No response.)

CONSTANTINE ALEXANDER: The Chair notes no one else wishes to speak in favor or support of Mr. Kent's position.

Is there anyone in opposition to Mr. Kent's position? Mr. Greenup. For the

record.

JOHN GREENUP: Excuse me, I'm John Greenup from 45 Foster Street. I added -- you'll see I put a letter in the file today on that.

CONSTANTINE ALEXANDER: Yes.

JOHN GREENUP: And I have copies for people who would like a copy of that.

Essentially in analyzing the Gallivan case there are two points to be brought up:

One is is there a Zoning issue here? Mr. Kent has said here on the record that he's not claiming there is a Zoning issue. Therefore, if there's no Zoning issue, the Board of Zoning Appeals has no jurisdiction to hear this case. That is quite clear.

There are two cases. There's a case on that which I cite which is Carsonson versus the Cambridge Board of Zoning Appeals which clearly states that in the holding.

CONSTANTINE ALEXANDER: I think

there is -- if I may just speaking for myself, there is a Zoning issue here. Despite what Mr. Kent may have said, he's not a lawyer. The fact of the matter is that the gravamen of the issue here is that a building permit was issued which Mr. Kent has said and is saying does not comply with our Zoning laws because it is inconsistent. The plans that are part of that Building Permit are inconsistent with the plans approved by this Board. So there is a Zoning issue.

And you can, members of the Board may disagree with me. But in my judgment it is a Zoning issue.

JOHN GREENUP: All right. Well, he has not specifically stated in his application for the appeal what the exact part of the Zoning Code has been violated. There's no reference to what that is. There's no reference to him claiming a Zoning violation to Ranjit. He says he has not.

There's no -- we don't see a denial letter from Ranjit as required by the statute. There's none of that in the file.

There's some procedural things he's failed to do to claim a Zoning violation.

The second, even if the Board finds there's a Zoning violation or there is a Zoning issue here, Mr. Kent's appeal is not timely because it was filed within -- outside of the 30-day limit. The Gallivan case is quite clear that with actual knowledge of the issuance of the permit, he has 30 days to appeal any Zoning issue that occurs in the permit. And it's just absolutely stated here in the holding by the Gallivan case.

CONSTANTINE ALEXANDER: Let me ask you a question, sir. Under that argument, that point, Mr. Kent had to file his appeal by July 11th, 30 days from June 11th.

JOHN GREENUP: Yes.

CONSTANTINE ALEXANDER: He filed it

30 days later than that, August 11th.

JOHN GREENUP: Yes.

CONSTANTINE ALEXANDER: What happened during the 30 days between July, in terms of the construction on this project, you, of course, were aware of Mr. Kent's visits to Mr. Singanayagam. So you were not completely -- it wasn't a situation where you were proceeding in good faith and were blind sided.

JOHN GREENUP: I wasn't aware of his claims until after --

CONSTANTINE ALEXANDER: What did you do, though, between -- there was substantial construction between July 11th and August 11th? Were you substantially -- I mean the Gallivan case, the person who was building the structure completely was building it off -- it was a prefab house, off site, completely finished the structure. Or virtually finished the structure. Not

knowing that this petitioner in that case was going to emerge from the woodwork and bring a complaint. And so the Court was very much influenced by the equities in favor of the person in your capacity. Because you were sort of blind sided. Were you blind sided in the 30 days? What happened in the 30 days that disadvantaged you that should now allow us not to consider this appeal?

TAD HEUER: Before you answer I'll state that I personally think that that's absolutely immaterial to the case but go ahead.

JOHN GREENUP: I would also say that that's immaterial to the case. Nor do I believe that there's an appropriate answer at this point.

I clearly at that point made an attempt to notify the neighbors. If you'll see in the letter that I have put forward here, immediately upon receipt of the permit, the

same day, I put a notice up on the side of the building so that everyone could see, that said the permit's had been issued. I tried to give notice to every person who was interested. You'll see that there's an e-mail that I sent to Mr. Kent, the Fields and all the other neighbors that had previously had any concern about this property.

Mr. Kent replied to me by e-mail that he acknowledged the permit had been issued. He asked me to give him a copy of the plans, which I did within one or two days after the issuance of the permit. So, Mr. Kent had timely notice, actual notice of the issuance of the permit. He had plans in his hand within a week of the permits being issued. So he had adequate time to go and consider and file an appeal should he have seen that there was a potential Zoning issue there. He failed to do that. He simply did not file the appeal that was required by the statute.

CONSTANTINE ALEXANDER: You heard his explanation as to why he didn't file.

JOHN GREENUP: It doesn't matter. The issue is quite clear, he must file an appeal within 30 days.

CONSTANTINE ALEXANDER: Okay. Thank you.

Is there anyone else wishing to speak in opposition to hearing this appeal tonight?

(No response).

CONSTANTINE ALEXANDER: The Chair notes no one else wishes to be heard on this matter.

Is there anything further you want to add before we close public testimony?

GEORGE KENT: I'd like to say two things:

One is that Mr. Greenup was aware that I was in opposition to this. I was trying to work it out with him. We had a succession of e-mail exchanges on the 19th of July.

Again, I hadn't been able to see the files of the old building permits to be able to determine that there was this problem with the new plans. What he provided me was the new plans from this year. And it wasn't until July 7th before I had access to those older plans and records to be able to compare them to what had just been issued.

We then had an e-mail exchange. And on the 19th of July we finished the discussion. And the finish of that discussion he asked me where are we? And I told him we have a fundamental disagreement. You think there's no problem if you raise the level of the entire first floor, and I think there is a problem. So he knew on July 19th, 12 days after I finally was able to make a comparison, that this problem existed. Now, no, I did not file within 30 days of June 11th because it wasn't until about a week after I had access to the plans that I had been able to

figure out that the problem was there. And by then I was talking to the Building Commissioner and to Mr. Greenup.

CONSTANTINE ALEXANDER: You made that point. Thank you.

Mr. Greenup, I don't want to get into he said or she said.

JOHN GREENUP: I'd like to rebut for a moment, please.

CONSTANTINE ALEXANDER: If you're rebutting what he told you, I don't think it's necessarily relevant to the disposition of this case.

JOHN GREENUP: I think one thing he did say is quite relevant. You made a statement to me that I had notice of what he was doing within the 30-day period. And he has just stated to you that in fact I did not have notice until July 19th, which is after the 30-day period.

CONSTANTINE ALEXANDER: All I was

trying to elicit was whether to what extent have you been prejudiced by the fact that this appeal was filed on August 11th rather than July 11th. That's the only thing I was trying to elicit.

JOHN GREENUP: I've been prejudiced by the fact that his appeal has not been filed in a timely manner, within 30 days that is required by statute. And --

CONSTANTINE ALEXANDER: Not responsible --

JOHN GREENUP: -- and he did not give me notice of his issue until after the 30-day period.

CONSTANTINE ALEXANDER: Okay.
Thank you.

You've already had a chance to speak. Are you going to add something new? I want to move this case along.

DEBRA MASTERSON: I would just like to suggest --

CONSTANTINE ALEXANDER: Come forward again, please.

DEBRA MASTERSON: It's Debra Masterson from 53 Foster Street.

I would just like to add for the record that I would submit to you that the 30 days should be -- that period was stayed by the fact that he was waiting for an opinion from Ranjit --

CONSTANTINE ALEXANDER: I understand. That's the point --

DEBRA MASTERSON: And also because the city file was lost. He had -- he was denied access to relevant information because that file could not be produced within the 30-day period.

CONSTANTINE ALEXANDER: Thank you.

TAD HEUER: July 7th is within 30 days of June 11th, am I correct?

CONSTANTINE ALEXANDER: Say it again, please.

TAD HEUER: July 7th is within 30 days of July 11th? Is my math correct?

CONSTANTINE ALEXANDER: That sounds right, correct.

TIMOTHY HUGHES: Yes.

TAD HEUER: The file was available although delayed within 30 days; is that correct?

GEORGE KENT: Yes.

TAD HEUER: Thank you.

CONSTANTINE ALEXANDER: Any further questions from members of the Board at this point on the procedural issues?

I'm going to make a motion and it can be voted up or down. I'm going to move that the Petitioner's appeal was timely filed.

That promptly after the issuance of the Building Permit in question, the Petitioner had a number of discussions with the Building Commissioner challenging whether the Building Permit at 45 Foster Street had been

properly issued. Within 30 days after it became clear to the Petitioner that the Building Commissioner would not withdraw or modify the building permits in question, which is 60 days after the building permits had been issued you filed your appeal. This is not a situation where the Petitioner did not actively pursue his right allowing Mr. Greenup to put himself in an economic disadvantage.

To require persons such as the Petitioner to an appeal within 30 days and pay a filing fee, when it is not certain that an appeal or even be necessary, would in my judgment be inequitable, particularly when there is no countervailing inequities in the case of the holder of the Building Permit. And it creates a trap for unwary abutters who are unlikely be aware of the Gallivan case.

I wish to make it clear that this Board

is not creating a hard and fast rule as to when appeals of decisions by the Building Commissioner must be filed. We should look the reasonableness of the actions taken by all interested properties in equities and inequities in allowing an appeal to go forward or not.

I think in this case in my judgement I so move that we should allow this appeal to go forward.

TAD HEUER: Mr. Chairman, is that a motion?

CONSTANTINE ALEXANDER: That's a motion. With the exception of the first sentence, everything else is explanation for the basis of the motion. So the record is clear that we have reasons for if the motion is carried, why we adopted the motion.

TAD HEUER: Can I speak to the motion?

CONSTANTINE ALEXANDER: Of course

you can.

TAD HEUER: I understand that the Gallivan case may or may not be binding precedent. I believe it's certainly persuasive. The case law does say that when you have no notice and you have no opportunity of notice, than the 30-day period is tolled. But the Supreme Judicial Court has said on I would gather hundreds of occasions that statutes of limitations are to be construed strictly, and that a failure to meet statute of limitations bars the case from being heard.

Here we have a 30-day statute of limitations. I would point to the Canton case decided two years ago by the Supreme Judicial Court in which the Petitioner sought to bring an action well after the 30-day period because the requirement of the statute in that case was an environmental case, said you must file within 30 days for the first

permit. They said it was the first permit they cared about which issued well after the first permits of the project. And the Supreme Judicial Court said no, you need to file within the time period for that first permit which is 30 days. The 30-day period is binding. It's a statute of limitations and those are construed strictly.

Regardless of the facts from the Canton case, the Petitioner said we didn't care about that first permit. They actually liked the first permit. The Court said it doesn't matter, you need to sue on that permit even if you have no reason to do so to preserve your rights.

Here, I think there is absolutely no distinction where the Petitioner knew of the issuance of the permit. The 30 days ran. If he wishes to speak with the Commissioner, he does so at the risk that his 30 days will run. I don't believe that any injury to the

Petitioner is relevant or injury to the permit holder is relevant whatsoever. It's I 30-day statute of limitations. I point out in the Canton case that there was no injury to the developer. The developer actually I think at this point, three years later, still hasn't put a shovel in the ground. Yet nevertheless the 30-day period is jurisdictional and must be met. It may be duplicative that you file an appeal in the hopes that it never has to be heard. We see that every week. People file appeals and say -- or they file motions and variance requests, and say we're actually going to hold this in abeyance because we hope we never have to get to it. And the same type of prophylactic action is what the statute requires here.

That the Petitioner files an appeal within 30 days, it's not needed because it's resolved, then that's what happens. But if

it is needed, it's filed within the 30 days and there's proper notice to the permit holder. Otherwise we create a situation in which permit holders could say that at any time they will have a challenge brought against the project that they're constructing, and it's simply not the principal formality of that statute of limitations is meant to create. I would strongly oppose this motion.

CONSTANTINE ALEXANDER: Does anyone else wish to comment?

BRENDAN SULLIVAN: To me I think the July 19th date is the key date. When the conversation with the Commissioner, the Commissioner stated that he was going to satisfy his concern. And up until that -- well, from that date, on that date, there was no need for an appeal. I think he thought that his concerns were going to be satisfied. It was after that, subsequent to

that then the Commissioner revisited it, reversed his decision. And if that's what triggered then the necessity of the appeal in my reading of it.

Otherwise I understand what you're saying. But otherwise any permit that was issued and people are just rushing down and appealing the issuance of it, and I don't think that serves anybody's benefit. And that we may need it some day, you know. Of course, the appeal has to be somewhat specific, too, which is another issue as to the merits of the appeal. But as far as when does the gun fire, the starting date to me would be July 19th is the starting date.

TAD HEUER: I would say that the Canton case speaks to that and the appeal doesn't need to be brought but must be relevant in 30 days. It's nonsensical but it's the whole indiscretion of the court and I believe it's the correct one that applies

here.

CONSTANTINE ALEXANDER: Does anyone else wish to be heard?

Tim.

TIMOTHY HUGHES: As much as I would like to explore whether or not the Building Permit conflicts with what we agreed on at the Variance, I have to agree with Mr. Heuer. I think that the statute of limitations has run out.

CONSTANTINE ALEXANDER: Anyone else or do we put it to a vote?

I believe this vote would require a simple majority, not a super majority because it's a question -- it's a procedural question as to whether we should go forward and hear this case. So three persons' vote. Three in favor rather than four in favor to carry my motion. All right.

My motion is that we hear this appeal on the merits. The Petitioner should not be

dismissed on the grounds of failure to timely file the appeal for the reasons I have already stated.

All those in favor of hearing this case on the merits say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: One, two. Two in favor.

(Alexander, Sullivan.)

CONSTANTINE ALEXANDER: All opposed?

(Show of Hands.)

CONSTANTINE ALEXANDER: Three opposed.

(Hughes, Heuer, Scott.)

CONSTANTINE ALEXANDER: The case will not be heard on the merits.

GEORGE KENT: I just point out, and Mr. Heuer, as Mr. Sullivan said, you're asking that every single Building Permit would be appealed, because in 30 days you

can't figure it out.

(8:35 p.m.)

(Sitting Members: Constantine Alexander,
Timothy Hughes, Brendan Sullivan, Tad Heuer,

Thomas Scott.)

CONSTANTINE ALEXANDER: The Chair will call 9993, 13-15 Avon Street. Is there anyone here wishing to be heard on this matter?

For the record.

MARK BOYES-WATSON: Mark Boyes-Watson, Boyes-Watson Architect, 30 Bowes Street, Somerville.

GUY ASAPH: Guy Asaph, 29 Hopedale Street, Allston.

CONSTANTINE ALEXANDER: And you are also making an appeal?

MARK BOYES-WATSON: We are.

CONSTANTINE ALEXANDER: On the decision of the Building Commissioner.

MARK BOYES-WATSON: We are. Not something we like to do habitually. And I'm going to be quick, and I think this is gotten easier when it appeared when we submitted the appeal. In a sense we're going to simplify.

Let me give you a tiny bit of background and in a way purpose. I mean, obviously it's a project specific appeal.

I think it comes out actually of a larger set of issues with which we've been discussing with the Commissioner, with the Community Development Department, the Planning Board, and the most recently with the -- as they reviewed this appeal.

Relative really to, you know -- I know that the Board's very aware of the complexity of our Zoning Code. And in many ways the complexity comes out of a desire to make buildings both more interesting than they would be if it was not complex, and more tuned to the neighborhoods in which they sit if it were not more complex. So that it varies by Zone and by its encouragement of complex architectural elements. That we like to use those as well in our design work. And so we find that we are often in grey areas, that we

then have to work with ISD. We realized as we -- there's never a good time to sort this stuff out. And it's not quite clear where to sort it out. So -- but we decided on this project that we would start that process.

And so what we -- and so the appeal included several elements that we come across often that I think that most of which is we try to describe them both to Community Development, to ISD and to the Planning Board. You know, everybody sort of acknowledged they have to deal with the difficulties with these issues, but we also realized how incredibly difficult it was to talk about. We realize that we were going to be before the Planning Board all night and before you all night. So what we are trying to do now is take what we think are the simplest of those two issues and just ask the Board to review their decision about what is -- what are the rules regarding bays?

So it comes down to what? So this is 13-15 Avon Street? Is that right?

CONSTANTINE ALEXANDER: That's right.

MARK BOYES-WATSON: Yeah. And there are two aspects of the bays that I want to talk about.

One is they're being allowed to extend into a yard. And the other is -- which there's been sort of in other forums and discussing the forums, how large a bay can be. The second of which is not in the Zoning Code at all, but has been sorted out by interpretation. The first of which is very clearly within the Zoning Code and I'm going to deal with that first. So, the Zoning Code basically allows -- and I'm going to read this because I've read it a million times, that as follows:

The projecting eaves, bay windows, chimneys, balconies, open fire escapes and

like projections which do not project more than three and a half feet, and which are part of a building not more than 35 feet in height, may extend beyond the minimum yard regulations otherwise provided for in the district in which the structure is built.

So again, a projecting -- I'm just going to highlight this for you. It actually revolves around what projecting means, this interpretation. Projecting. Is it projecting eaves, chimneys. So you're thinking of the way a chimney projects. Bay windows. So, bay window, chimney, bay window. Because what's happened is -- and I don't know if it's always been interpreted this way, but right now it's interpreted by the ISD that that word -- it says later on may extend beyond the minimum yard, not project beyond the minimum yard but extend beyond the minimum yard. That although you may have a bay to that extent that extends, it must also

project. It must project vertically. It must not have a foundation.

Which you say well, what's so irritating about that? Except that almost all bays in Cambridge, they're on older houses, have foundations. It's an unusual condition. I'm not going to hazard a guess as to how unusual, but it's not never. Normally they do have bays. So that if you have a historic house, it may have -- it probably has a foundation under its bay. So even though that bay might be meeting that regulation, you actually have to take that foundation out to make it comply. You know, if you have a house in a Res B area is 15 feet back from the street, you had an old historic bay projecting into the yard, but it had a foundation. It wouldn't be exempt by this rule because of the ruling that it must project in terms of a cantilever, not just extend. What I -- so I -- and I firmly

believe that because of the way that the Zoning Code was written, that when they wrote that, they intended -- they didn't intend to preclude the foundation.

So what we want to ask the Board is do they think that's what's intended and desirable or should -- or does it mean what I think it says when it says bay windows, chimneys and like projections may extend. Does it mean the foundation's not part of that? As long as the thing is not more than three and a half feet out, an architectural element may extend into a yard. So that's No. 1.

Shall I rollover? Because we're only doing two aspects of bays. Do you have any questions or should I --

CONSTANTINE ALEXANDER: Do members of the Board have any questions yet at this point?

Keep going.

MARK BOYES-WATSON: Then the second part -- and so in this specific circumstance which gets to be -- so on this building there's actually, in the rear lot -- you see, I'm going to speak to this bay.

CONSTANTINE ALEXANDER: That's the rear lot?

MARK BOYES-WATSON: Yes.

Avon Street. Rear yard. So actually this house has, you may be familiar, has from the last hearing has a very large rear yard. And here's the rear facade here. And we have this bay here. And, again -- by -- and this is sort of in the grey area of interpretation. But and I'm going to quickly show you an elevation to explain. This comes, this comes about because clearly there's a problem that if you make a huge bay, you can kind of subvert the requirement for the setback.

So the Building Department has come up with the rubric that a bay in that definition

shouldn't be more than 25 percent of the facade of which it sits. So you can't have a huge bay.

The interesting thing about this design is that what I illustrate in here is the purple thing is the bay as we had designed it. The hatched thing is the -- the plane, this plane here that's closest to the setback line, that sits on the setback line. And so, what the Building Department in this specific case has ruled, is that this purple is more than 25 percent of that red hatched area. So, see that? It's 32 percent. So actually precluded that bay. We actually removed this top part so as to make it smaller and comply. So, but the interesting thing in this case is that the whole facade actually goes over here. And in the ruling that the 25 percent is of only the red hatched area, we're actually being penalized for setting back this piece about three feet already.

Because we're actually -- ironically were that closer to the property line, closer to the setback line, ironically the bay could get bigger. So you've got a funny situation where you actually being --

CONSTANTINE ALEXANDER: Looking at this letter from Mr. Singanayagam, I didn't see any issue regarding the size of the bay. I thought the issue was simply is that you have a bay with a foundation that projects more than -- projects into the prescribed rear yard.

MARK BOYES-WATSON: Yeah --

CONSTANTINE ALEXANDER: So I'm puzzled why we're talking about this right now.

MARK BOYES-WATSON: Yeah. I'm referring my letter to -- it's not specifically addressed in the Commissioner's letter, but it was in our appeal. It wasn't in his -- it's not specifically addressed in

what he reviewed.

CONSTANTINE ALEXANDER: Even in the letter from you, sir, that's in our file, or e-mail I should say, didn't talk about the size of the bay window other than the projection. So I'm a little puzzled why this issue is before us right now.

MARK BOYES-WATSON: I only have the marked up copy is the one I sent. Do you have in your file my letter to the Commissioner?

CONSTANTINE ALEXANDER: I'm looking at the e-mail -- Mr. Asaph is it?

GUY ASAPH: Yep.

CONSTANTINE ALEXANDER: -- sent. Which is in our file. And it says, the relevant part -- a third example is the interpretation of the definition of a bay window. The Zoning Code says -- and it quotes the section that you quoted. It's by the way 5.24.2.

MARK BOYES-WATSON: Right.

CONSANTINE ALEXANDER: And it goes on, the Building Department has determined that a bay is not a bay if it has a foundation. This interpretation is causing problems.... And that's it. There's no discussion -- and then he goes on we're going to challenge this, or not challenge, but seek a determination. So the question I thought we were looking at tonight is a bay window that has a foundation, you get the benefit of 5.24.2.

MARK BOYES-WATSON: (Inaudible.)

CONSTANTINE ALEXANDER: Well, we didn't -- the issue about the size of the bay window --

MARK BOYES-WATSON: You weren't expecting that.

CONSTANTINE ALEXANDER: I didn't think it was an issue. Maybe -- this is the first time I've heard about it until right now, that's all.

BRENDAN SULLIVAN: I mean, it

appears to be clearcut. That it's either on that plane or it's not on the plane. In other words, you have an existing plane and the proposed bay exceeds that 25 percent number.

MARK BOYES-WATSON: Right. I mean, I think that though that the issue -- I actually agree with you. And I guess what we're getting into --

BRENDAN SULLIVAN: You may not like the answer but it's clearcut.

MARK BOYES-WATSON: Actually, the word plane isn't even there, and the language that restricts it isn't there. So, you know, again, it's one of those issues probably better to dealt with an amendment to the Ordinance that clarifies for you and for us.

CONSTANTINE ALEXANDER: All right.

BRENDAN SULLIVAN: They meet on Monday night.

MARK BOYES-WATSON: Right. Right. So given that, I think then --

CONSTANTINE ALEXANDER: The issue really is about foundation.

MARK BOYES-WATSON: The issue is about this foundation.

CONSTANTINE ALEXANDER: The bay with a foundation is titled to the benefit of 5.24.2.

MARK BOYES-WATSON: Right.

CONSTANTINE ALEXANDER: Right. IN so many words.

MARK BOYES-WATSON: Right.

CONSTANTINE ALEXANDER: In so many words.

MARK BOYES-WATSON: Right.

CONSTANTINE ALEXANDER: And your belief is it is. That the fact that it has a bay window has a foundation, it should be irrelevant. And that 5.24.2 says you can have a bay window as long as you don't project more than three and a half feet --

MARK BOYES-WATSON: Just like you

can have a chimney --

BRENDAN SULLIVAN: If you go back to historic, and you raise the thing about older and obviously historical correct houses that have a foundation. The reason for that is, Mark, is because the floor usually extends, becomes part of that bay, becomes liveable space as opposed to a chimney which you can't occupy it. It's an attempt again -- it's dead space. It's mechanical space. It's not useful other than for the benefit of exhausting whatever. So I see a clear distinction between a bay window, you know, somebody pulling out say a couple of double hung windows and putting in a bay or a bow window for added shelf space as we get from time to time in a kitchen. Probably ones above the sink for a little more shelf space as opposed to putting in a so-called bay window with a foundation. And historically that's because the floor area has extended

all the way to that exterior wall.

So, the tying that together with some of the other language in the Ordinance, I don't think they correlate at all.

MARK BOYES-WATSON: But it's interesting because -- I know that there are those kind of bay windows that have a sill height and it doesn't reflect floor area and whatever. This provision isn't actually like that. This provision allows the floor to go out. It allows -- you have to count it as floor area, but it doesn't prohibit the occupancy of a bay.

CONSTANTINE ALEXANDER: Here's my dilemma, putting the chimney aside, the situation because I think that's special, and I'll get to the reasons why it's special. You start with your basic tables in Article 5 which have your yard requirements. And there's no reference to -- except the yard requirement could be reduced to a bay window

that doesn't project more than three and a half feet. It doesn't say that. Separately there is 5.24.2. But most of the areas, things covered by that, are basically architectural parts of a building that project into the rear yard, but they don't have the same massing of the structure itself. And so, I thought from reading it, I might be dead wrong, but the basic reasoning for 5.24.2 was to protect against technical inadvertent violations of the Zoning Code because you have something that sticks out into the yard, although it doesn't have the massing of the building itself. You want -- once you put a foundation under a bay window, it strikes me, that you basically are increasing the massing of that bay window. You're ascending the side of the building on which the bay is located closer to the lot line, and within the prescribed rear yard.

Therefore, I don't see 5.24.2 being

applicable because of the foundation. It just changes the massing, and that is a sufficient to say 5.24.2 doesn't apply. You fall back to the basic rules. And the basic rule you're not entitled to -- I mean, basic rules are such that the Commissioner is right. I mean, that's how I look at it. I'm willing to be persuaded.

MARK BOYES-WATSON: Right. I mean, and I think that's a thoroughly logical. The only thing is that if you, if you -- with the way that this is written, you can actually have substantial bays. They could go three stories high. Come out three and half feet, be 15, 20 feet wide if they're on a big facade. That's allowed. So, the fact that -- and actually, they could be just five inches above the ground. So, in terms of massing, it's exactly the same. It's -- you know, that's allowed. So it just seems to me --

TAD HEUER: Why don't you do it then?

MARK BOYES-WATSON: Sometimes we will. But, and that's not -- you know, we're not really arguing for what we can't -- obviously we think we do everything we can. And we just -- we're not fighting with the ISD. This in the sense that in all of these other ones, we all just want good clarity, better crisper understanding, and also make sure that the provisions are working for the city. Because we don't need to -- we don't need to win this argument with you today. And we don't need to -- we didn't want to put the Planning Board in a difficult situation. We don't actually have that interest. The interest that we have is sort of, is to be able to design good buildings that the ISD and we agree comply with the Zoning Code.

CONSTANTINE ALEXANDER: But, Mark, we have clarity today. The Building Department has a rule. It's a very clear

rule, you've got a foundation under a bay. You're not entitled to 5.24.2. You may not like it, other people may not like it, but we do have clarity.

Now your appeal today would have to be that that clarity is wrong. Just a clearly wrong interpretation of our Zoning By-Law. But if we can't reach that conclusion, then the recourse is to go to the Planning Board and get the Zoning Board changed.

MARK BOYES-WATSON: Absolutely. And I'm still hoping to persuade you. Actually the reading is wrong. It's not what's intended.

TAD HEUER: What's our standard? Are we de novo on this?

CONSTANTINE ALEXANDER: That's a good question. I thought about that myself. I think the general common law is that we should give deference to the determination of the administrators who work with the code, in

this case, the Zoning Ordinance day in and day out. I don't think we're bound by it. That's why there's an appeal right. But I do think that there is an element, I think the courts recognize, that we should give deference to it. But we can decide that deference be nice, but we don't agree with. It's just dead wrong. I don't know how to -- I can't put it in any more concrete than I think deference to and taken into account the determination of the people who work with this code day in and day out. So it's not quite de novo but it is -- we're not bound by what they do. I don't know exactly.

BRENDAN SULLIVAN: It has to do with fair and equitable interpretation and procedure that they follow on a regular basis.

CONSTANTINE ALEXANDER: The question is -- I was wrestling is it standard -- are they clearly wrong? If we

can't say they're clearly wrong, then we have to uphold them? I don't think that's what the law is. But never was presented with anything to know the answer to that.

TAD HEUER: Is it arbitrary and capricious as in Chevron? Is it, I mean --

CONSTANTINE ALEXANDER: It's basically administrative law. It's almost 40 years since I was in law school and I learned about administrative law.

TAD HEUER: Yes, Chevron.

CONSTANTINE ALEXANDER: The law as I understand it, you give deference which you're not bound. And I don't think there's a rigid standard like clearly wrong. Or arbitrary and capricious. I guess what I'm trying to say in a very complicated way it is a modified de novo review.

TAD HEUER: And I guess the reason I'm asking is because this obviously came up in a Variance application.

MARK BOYES-WATSON: Actually what -- it wasn't subject -- yes, it was subject.

TAD HEUER: Yes. And I think as the motion as it was framed, we took out the request for foundations with the bays because it was making some people uncomfortable, and we thought that that might be a way to get more people in the neighborhood on board with the proposal. The proposal ultimately failed. But it seems that that was the right place to ask for it. You say the Commissioner doesn't believe this, we go to a Variance. We're asking you to vary from the interpretation that ISD has given in the code, and we want a Variance from that to allow foundations under these bays because they're protruding into the setback and they're intruding into the setback. So, it seems proper that we do that as a request for a Variance. We take anything under request for a Variance. And

decisions were made to include it and not include it.

Here I think if the Commissioner has made a determination that on balance seems to be a reasonable one -- I mean, we can have alternative interpretations that there's, you know, is a bay window more like a chimney or is it more like a projecting eave? I think I'd probably lean more toward it's like a projecting eave than a chimney. And that the intent of the Ordinance was, as the Chairman has said, to kind of deal with things that inadvertently project into a setback but have no purpose for increasing a massing in the setback in those situations. I think we wouldn't want to be in a situation where someone decides to put in a bay three stories up and says well, I have a right to go build a foundation under it. You know, that kind of seems to be against what the code is looking at there.

CONSTANTINE ALEXANDER: I want to address one thing on the chimney because I wants to get back to that.

TAD HEUER: Oh, sure.

CONSTANTINE ALEXANDER: I think chimney is different than the bay window. Chimney is generally it's a mechanical. Under our Zoning By-Laws we treat mechanicals a lot different than everything else. We allow mechanicals to go more than high limit. So I think the fact that a chimney protrudes into the side yard is not the same as an eave or a bay window or the like. So I don't get hung up about the chimney being part of the list of items in 5.24.2. But beyond that, I think I might -- I concur with what Mr. Heuer has said, and what I've suggested so far. Is that I just think there's a difference in kind between a bay window with a foundation and a bay window without a foundation. And that I think is what the Building Commissioner

is -- how he is interpreting the Zoning By-Law and I don't find it completely wrong. I don't find it wrong at all. I think it is a one way of dealing with it, and it strikes me as okay. I mean, it may not -- it may come out differently, and I would support that as well. But I'm willing to defer to their expertise and their experience with the buildings in the City of Cambridge.

MARK BOYES-WATSON: And I hear you. I think that when we went to the Planning Board, I think the Planning Board wrote a letter regarding this.

CONSTANTINE ALEXANDER: I'll get to that.

MARK BOYES-WATSON: Yeah, yeah. So I fully understand that the Board would ordinarily would have to have a reason to overturn the Building Commissioner. A very good reason to have to.

CONSTANTINE ALEXANDER: No. A

reason.

MARK BOYES-WATSON: And I think that, you know, as with my other five or six items, depending on who's counting, maybe this will have to be slotted into the process that you are looking to hear in the Planning Board letter I guess.

CONSTANTINE ALEXANDER: Further questions or any questions at this point? I'll open it to public testimony.

Is there anyone here wishing to be heard?

GUY ASAPH: May I be heard?

CONSTANTINE ALEXANDER: I'll give you a chance.

GUY ASAPH: Okay.

CONSTANTINE ALEXANDER: Unless it's something you want to say right now. I'm not going to cut you off.

GUY ASAPH: Yeah -- no, just another fast it of it.

CONSTANTINE ALEXANDER: Go ahead.

GUY ASAPH: I think in the original hearing a lot of the opposition when you think bay in a setback, that you're getting something that you shouldn't have. And there's opposition to it. Because it's too big and it -- somehow it doesn't count.

And I know in speaking with some of my neighbors afterwards, there was confusion that the bays don't count in square footage. No, they count in square footage.

I guess the only point that I wanted to make was in the architecture and in the buildings that we want to do, and this is a perfect example, if it's trying to keep consistent architecture both with the street and with the existing building that we're adding on to.

On the street there are ten houses with bays. Eight of them have foundations under those bays. In this particular house, as I

said, I'm not trying to, you know, take a second bite on the Variance, it was more to clarify this issue going forward. But when we first submitted our application, we had thought that the bay on the front of this house was in the setback by an inch or two. Before we got to you we had it surveyed and determined that it wasn't. But the -- I think the unintended consequence of this issue of foundations under bays, was that if that front bay on this house was one inch into the front yard setback, then on the main facade that we're trying to protect that the whole street, we would have ripped out a granite foundation under a grand bay on a nice house. And just by pulling that granite foundation out, it was now conforming. And surely that seems to me not what the Planning Board or the Zoning wants to encourage or intend in the build environment. Where we're trying to make our new buildings more,

you know, similar to the existing buildings. When in fact an interpretation the other way on this could accomplish exactly the opposite. That historic buildings get bays ripped out from under them in order to realize their development potential.

TAD HEUER: But I think that is just another argument for why the Variance is the right approach. Variances are for when you come to us and say it's completely Nonsensical that this would apply to this building. Look at all the other buildings in the street. They all have foundations under their bays. It would make no sense. An economic and visual hardship to come in and tear out a granite foundation for a one inch overage into the front yard. I mean, that's what we do most of the night. We come in and have those conversations and we say yes, that's true. I think I would have been -- I think I was sympathetic then. I'm

sympathetic now. I voted for the petition before. That that is a legitimate request in the Variance mode. But even if I agree with you and you see from my previous vote that I probably do, I also think that the Commissioner is entitled to deference if he's not plainly wrong in his interpretation of the code. I don't think he's plainly wrong. I may disagree with him, but it's not my job sitting here to be disagreeing and imposing my belief unless I think he's just made an error. And I don't think he's made an error. I think he has an interpretation on which reasonable minds can differ.

CONSTANTINE ALEXANDER:

Mr. Singanayagam, do you wish to add anything?

RANJIT SINGANAYAGAM: Just the bay window, there's no definition for bay windows in the Ordinance.

CONSTANTINE ALEXANDER: Right.

RANJIT SINGANAYAGAM: And we've always been putting that relationship -- the other reason is that once you put the foundation, the footprint changes. So that would be part of the main building rather than a prediction. That's my view. That's what I would say typically.

CONSTANTINE ALEXANDER: Thank you.

THOMAS SCOTT: And if the bay that you're proposing is part of the condition, part of the condition, couldn't you just modify the -- push the wall back so that the bay wasn't within the setback?

MARK BOYES-WATSON: You can sometimes. In this case it wouldn't work with everything else that's going on. And I think that -- because that's always true. You could do that for any -- those exemptions are recognizing that often the code actually and development pushes you against the limitations that it's crafted so you quite

often fill a site. So I think that's why you have -- but, yes you could always obviate that. If you were desperate to have a foundation, move your wall.

GUY ASAPH: I'm sorry, just because I went to the point that's not discussed, but believe me I don't want to take it longer. But exactly that point. Bring your building back and do whatever you want. I think the reason that bays were allowed was to create more interesting facade. If we weren't allowed to do something interesting with that facade, every building would be just a flat wall. So that's why they allow those bays to come out.

The question that we're not addressing tonight about the size of the bay, 25 percent of the facade, I mean, you have to, you have to have some measurement of how big it should be. And the 25 percent doesn't seem unreasonable. But in responding to that,

what we've done in this building is intentionally pull back a whole section of the building. There's the facade with the bay we're talking about, and pull back the other. So that in order to make the whole rear elevation more interesting, we've -- we have pulled way back from that line.

And then in the interpretation of the size saying no, you can only count 25 percent of this furthest point rather than 25 percent of the entire plane, kind of defeats the purpose of creating interesting facades.

CONSTANTINE ALEXANDER: The argument that you're making is fine, it goes, as Mr. Heuer pointed out, as to why we should grant you a Variance. Because it's architecturally a good idea to allow you to have the bay you want. That's not the issue that's before us. The issue that it's a citywide issue as what do you do about bay windows with or without foundations in terms

of setbacks. So whether -- that's the issue we have to deal with. And that's the issue before us. I don't want to get any further into the architectural reasons why you're doing it for this property.

GUY ASAPH: No. And I was taking it to a different issues about bays in the foundation. And where this clearly led as Mark said, first we met with the Commissioner and said hay, here's all this stuff, why don't we do something. And we needed a forum to do it.

CONSTANTINE ALEXANDER: This is a forum.

GUY ASAPH: Could serve all the examples. We met with him and then meeting with Community Development and they said oh, yeah, wow, we need to do something. This is interesting, yeah. And then with the Planning Board. Wow, yeah, this -- no, I can see that point. You know, as you say, like

minds can disagree on an interpretation, but it seems like the outcome that the Community Development part and Planning Board was hoping for that these issues get further discussed and --

CONSTANTINE ALEXANDER: It's being discussed tonight.

GUY ASAPH: And the technical -- yeah, not the other ones.

CONSTANTINE ALEXANDER: Does anyone else wishing to be heard on this matter?

(No response).

CONSTANTINE ALEXANDER: The Chair notes no one else wishes to be heard.

Did you raise your hand, sir? Come forward and you've got to give your name and address.

UNIDENTIFIED MALE: Never mind.

CONSTANTINE ALEXANDER: You've been ordered to sit down, right? Not by the Chair, for the record.

The Chair notes no one wishes to be heard on this matter. The Chair would note for the record that we are in receipt of a memorandum unsigned from the Planning Board regarding this matter. "The Planning Board reviewed the appeal in case No. 9993 and discussed the technical elements of the Zoning Ordinance as relating to bay windows and facades and other issues. At this time the Planning Board supports bay windows in this project and others and would not suggest that the current interpretation prevail. The Planning Board suggests review of other parts of the appeal in the future with possible clarification to amendments to the Zoning Ordinance."

I will close public testimony.

Comments, questions by members of the Board or are we ready for a vote? I guess we're ready for a vote. Okay, I'll make a motion.

The Chair moves that the Petitioner's

appeal challenging the Building Commissioner's determination of Section 5.24.2 of the Zoning Ordinance only applies to bay windows without a foundation is hereby denied.

And that the Commissioner's longstanding policy of applying 5.24.2 only to bay windows without foundations is correct.

And the reasons I would make this motion is that Section 5.24.2 is intended only to allow building features not as substantial in total mass as a feature with a foundation to project and to proscribe the yard setback.

A bay window with a foundation is integral part of the building itself and creates a mass inhabitable to the setback requirements of Article 5.

The massing of this sort was intended to be an exception of the setback tables of Article 5. The tables will so provide by

cross reference of section 5.24.2 or other otherwise, and they do not.

The Chair notes in this regard the section 5.24.2 does refer to chimneys which do have substantial mass but also notes chimneys are essentially a mechanical feature of the structure and that our Zoning Ordinance treats them specially such as exempting them from the height and limitations of the Ordinance.

So, the motion is to deny the appeal. Amendments or ready for the actual vote? Okay. Put it to a vote.

All those in favor of dismissing or denying the appeal of the petitioner, say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. The appeal's been denied.

(Alexander, Hughes, Sullivan, Heuer, Scott.)

(9:15 p.m.)

(Sitting Members: Constantine Alexander, Timothy Hughes, Brendan Sullivan, Tad Heuer, Thomas Scott.)

CONSTANTINE ALEXANDER: We're going to reconvene the meeting. There's a case for 9:15. It's the last one on our agenda. We're going to get to it much later than 9:15. Excuse me, 1380 Massachusetts Ave. Is there

anyone here on that matter?

UNIDENTIFIED MALE: Yes.

CONSTANTINE ALEXANDER: You're
Petitioner I assume?

UNIDENTIFIED MALE: Yes.

CONSTANTINE ALEXANDER: Okay. I
think as you may know, we're going to have to
continue the case. But I'll explain that to
you at the time when we get to your case. For
the same reasons we continued the Otto's, the
pizza case before you. Just very briefly, I
do want to get to the other cases. But you
under our Zoning By-Law you have to go to the
Harvard Square Advisory Committee and ask
them to give us a comment on your proposal.
And unless you have that with you tonight --

UNIDENTIFIED MALE: No, I don't.

But when would the continuance be for, do you
know that?

CONSTANTINE ALEXANDER: When will
it be till?

UNIDENTIFIED MALE: How long before the continuance?

CONSTANTINE ALEXANDER: How long? When can we hear the case next? It's going to be at least 30 days because we're going to say you have 30 days -- or the Harvard Square Advisory Committee has 30 days to give us their comments. Failing that then we're going to ignore the fact that they didn't give us any.

UNIDENTIFIED MALE: I spoke with Les of Development, and he said that he would speed it up for me to meet with the advisory committee.

CONSTANTINE ALEXANDER: Okay. That's fine. When would be the earliest that we can hear this case?

SEAN O'GRADY: December 2nd.

CONSTANTINE ALEXANDER: December 2nd. You can stick around if you like until we get to your case. I don't want to --

UNIDENTIFIED MALE: Could we be heard contingent upon that approval?

SEAN O'GRADY: Gus, you're at 9:15.

CONSTANTINE ALEXANDER: I know. I don't want to take this case out of order. I just want to go in regular order since there are people around.

UNIDENTIFIED MALE: Can we be heard contingent upon that approval?

CONSTANTINE ALEXANDER: No. No, sir.

I'm just giving you advice. You can stick around. We're going to continue this case until December 2nd because you have not satisfied a jurisdictional requirement. And I don't want to have any further discussion because I really want to move on with the agenda and take the next case in order.

(9:15 p.m.)

(Sitting Members: Constantine Alexander, Timothy Hughes, Brendan Sullivan, Tad Heuer, Thomas Scott.)

The Chair will call case No. 9994, 310-320 Webster Avenue. Is there anyone here wishing to be heard in this matter? For the record.

ATTORNEY JAMES RAFFERTY: Good

evening, Mr. Chairman, members of the Board. For the record, James Rafferty, an attorney with the law firm of Adams and Rafferty located at 130 Bishop Allen Drive.

CONSTANTINE ALEXANDER: Mr. Rafferty, since you complimented me on my brilliance earlier, I'm going to give you a compliment in return. I mean, you're very versatile. From pizza places to auto repair garage. You cover the waterfront, don't you?

ATTORNEY JAMES RAFFERTY: A little bit of grease and olive oil. But thank you. Any favorable comment from the Chair, I value.

This is the application of CLM Auto which is a family business. So we have C here, Carlos Pinatel (phonetic).

MARIO PINATEL: Mario.

ATTORNEY JAMES RAFFERTY: Mario. So C is Carlos. Then we have M, Mario. And

then we have L, Robert. Those are the three Pinatel Brothers. They have operated a business at this location for 20, 30 years I guess, right?

CARLOS PINATEL: Well, in this location probably 15 years.

ATTORNEY JAMES RAFFERTY: 15 years. And I say this location because, Mr. Chair, the location that's actually the subject of this Special Permit and the Variance tonight has only recently been acquired by them. If you have had an opportunity to go out to the site, it's a hole in the ground.

CONSTANTINE ALEXANDER: Well aware of that hole.

ATTORNEY JAMES RAFFERTY: It's a long sad story for the Board and for investors, and there's a lot of a lot of fallout from that situation. But CLM, the auto copy, the auto body auto repair garage owns the property on either side of that. So

last year they were successful in getting financing, and they've acquired this site. And what they want to be able to do is to construct a building. Manny Tavares is the architect. And Mr. Tavares has prepared the plans and can show you what's intended. But the proposal here would obviously be to fill the hole, cap it and build a one-story auto repair garage. The ownership of that parcel, the parcel that is the empty parcel today when it was acquired, it's in one trust. The parcel to the left as you're moving toward Somerville is in another trust. That has current --

CONSTANTINE ALEXANDER: The left to the right as you're facing.

ATTORNEY JAMES RAFFERTY: Well, it depends if you're going up Webster or Elm.

So, the building as you're looking at this site plan, this is the hole if you will.

CONSTANTINE ALEXANDER: That's the

hole.

ATTORNEY JAMES RAFFERTY: And this is the existing operation. And then there's a small building right here.

CONSTANTINE ALEXANDER: Is that owned by your client?

ATTORNEY JAMES RAFFERTY: They own both sides of it.

CONSTANTINE ALEXANDER: Okay.

What's in that building now or what's it going to be used --

ATTORNEY JAMES RAFFERTY: This building right here?

CONSTANTINE ALEXANDER: Yes.

ATTORNEY JAMES RAFFERTY: Now is part of the auto repair, but mostly storage of parts and vehicles right here now.

CONSTANTINE ALEXANDER: Will that change if we grant relief tonight?

ATTORNEY JAMES RAFFERTY: Yes. Tonight's proposal would allow -- and it's

characterized as an addition to an existing structure. The intention here is that this will become a single structure. The existing structure plus the hole -- well, actually before we can get a Building Permit, need to combine the lots for title purposes so as to not have a property line going through the middle of the building.

This building, the other building that's there today will remain in separate ownership with a demising wall between it. There won't be any penetrations in this wall.

CONSTANTINE ALEXANDER: In that building, the existing building, do you do auto body work in there?

ATTORNEY JAMES RAFFERTY: That's auto body and auto repair.

CONSTANTINE ALEXANDER: Okay. And that's not permitted in this district.

ATTORNEY JAMES RAFFERTY: No longer. So the auto body use is

grandfathered. And the proposed new structure would only be auto repair, and the floor plan shows that. Shows that provision.

CONSTANTINE ALEXANDER: And you're allowed to do that by Special Permit which is why you're here tonight?

ATTORNEY JAMES RAFFERTY: Exactly. Which is what one of the matters of the relief is.

TAD HEUER: And the demising wall is on the zero lot line between them, is that --

ATTORNEY JAMES RAFFERTY: Yes, that's correct. And that's pre-existing. So that building is there and this building is here. And they had both buildings and they had this building between them and there was ambitious plans to build a cultural center and condominiums and it did not fair well.

So, at the end of the day from a

constructability and Building Code perspective, this would become a single lot with a single structure on it. It will abut another structure also part of the business but owned by a separate entity and performing a different function. What it will mean from elevation perspective is a vast improvement on the streetscape. And what Mr. Tavares has --

CONSTANTINE ALEXANDER: Anything would be a vast improvement.

ATTORNEY JAMES RAFFERTY: I would wholeheartedly concur.

MANNY TAVARES: This is Somerville this way. And this is -- we're about here.

CONSTANTINE ALEXANDER: That's existing.

ATTORNEY JAMES RAFFERTY: We want them to see.

CONSTANTINE ALEXANDER: Is all of that new stuff or does that include the old?

ATTORNEY JAMES RAFFERTY: This here shows -- what's not on this elevation is the building that's not the subject of the Petition. So this represents -- would you kindly show where is the what I call the hole parcel. Is it right about here?

MANNY TAVARES: Well, right here.

ATTORNEY JAMES RAFFERTY: Right there.

MANNY TAVARES: That's the existing building.

ATTORNEY JAMES RAFFERTY: That's the existing building?

MANNY TAVARES: You can see it here if I can pass this around.

ATTORNEY JAMES RAFFERTY: This is the building. This is the addition. So that's the hole....

Now, if you saw the whole elevation, some of the photos too, there's a consistency of material and appearance so that the facade

on both streets will be here. The curb cuts will be cleaned up. There's random curb cuts. There's parking -- we know Webster Ave. has a long history of automotive repair uses. But this will provide a certain harmony on that street front that's lacking.

CONSTANTINE ALEXANDER: One of the big issues that's got to be with the Special Permit is traffic. Right now this is a very busy garage presumably because of the quality of the work that's done. We're going to be talking about expanding the garage, there's going to be a lot more cars driving in and out for repair. Talk to us about why we should not be concerned about the traffic problems on the Webster Street.

ATTORNEY JAMES RAFFERTY: Well, the Special Permit does indeed talk about change in patterns and congestion. The reality is that the site is very tight now. This is going to allow for a better organization of

the current activity. Frankly, cars are parked on the sidewalk. Cars are double parked. It's a very active site on a very constrained building. This building in many ways is going to address that. It's not simply a case of there will be added volume in the business. Hopefully there will be some. But it really -- as you see when you look at the floor plans, the whole goal here is to create a more orderly way to operate the business. In fact, the number of curb cuts will be reduced if you look at the site plan. So, there will be new sidewalks established. And there also will be an opportunity here to close a curb cut at the front here in the front end of the building, you'll see on the site plan. So right now across the front of the building, on the nose of it, you can go from one side to the other. On the site plan they're proposing to close one. So there would be only -- you can only access this nose

tip from the Elm Street side of the building is what the proposal is. Right now you can cut across that with a vehicle, and vehicles frankly do that.

So, the issue around the traffic I think is actually -- the case can be made it is a net improvement because of the more orderly organization of the existing business. The other thing about the relief here is that it has a 1.0 FAR. And if this building if a third party unrelated to either of the other two parties, simply came along and wanted to build that structure of that size, they could do as of right. But, what happens here is because this building is slightly over, the allowable 1.0 FAR because it has a second floor, that gets transported to the FAR calculation for that site.

CONSTANTINE ALEXANDER: And your FAR is going to go to 1.07. So you're at 1.0. So it's going to be slightly in excess of

what --

ATTORNEY JAMES RAFFERTY: Right.

CONSTANTINE

ALEXANDER: -- accessible. And that's the basis for the Variance. We can talk about the Special Permit which is required for the use --

ATTORNEY JAMES RAFFERTY: The Special Permit is the use. And the dimensional issues are the added GFA associated. And the hardship, there again, is related to the ownership pattern of the lot, and the fact that there's a pre-existing structure. So the new, new construction will be all of this, plus an extension of the second floor up here. So the net increase in square footage here between the two lots we're going -- I think it's only in the --

MANNY TAVARES: We're reducing the FAR considerably on the --

CONSTANTINE ALEXANDER: I saw that,

yes.

MANNY TAVARES: So I think that's a good thing.

CONSTANTINE ALEXANDER: But by consolidating the lots and the new building you are going to technically going over the top?

MANNY TAVARES: Go a little bit. Very little.

TAD HEUER: In this district is it zero side yard setbacks?

ATTORNEY JAMES RAFFERTY: Yes. This district can take advantage of the provision that says if you abut a building that has a zero side yard on a wall, you can build similarly.

TAD HEUER: Right. So, essentially because they're being merged lots or creating FAR issue whereas if theoretically they were unmerged and they were two separate owners, theoretically you might have a setback issue

but you might not have to come before us at all because you're constructing a separate building under separate ownership that doesn't need to compensate for the above 1.0 FAR in the existing that's now being spread essentially to the -- the plus 1.0 FAR in the existing building that's being spread to a conforming FAR building that's being constructed; is that right?

ATTORNEY JAMES RAFFERTY: Yes. But there is --

TIMOTHY HUGHES: There wouldn't be a setback issue even if they built it.

TAD HEUER: That's fine.

TIMOTHY HUGHES: Right.

CONSTANTINE ALEXANDER: Keep going.

ATTORNEY JAMES RAFFERTY: I thought I was done. Do you have the floor plan, Manny?

MANNY TAVARES: Yes.

CONSTANTINE ALEXANDER: It's the

same floor plan we have in our files?

MANNY TAVARES: Yes.

ATTORNEY JAMES RAFFERTY: Yes. And the floor plan I think illustrates -- can you show where the lot line is now?

MANNY TAVARES: It's right about here. This is the wall we're removing. Everybody can see that. And this is that corner building that's there now. The wedged-shaped building. You can see that.

CONSTANTINE ALEXANDER: Where's the hole?

MANNY TAVARES: The hole is right here. So this whole section is going to be --

ATTORNEY JAMES RAFFERTY: Once you locate the lot line, the hole is --

MANNY TAVARES: Right about this line right here.

ATTORNEY JAMES RAFFERTY: -- out to the other end. It's on the lot line. So --

MANNY TAVARES: This is a double wall right here, which is originally what's there.

ATTORNEY JAMES RAFFERTY: And that's the wall of the abutting building.

MANNY TAVARES: The abutting building, and that's this wall right here.

ATTORNEY JAMES RAFFERTY: And part of the hardship is the desire to operate this as a single structure. And we frankly had discussed with Mr. Singanayagam well, we can build this under the current ownership pattern, build a wall and then merge the lots and take the wall down all to avoid coming here. And I said I so enjoy coming here, why would we go through all that effort to build a wall and take it down when all it means is coming to see the Board? So that's one of the reasons we're here. Saving us to build a wall and then take it down later.

CONSTANTINE ALEXANDER: I had a

question, why didn't you buy that hole a long time ago so we can get rid of the hole that's been there for so long? That's one of the -- I have to and then I'll move on. Not one of our better moments as a Board when this Board approved that cultural center. Mr. Sullivan was not sitting on the case that night and I voted against it. I don't have a guilty conscious.

TIMOTHY HUGHES: I wasn't sitting on the case that night.

TAD HEUER: Nor was I.

CONSTANTINE ALEXANDER: Allowed an FAR of four-point something in a 1.0 district. Be that as it may.

ATTORNEY JAMES RAFFERTY: We call those the good old days.

CONSTANTINE ALEXANDER: Let's see. Any questions at this point from members of the Board? I assume you're through your with presentation, Mr. Rafferty?

ATTORNEY JAMES RAFFERTY: Long ago.

CONSTANTINE ALEXANDER: Anyone wishing to be heard on this matter?

(No response.)

CONSTANTINE ALEXANDER: The Chair notes no one wishes to be heard. The Chair is in receipt of correspondence.

We have a letter from Timothy J. Toomey, Jr. from the City Council addressed to this Board dated September 29th. "I'm writing to lend my support to BZA case 9994 requesting a Variance at 310-320 Webster Avenue that would allow the Petitioner to construct an addition to the existing structure. Petitioners have had a successful business in Cambridge for a number of years and are looking to expand their operation. The redevelopment of this parcel will certainly benefit this area and the proposed uses in line with the surrounding businesses and buildings. Currently the parcel in question

has fallen into serious neglect and is nothing more than a hole in the ground. A local business redeveloping this to expand their business and create local jobs is an excellent alternative to the current situation. Thank you for your attention to this matter. I hope you will find favor with the Petitioner's request."

We have a letter from Charles J. Marquardt, M-a-r-q-u-a-r-d-t. Ten Rogers Street, unit 1120. And it's dated September 29th. "I'm writing in support of the Variance and Special Permit request by Carlos and Mario Auto Repair, case 9994. Mario and his brothers, owners and operator the CLM Automotive have been providing automotive repair services to my extended family in our cars and vans, both personal and business vehicles for about a decade. During this time they have provided a great service at a fair price while treating their employees and

the community with loyalty and respect. Their approach to business and customer service has led me and my family to recommend them without hesitation. Their approach has also helped them to attract and retain new customers leading to an opportunity to expand their business in this current Cambridge location. An expansion that requires both a Variance and Special Permit to move forward, each of which I support for the following reasons:

"Support the growth of local businesses. CLM has grown locally through hard work in delivering a valuable service to its customers. It is a service that is in demand as people hold on to their cars longer in these difficult economic times. Granting the requested Variance and Special Permit would not only allow CLM to expand their business, but will enable local residents to keep their older cars in better working order

thereby helping them to make ends meet. This is a time honored tradition of local businesses working with the local communities to help each other in good times and bad.

"Support intelligent growth. Having been to their location over the last several times -- over the last year several times, it is no secret that CLM is space constrained for growth. They have put forward a good plan to expand within their existing location. The Board should take into account the goals of the city to attract and retain businesses of all sizes and types, particularly those that provide valuable services to the residents of Cambridge as well to encourage their growth in Cambridge. CLM has put forward such a proposal. It is a proposal worthy of receiving its Variance and Special Permit requests.

"Green jobs. Cambridge has made great

strides in responding to environmental challenges. This comes both in terms of limiting the city's and residential commercial residents impact on the environment and is working to prepare workers for the green jobs of tomorrow. I put to you that CLM is part of the this environmental awareness and green jobs campaign. By keeping cars in better working order, they help owners to reduce their need for fuel thereby reducing their impact on the environment. By keeping cars in better working condition they help to reduce production of greenhouse gasses. And by helping prolong the lives of cars they help reduce the impact of junking one car and buying a new one. Yes, you may and consider an automotive repair shop a green job, but I believe they are far more green than given credit for being. CLM has earned a reputation of providing great work for a fair

price. It has brought them business and helped them to grow in Cambridge. They have come forward for permission to expand and grow more in Cambridge. I believe that CLM has earned the opportunity to implement their proposed expansion, and that providing CLM with the opportunity to expand as proposed provides community benefits that far exceed any potential impact on the expansion. I strongly urge the Board to grant the Variance and Special Permit providing an opportunity for a family owned business to grow and expand in Cambridge."

You couldn't have said it better, Mr. Rafferty. I'm looking to see if there are any other letters in the file. I don't believe there are any.

I will close public testimony unless you have anything further to add.

ATTORNEY JAMES RAFFERTY: No thank you.

CONSTANTINE ALEXANDER: Any questions or comments from members of the Board? We have to take two votes obviously. One for the Variance and one for the Special Permit.

The Chair moves that this Board make the following findings with regard to the request for a Variance from our FAR requirements.

That a literal enforcement of the provisions of this Ordinance would involve a substantial hardship to the Petitioner. Such hardship being that the Petitioner has thriving and growing business and needs additional space that could not be satisfied except by expansion into the neighboring property.

That this hardship is owing to the circumstances relating to the shape of the lot and structure. This is an odd shaped lot abutting an odd shaped lot.

And finally, that relief may be granted

without substantial detriment to the public good or nullifying or substantially derogating the intent or purpose of this Ordinance.

Granting the Variance would allow actually a rationalization of traffic patterns of this neighborhood which is a desirable goal under our Zoning By-Laws.

That this project would appear to have unanimous community support, including a letter from the City Councillor.

And, therefore, this Chair moves that a Variance be granted to the Petitioner based on these findings on the condition that the work proceed -- and I'm going to interrupt right here. These are the final plans?

MANNY TAVARES: Yes.

CONSTANTINE ALEXANDER: We're going to tie it to those plans.

The work proceed in accordance with plans submitted by Petitioner prepared by

M.J. Tavares, T-a-v-a-r-e-s Architects.
They're numbered A-1 and X-2. Both of which
have been initialed by the Chair.

All those in favor of granting the
Variance on the basis of these findings, say
"Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in
favor.

(Alexander, Hughes, Sullivan,
Heuer, Scott.)

CONSTANTINE ALEXANDER: Now we have
to turn to the Special Permit. Under our
Zoning By-Law expansion of an automotive
repair shop in this district requires a
Special Permit from this Board. To grant the
Special Permit we have to make certain
findings. I would move that we can make the
findings on the following basis:

That the relief being sought, the
expansion of the repair shop, will not cause

congestion, hazard or substantial change in established neighborhood character or with respect to the traffic generated. As indicated, as I stated before that traffic actually would be rationally improved. And that established neighborhood character is that of automotive repair shops and of industrial type businesses.

That the continued operation of adjacent uses will not be adversely affected by the nature of the proposed expansion. And witness to that is that there's been no testimony or indication that neighbors object to what is being proposed.

That no nuisance or hazard would be created to the detriment of the health, safety and welfare of the occupant or the proposed occupant or the citizens of the city.

And that the proposed use would not impair the integrity of the district or

adjoining district or otherwise derogate from the intent or purpose of this Ordinance. As I mentioned, the integrity of the district is such of automotive repair and similar type businesses, and what is being proposed would again rationalize these type of businesses with regard to this structure and improve the general streetscape of this area.

So on the basis of these findings, the Chair moves that a Special Permit be granted to the Petitioner on the condition that the work proceed, and again, in accordance with the plans identified in my vote with regard to the Variance.

All those in favor of granting the Special Permit say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. Variance granted.

(Alexander, Hughes, Sullivan, Heuer, Scott.)

(9:35 p.m.)

(Sitting Members: Constantine Alexander,
Timothy Hughes, Brendan Sullivan, Tad Heuer,
Thomas Scott.)

CONSTANTINE ALEXANDER: The Chair

will call case No. 9995, 141 Portland Street. Is there anyone here wishing to be heard on this matter.

PETER COOKE: Yes, Mr. Chairman, my name is Peter Cooke here on behalf of the Petitioner T-Mobile.

CONSTANTINE ALEXANDER: This is a telecommunications Special Permit case but in an industrial zone which is important because the requirements are not as severe. A number of things we have to find are not as severe in an industrial district.

PETER COOKE: This is a modification of existing T-Mobile installation. It consists right now of a two blue top cabinets and six antennas flush-mounted to the penthouse of the building if you will. We're seeking to modify the two existing cabinets with two booster cabinets which essentially are one-by-two type of addition added on to the side of the cabinet. And then the

addition of a third cabinet on a lower roof on the same side of the building as the existing cabinets.

We're also proposing to add two new antennas on the same penthouse, again, painted to match and similar style to what's already there. The building background, it's a commercial building located at the corner of Portland and Broadway. And the reasons for the changes are two-fold:

One, that the cabinets are really to upgrade the existing technology. This is one of our older sites in the city. I'm sure you heard the 3G versus 2G technology upgrades, and that's essentially what the cabinet work is about.

The two additional antennas are part of an overall program that T-Mobile is implementing to try to maximize coverage and technology on existing sites before moving forward with trying to establish new sites.

So, these two additional cabinets, excuse me, two additional antennas essentially create what we would call a fourth sector which would give us additional coverage pushing to the south, southwest of the property.

We have some photo simulations.

CONSTANTINE ALEXANDER: Those are the same ones that are in our files?

PETER COOKE: Those are the same. And hopefully this is a relatively straight forward application.

CONSTANTINE ALEXANDER: Question: How tall is that building?

PETER COOKE: The top of the penthouse is 154 feet.

CONSTANTINE ALEXANDER: We're talking about a building that's sort of quite high, and therefore the visual impact is not as great because you have to really stick your head up in the air --

PETER COOKE: Absolutely. As you

can tell from the photographs, you would even be able to get photo simulations so we actually had to move quite a bit a ways away to be able to do that which obviously in our opinion minimizes the --

CONSTANTINE ALEXANDER: And for the record, we have to make this finding. Is T-Mobile Northeast a duly licensed FCC carrier?

PETER COOKE: Yes, they are.

CONSTANTINE ALEXANDER: How are you going to -- talk just briefly about how you're going to disguise the visual impact of what you're proposing to do in terms of painting or how you're mounting.

PETER COOKE: The antennas themselves will be painted to match the underlying facade. The penthouse as you know is a brick veneer. The existing antennas are painted to match the underlying brick. The new antennas would be done the

same. There is another carrier up there as well. So when you're looking at those drawings, please keep that in mind as well.

As far as the cabinets, there are above color cabinet. They will be the same color as the cabinets that are already up there. We think it kind of blends into the overall coloration of the penthouse area and the other rooftop equipment that's up there. We were before the Planning Board on the 21st of July. I believe you have that --

CONSTANTINE ALEXANDER: There is a letter in support from the Planning Board that I will read into the public record at the appropriate time.

PETER COOKE: Yes, sir.

TAD HEUER: Just out of curiosity, who owns the hideous red antenna? Do you know?

PETER COOKE: The hideous red antenna.

TAD HEUER: Or antennae.

PETER COOKE: Yeah, I'm not sure who the other carrier is. I actually --

CONSTANTINE ALEXANDER: It's not you though?

PETER COOKE: No, it's not ours. We've only got the six existing on the penthouse.

TAD HEUER: Can you point out to me, and maybe I'm just missing it. I only see one of the new proposed T-Mobile antennas. What facades are they on?

PETER COOKE: The two new ones are actually on the same one -- it should be on the -- it would be right there.

TAD HEUER: So where the arrow points to one antenna, it's actually that one in the center and one to the right of it?

PETER COOKE: Yes, to your right, correct.

TAD HEUER: Okay. So they're

mounted on the same facade.

PETER COOKE: Yes. They called out the hideous red one is somebody else's.

TAD HEUER: Right. And then the red coloration on these of your proposed I presume is merely to highlight them.

PETER COOKE: To try to pull them out for you, absolutely.

TAD HEUER: Right. But that won't be the color that they are --

PETER COOKE: No, absolutely not.

BRENDAN SULLIVAN: Does every carrier buy the antenna from the same manufacturer?

PETER COOKE: There's actually for our four or five different manufacturers. But the coloration?

BRENDAN SULLIVAN: I guess the real objection that I have is, and everybody always paints it the background color, you can almost paint it any color and you're going

to see it. You know, even if you painted it a ghost color, it's this object that projects from the building that you're going to see no matter what the background color is. And that to me is what's hideous. I mean, I would almost like to see a flatter panel rather than these antennas. And I guess the reason that it has to sit off the building and in order to get cable up and into it --

PETER COOKE: Well, I think there's a couple ways you can wrestle with that. You know, there's two issues. One is you're correct, there's the cable that comes in and ties it back down to the cabinets. The other part about it is -- and I think you run into some difficulties, too, is that the antennas are directional antennas. So they are, they are sometimes angled off the face of the building.

BRENDAN SULLIVAN: Do they ever move them?

PETER COOKE: Move them in terms of changing the directions?

BRENDAN SULLIVAN: The positioning, yes.

PETER COOKE: Matter of degrees. They'll move them more -- you'll see some of the older sites probably more of a down tilt than the angle itself.

BRENDAN SULLIVAN: I guess where I'm going is I would like to see these things more stealthy. That you absolutely positively they blend right into the --

PETER COOKE: Well, I think there's --

BRENDAN SULLIVAN: Coloring doesn't do it for me.

PETER COOKE: Well, there's a couple ways to do it. And I know we've done it in certain situations where we've used a flatter -- this one is called out with a pipe mount detail. We can probably -- and I've

seen them use them in other applications where they have more of a hinge-style antenna which does get you a little flatter to building.

TAD HEUER: Interesting, because I asked one of your colleagues, not T-Mobile, and they said they've never heard of such a thing and they would look into it. They never got back to me.

PETER COOKE: They haven't gone to Boston then because that's typically -- now, again, with the angling sometimes it doesn't, quite honestly, it doesn't give you enough of the effect.

BRENDAN SULLIVAN: You know, what does Concord and Lexington do? I would think Lexington is very, very picky on any type of attachment to a building, are they not?

PETER COOKE: Some communities are --

BRENDAN SULLIVAN: Which is the

toughest community?

PETER COOKE: The other option that you have is to actually build a box, like a fiberglass box that sits over it. So you -- the box obviously is bulkier. But it does allow you to not have the gap between the back of the antenna and the wall itself. What I find the bigger issue is that they -- the coloration -- and I think you guys actually have a much -- I shouldn't say it, I think your enforcement folks are probably better than I see in other communities, where the coloration actually is enforced more here. In Boston I can tell you the BRA that we're doing a color match type of situation, they sometimes will ask, you know, the color be brought in and shown to the planning officer to double check that the color is correct.

When you're building one of those boxes, it's typically made out of a

fiberglass type material. And I think the plus is you -- it looks more like a building feature when it's mounted to it, but it is. The minus is the bigger mass, you know, on the facade.

TAD HEUER: I mean I guess I'm looking at this, and it's PS4, which is the one with the yellow house in the foreground. And clearly the way the sun's hitting it is you do see quite a bit of shadow, and the pipe mount is actually fairly prominent because you can see how far it is sticking out from the building.

PETER COOKE: Yes.

TAD HEUER: Something you may have heard us say before, and if you haven't we've been saying it to a number of providers over the last few months, that it appears that the pipe mount is clearly the cheapest and easiest way of getting an antenna up there quickly. But, you know, I think I would tend

to agree with Mr. Sullivan and also with what you said, I'm thinking of -- as I mentioned before at the corner of Park Street and Tremont Street in Boston, there's a 7/11 that has two large boxes, very well painted to match brick facades on a third story across from Park Street Station, dead center of Boston. And unless you were looking for them, you would never see them there. They're that well integrated into the architecture. They are bigger, and I think more people would see them if the stealth provision was interpreted solely as trying to make it as thin as possible, because you see pipe mounts and the backing and everything else.

PETER COOKE: My review of these -- you've got a couple of parting issues here, and that's why you see the big red antennas. And not to throw my other brethren under the bus, you've got a couple of angled antennas here that try to hit their, you know,

their objectives. So they have some angle iron plus the antenna which I think it's a big part of, you know, the issue that I see with this, with this facade. Our antennas I think are pretty -- the penthouse is oriented in a way that it's helpful. You can keep it relatively flat in terms of the way our antennas are trying to point. I think if you went with the hinge antennas and limited the -- and I think I've seen that in other communities, where you limit the front face of the antenna mount not being any further forward. Melrose, for example has a, they don't allow any more than 12 inches. The front face can't be more than 12 inches off the front of the building.

TAD HEUER: And they make those?

PETER COOKE: You can do that.

TAD HEUER: T-Mobile buys them?

PETER COOKE: We buy them? I can tell you everybody buys them because you

don't put them up in Boston without -- the BRA up there requires, that reviewer requires the hinge style antennas.

TAD HEUER: Would this proposal pass review in Boston?

PETER COOKE: This proposal would pass review because there's not -- typically when they pick up their review, it's more on a construction level detail.

Now, I will say that in this particular case he would probably change out this pipe mount to a hinge-style antenna. And they would do that by hand and, you know, send us on our way. I wouldn't, you know, I'm sure that there's mounting on here because that's probably what's already up there.

TAD HEUER: Was there any thought -- and this is a somewhat interestingly shaped building that it has recesses built into its massing. You know, a lot of buildings are just flat facade front.

Was there any thought -- and it may not have been positive in terms of coverage and heights and other things, but, for instance, to sit some of these antennas into, for example, I'm looking again at PS4 into the recess, all the way at the left. Or anything that would --

PETER COOKE: Well, what happens on the recesses, is the signal that comes out of these antennas is almost like the light beam out of a projector. So if you stick into a corner mount, unless you have -- if the corner's like this, unless you were pointing exactly out that way, you'd get the building itself kind of knocking down the side lobes of the signal. I think in this case, you know, they've tried to consolidate to the existing penthouse, trying to keep, you know, all in one location. You know, my feeling is that if you had conditioned it on a hinge-style antenna, and frankly if you told

me that you wanted me to change out the other antennas to a hinge-style antenna, that would certainly be a condition that I would have no issue with bringing back to T-Mobile.

BRENDAN SULLIVAN: We're heading in the right direction.

TAD HEUER: Yes, you're doing well for yourself.

PETER COOKE: I find that -- I've been doing it too darn long because I have people in my profession that they think they're never going to see you again, and I know that's not the case.

TAD HEUER: We try to encourage people to keep that fact in mind.

CONSTANTINE ALEXANDER: You're one of the better presentations that we've had on telecommunications.

PETER COOKE: Well, I appreciate that. Thank you.

CONSTANTINE ALEXANDER: It's

responsive and it's thought out and you answer our questions.

BRENDAN SULLIVAN: Well, I think he understands and appreciates our concerns.

CONSTANTINE ALEXANDER: Yes, exactly.

Further questions or comments at this point?

Is there anyone here wishing to be heard on this matter?

(No response.)

CONSTANTINE ALEXANDER: The Chair notes that no one wishes to be heard.

We are in receipt of a memo from the Planning Board dated September 22nd. "The Planning Board reviewed the application to add equipment to the current installation." We're talking about the property here obviously. "The Planning Board finds that the submittal is consistent with the existing installation and uses the existing building

features on the rooftop and mechanical penthouse facade to minimize a distraction of additional equipment."

Ready for a motion?

Do you want to, as part of the motion, do you want to condition it upon the change of the antenna to a hinge style or not?

BRENDAN SULLIVAN: Not knowing what they really look like, but if it's an improvement, I would go with the improvement.

CONSTANTINE ALEXANDER: I agree with you. If it's an improvement I think we all can agree we should go for it, but how do we get there?

THOMAS SCOTT: If it increases the projection off the building, is that something the hinge style is?

BRENDAN SULLIVAN: Well, it's a different type of feature.

CONSTANTINE ALEXANDER: It's a different type of feature. I think without

looking at it, I'm a little bit (inaudible) to say you can substitute a hinge type for what's on the plans. We know what's on the plans. We know what the visual impact is from the photo sims. I personally would not condition it on that. I don't think we can delegate to Mr. O'Grady or the Building Department that decision of which looks better. It's our call not their call. So I would not be in favor -- I'll defer to other members of the Board, I would not be in favor of putting that condition in.

PETER COOKE: I don't call out a --

CONSTANTINE ALEXANDER: It's not for you, it's for members of the Board.

PETER COOKE: Well, I'm just trying to figure out a way that you can -- in essence you're trying to get the front facade as close to the building as you can. So, if I had a dimension here, I would be able to --

CONSTANTINE ALEXANDER: The problem

is we tie, in this Board we tie the relief to the plans you've given us. If you want to modify the plans even to make an improvement, you're likely going to have to come back before this Board with those modified plans. We don't say well, this is okay, but work it out later with the Building Department.

PETER COOKE: Yep.

CONSTANTINE ALEXANDER: So, once again, I think we have -- we live with these plans. We hope the next time you're before us, knowing what you heard tonight, that you would present plans with a hinge type.

PETER COOKE: Actually, I'm going to be back next month and that one you're going to like even better.

CONSTANTINE ALEXANDER: Okay. I'll take your representation.

TAD HEUER: So at the risk of holding Mr. Cooke's client to a higher standard, given the quality of his presentation, which

I don't want to do, I understand the Chair's concern that when we have phot sims, we tie decisions to photo sims. I also think this Board in the last four or five months has been increasing concerned about the pole mounted antennas that are slapped on top of buildings, I mean, I think I would be in favor of allowing, if it were tied to something that Mr. Scott said, that it decreases the distance -- and my concern has always been the distance between the front facade of the antenna and the front facade of the building. And if it decreases that while maintaining -- I assume it looks like a panel antenna, is that --

PETER COOKE: Oh, yes. All you're changing out is you're getting rid of the pipe, because it basically you've got --

TAD HEUER: It's a top bottom mounting?

PETER COOKE: You've got the bracket

and you've got the pipe and you've got another bracket. So, by getting rid of the pipe and one of the brackets, you've got really the original brackets mounted on the wall and it has a hinge to it which allows them to get it out far enough frankly to be able to down tilt it and to turn it slightly.

TAD HEUER: Right.

CONSTANTINE ALEXANDER: I think we go down this route, and I don't propose it this way, we have to continue the case and you bring in the different plans. We have the case on Massachusetts Avenue, the building you're well aware of. We told people we wanted you to redesign it. And they came back with worse than what they had before. I don't want to be in that position where we -- and it's not in any way a criticism to you or your client.

PETER COOKE: I appreciate that.

CONSTANTINE ALEXANDER: I don't

want to be there. We know what we have here. Either we tell you to come back because we're not going to approve this, and we have to continue the case for a month or two. Or we go ahead with this and tell you that the next time around we have --

PETER COOKE: And, again, my sense is given the height of the building, 150-foot height, I believe it's pretty minimal. I know it's lower is what I'm thinking of.

TAD HEUER: Right.

PETER COOKE: And you'll start to see as -- you'll start to see them bringing stuff in lower and closer to the ground. And when they end up doing that, obviously those kind of details really start to come out.

TAD HEUER: I mean I will say and, you know, I would be in favor of asking the Petitioner to our next meeting and taking that case well before anyone else because it's actually from everything that the

Petitioner has said, a significant improvement, an improvement that we're looking for and we're also looking for guidance on this that we can go back to other carriers who have not as thorough as T-Mobile has. I know it creates a hardship in some sense for the Petitioner. And if the Petitioner wants to move forward tonight, I don't begrudge him that whatsoever. But I personally would not mind taking this case out of order in a continued fashion to the next meeting and --

CONSTANTINE ALEXANDER: First, it's got to be a case heard so we have to make sure that everybody is here for the next meeting.

And second of all, you'd have to revise those plans. The new plans would have to be in the Monday before the Thursday. And the next meeting it two or three weeks from now.

PETER COOKE: I believe I'm back here on the 28th of October.

CONSTANTINE ALEXANDER: Mr. Heuer makes a good point. What's the sentiment of the Board, do you want to continue the case or do you want to move forward?

BRENDAN SULLIVAN: If it's not a hardship on the Petitioner.

PETER COOKE: We do want to come back.

CONSTANTINE ALEXANDER: Okay. When's the next case?

TAD HEUER: When is Mr. Cooke next hero?

SEAN O'GRADY: The October 28th did you say?

PETER COOKE: Yes. We just filed for the St. Peter's Church. She said we should get the last slot on the 28th.

SEAN O'GRADY: I think you have. Because she told me that had closed and a new one was open and there was nothing on.

I do know this. You have on

the -- well, we have eight and three regular. We have four continued, but one of them's the Decatur which is just going to die. So you're really at eight and three, a full course.

CONSTANTINE ALEXANDER: Can all members of the Board make the meeting on the 28th of October?

TIMOTHY HUGHES: Yes, I can. I want to go on the record as saying I don't see a problem with us not amending the plans, but you know, allowing for a different mounting hardware if it decreases the distance off the facade of the building. I think this is one of the problems with tying everything to an exact plan. And I think this is a kind of change that could be made on the site that we could make to the plans as a part of our motion instead of having to continue every case just because, you know, we see a better way to do it but it's not written -- drawn up in front

of us right now. I mean, I don't see why we couldn't amend the motion to allow for a different mounting hardware and pass the case tonight.

CONSTANTINE ALEXANDER: We can do that. But the reason we do tie it to specific plans is to make the Building Commissioner's job easier. So that they're not in a position of having to guess the impact. We know exactly what we approve. But if the Board's sentiment is you want to approve this with a condition, that's fine by me. I don't support that, but I will, I'll make the motion whichever way you want me to make the motion. I don't see any harm, Tim. The Petitioner doesn't have a problem. We're all going to be here on the 28th. What is wrong with actually knowing what's going on and seeing it before us?

TIMOTHY HUGHES: Well, I'm not sure that a drawing is going to elucidate the

situation much better for us.

CONSTANTINE ALEXANDER: Photo sims will though.

TIMOTHY HUGHES: This is so far away. We're not going to notice the three inches difference.

PETER COOKE: At that scale and the like, you're not -- and there's going to be different times -- what you will see is you'll see this last detail of the antenna mounting detail. I will be able to come back and say, this drawing that you have before you today, you know, that would end up being 14 inches off the facade. I can do a hinge detail that would let me be, you know, 11 inches off the front of the facade. There's just no way to be able to put that three-inch detail up on something like this. But certainly, you know, certainly on a set of drawings, you know, we can take 25 percent of the distance off the facade, off the facade.

And I certainly don't want to leave you with the impression that it can't be done if it certainly can.

CONSTANTINE ALEXANDER: What do members of the Board want to do?

BRENDAN SULLIVAN: Well, if they're willing to come back on the 28th, I would have them come back.

CONSTANTINE ALEXANDER: That's my view as well. Tom or Tad?

THOMAS SCOTT: There's two things that he's mentioned, one the hinge mounting and the other thing was the fiberglass panel.

PETER COOKE: The box.

THOMAS SCOTT: Yes. Not that I would impose that here, but I would like to see an example of that. Could we ask you to do that?

PETER COOKE: Yeah, I can get some photos of some boxes to that.

BRENDAN SULLIVAN: Shoot it along to

Sean or something like that.

PETER COOKE: It's basically a -- it's the same material they use when you see the faux chimneys. It's that material, but it's just with the box mounted on the wall.

CONSTANTINE ALEXANDER: Okay. So I guess the motion will be to continue the case as a case heard until the 28th so you can bring that facade with you.

PETER COOKE: I can bring all that in, sure.

CONSTANTINE ALEXANDER: Ready for a motion?

The Chair moves that this case be continued as a case heard until seven p.m. on October 28th?

SEAN O'GRADY: Yes.

CONSTANTINE ALEXANDER: On October 28th. On the condition that the Petitioner sign a waiver of time for a decision to be

rendered. Mr. O'Grady will give that to you in a second.

On the further condition that the sign that's on the building now be modified to reflect the new date and new time. It will be at seven p.m.

PETER COOKE: Yes. I'll change that.

CONSTANTINE ALEXANDER: And further conditions that the revised plans which you're going to prepare have to be in the file with the Zoning office no later than five p.m. on the Monday before.

PETER COOKE: Okay.

CONSTANTINE ALEXANDER: You're doing two things at once. I just want to make sure you know that.

PETER COOKE: That's fine.

CONSTANTINE ALEXANDER: And the last condition that with respect to the chimney, that you bring to this Board and show

to this Board a sample of what the material in the appearance of the facade will be.

THOMAS SCOTT: You're just looking for an example of a panel, a panel to conceal the antenna -- the ray of the antennas.

PETER COOKE: Yes. You promise to torture the next guy with that.

CONSTANTINE ALEXANDER: We're going to mount it up here.

All those in favor of continuing on the basis so moved, say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Four.

(Alexander, Sullivan, Heuer, Scott.)

CONSTANTINE ALEXANDER: Opposed?

TIMOTHY HUGHES: Opposed.

CONSTANTINE ALEXANDER: Motion carries.

TIMOTHY HUGHES: Gus, can I have a few minutes?

CONSTANTINE ALEXANDER: Sure.

(Whereupon, a discussion was
held off the record.)

(10:05 p.m.)

(Sitting Members: Constantine Alexander,
Timothy Hughes, Brendan Sullivan, Tad Heuer,

Thomas Scott.)

CONSTANTINE ALEXANDER: The Chair calls case No. 9996, 62 Prentiss Street. Is there anyone here wishing to be heard on this matter? By now you know the drill, name and address for the stenographer.

JAMES LOUTZENHISER: Yeah, I'm actually here on behalf of John Peter James. My name is Jim Loutzenhiser, L-o-u-t-z-e-n-h-i-s-e-r.

CONSTANTINE ALEXANDER: You're here before us because the person you're representing needs to close the rear porch.

JAMES LOUTZENHISER: Correct.

CONSTANTINE ALEXANDER: It's a Special Permit, not a Variance. Because you're talking about increasing a non-conforming structure, the FAR by less than 25 percent.

JAMES LOUTZENHISER: Right. That sounds correct.

CONSTANTINE ALEXANDER: Anything more you want to say?

JAMES LOUTZENHISER: I'm all for it. I have no problems with. The neighbors have no problems with it that I know of.

CONSTANTINE ALEXANDER: We do have a letter in the file from you.

JAMES LOUTZENHISER: From me, yeah.

CONSTANTINE ALEXANDER: I'm not going to read it because you already said you're in support.

JAMES LOUTZENHISER: Sure.

CONSTANTINE ALEXANDER: Questions from members of the Board?

TAD HEUER: Is there a reason that the approach to the third floor is different from the approach that it appears to be taken from the first floor where they use, it looks like, you know, four or six lights and other things and instead they have these more mundane casement windows, do you know?

JAMES LOUTZENHISER: I don't know why he's chosen that, no. I'm sure he's open to....

CONSTANTINE ALEXANDER: Well, the question is if we do approve relief, we're going to tie it to the plans that are in the file.

JAMES LOUTZENHISER: Yeah, I don't know his reasons for choosing the windows he's chosen.

CONSTANTINE ALEXANDER: At this point questions from members of the Board or comments at this point? You'll have a further chance.

Anyone here wishing to be heard on this matter?

(No response.)

CONSTANTINE ALEXANDER: The Chair notes no one wishes to be heard. We are in receipt, the Chair would note for the record that we are in receipt of a letter from

Mr. Loutzenhiser, which I will not read because it is in support of the Petition and you've already expressed your support.

There's also a letter dated September 16th from Marsha M. Governale, G-o-v-e-r-n-a-l-e. "My name is Marsha Governale, I live at 64 Prentiss Street, No. 3 in Cambridge. I recently received a notice of public hearing for case No. 9996, a Petition for a Special Permit to enclose the porch at 62 Prentiss Street. I am probably the person most like affected by this proposed construction since my bedroom window looks directly into the windows of the area that's supposed to be enclosed. I support Mr. James' Petition to enclose the porch. I think the enclosure will provide us both with more privacy. I don't have any problem with the way it will look as many of the raised porches in the neighborhood are already enclosed."

THOMAS SCOTT: I have the same comment as Tad about the windows. Every window in the house is double hung and they've chosen these casement style windows that are absolutely much larger than the existing windows in the house. It just looks odd.

TAD HEUER: Yes. I mean, no one is going to see it, but I don't understand why you would choose that.

THOMAS SCOTT: Yes. You can't answer the question.

JAMES LOUTZENHISER: Yeah, I can't. Can I take a look at it?

CONSTANTINE ALEXANDER: Sure.

THOMAS SCOTT: It's FAR.

CONSTANTINE ALEXANDER: No. It's an intention of a non-conforming structure, but not more than 25 percent. I think it's setbacks. Increase massing in the setback.

JAMES LOUTZENHISER: Marsha is really the only person that will be affected.

CONSTANTINE ALEXANDER: She doesn't have a problem.

TAD HEUER: We're not making the decision for all time.

CONSTANTINE ALEXANDER: I know, but the fact of the matter is we have no right to deny the Special Permit on the grounds we don't like the design of the windows.

TAD HEUER: Really?

CONSTANTINE ALEXANDER: I don't think so. We're not an architectural review board.

THOMAS SCOTT: Do you think they would consider changing the windows?

JAMES LOUTZENHISER: I would guess, he'd be happy to change them. I think he'd like to get moving along with the project, that's all. I would guess he wouldn't have a big problem with changing them. That's just my guess.

CONSTANTINE ALEXANDER: I'm happy

to make a motion that would allow the change of the design of the window as long as the amount of window space -- the total square footage of the window opening is not increased.

You could live with that, Sean.

SEAN O'GRADY: Yes, I could live with that, sure.

THOMAS SCOTT: It looks like it's enclosed and it has three double hungs.

JAMES LOUTZENHISER: That's actually a porch back there. You can't really tell by the -- by seeing it from the elevation.

TIMOTHY HUGHES: I have trouble with the idea that a guy wants to put casement windows in and we're going to make him put double hungs in. You know? I mean does he have any physical deformities or arthritis with opening a double hungs that you know of?

JAMES LOUTZENHISER: No.

TIMOTHY HUGHES: You know, this is his choice in windows.

CONSTANTINE ALEXANDER: Not that I would do it, but I don't think we have a right to say --

THOMAS SCOTT: It's just aesthetically wrong.

CONSTANTINE ALEXANDER: It is. Let me suggest we move on and give him the opportunity to go to double hungs.

JAMES LOUTZENHISER: Okay. I'll express that you would like to see that.

CONSTANTINE ALEXANDER: But he doesn't have to.

JAMES LOUTZENHISER: Great. Okay.

TAD HEUER: Where is he by the way?

JAMES LOUTZENHISER: He is -- his mother is sick in Ohio.

CONSTANTINE ALEXANDER: I think we're ready for a vote?

The Chair moves that this Board grant

the Petitioner a Special Permit to enclose a rear porch of the premises on the basis of the following findings:

That the traffic generated or patterns of access or egress to the structure that would cause congestion, hazard or substantial change in established neighborhood character is not present.

That the continued operation or development of adjacent uses will not be affected in this regard.

The Chair notes that the person adjacent, most directly affected by the proposed work is in support of the project.

That the continued use of -- I'm sorry. That there would be no nuisance or hazard created to the detriment of health, safety or welfare of the occupant. Although some members of the Board may feel there is going to be a hazard. But architectural...

THOMAS SCOTT: Architectural

detriment.

CONSTANTINE ALEXANDER: Thank you.

And that the proposed use would not impair the integrity of the district or adjoining district or derogate from the intent or purpose of this Ordinance.

The Special Permit --

TAD HEUER: Architectural integrity?

CONSTANTINE ALEXANDER: Anyway, I'll get to it.

The Special Permit would be granted on the condition that the work proceed in accordance with plans submitted by the Petitioner prepared by Peter Wright Studio Architects. They are 1, 2, 3, 4, 5, 6, 7 pages of plans. The first page of which has been initialed by the Chair. Provided that the work need not -- with respect to the windows, need not proceed in accordance with the plans so long as the alternative window

treatment does not increase the opening of the windows in the addition. Does that do it? I get a shrug of the shoulder.

All those in favor of granting the Special Permit on this basis say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Four in favor.

(Alexander, Hughes, Sullivan, Scott.)

CONSTANTINE ALEXANDER: Opposed?

(Show of hand.)

CONSTANTINE ALEXANDER: One opposed.

(Heuer.)

TAD HEUER: You still win.

(10:20 p.m.)

(Sitting Members: Constantine Alexander, Timothy Hughes, Brendan Sullivan, Tad Heuer, Thomas Scott.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9997, 24 Russell Street. Is there anyone here wishing to be heard? Good evening. For the record, your name and address, please.

ELIZABETH OLSON: Elizabeth Olson, 24 Russell Street.

EVAN OLSON: Evan Olson from 24 Russell Street.

CONSTANTINE ALEXANDER: You're before us because you're seeking a Variance to demolish an existing mud room and construct a new mud room and half bath.

ELIZABETH OLSON: Yes.

CONSTANTINE ALEXANDER: Tell us a little bit more about the project. Particularly we have to find to grant you the relief, I think you may know, we have to find

a hardship that's tied to the shape or topography or soil conditions of your property. If you could address that, I would appreciate it.

ELIZABETH OLSON: Sure. We bought the house, it was just the two of us and we are now a family of four. And we don't have space in our kitchen to allow our family to sit down together at a meal. So, there is a bathroom, powder room in the kitchen that we would like to move out of the kitchen to allow to have an eat-in space, which when we would replace that bathroom with a small addition for a powder room next to the mud room.

CONSTANTINE ALEXANDER: And right now you have a non-conforming structure from a Zoning point of view. So any change requires Zoning relief. And in fact which is FAR change, is relatively modest increase in the slight non-conformance in the Zoning By-Law. You're at 0.56. Right now you're

going to go to 0.58 in the district that has a maximum of 0.5. That's for the record that's why you're here.

EVAN OLSON: Right.

ELIZABETH OLSON: Yes.

EVAN OLSON: Yeah, and the hardship that we would like to present is that as my wife said, though the house was redesigned or revamped by a couple, so everything is for two people. And that's when we bought it, it was beautiful, it was great. But now with two small boys we're going to be a very large quickly. There really isn't space, you know, to eat together, or there will not be space soon. So we feel that the hardship is we love where we are and we don't want to have to move especially in these economic times. So by doing this modest addition, that would solve all our problems, and we can be there for many years to come.

CONSTANTINE ALEXANDER: And the

plans you submitted to us are the final plans?

EVAN OLSON: They are.

CONSTANTINE ALEXANDER: Questions from members of the Board at this point?

TAD HEUER: I just have a procedural question. You noted in your FAR calculation that the open space doesn't change but remains non-conforming at 63 percent lot area?

ELIZABETH OLSON: It was non-conforming I think before.

TAD HEUER: But you only need 40 percent, right? Like, if I'm reading this correctly, does the lot -- does the house take up 63 percent of the lot or does the house take up 37 percent of the lot?

ELIZABETH OLSON: I'm not sure I know the answer to that. Our architect wrote that.

EVAN OLSON: The lot area is 5,099 square feet.

TAD HEUER: Really?

EVAN OLSON: Well, according to the survey.

TAD HEUER: How about 3405?

EVAN OLSON: Sure.

ELIZABETH OLSON: Oh, 3405.

EVAN OLSON: Oh, okay I'm reading....

TIMOTHY HUGHES: How many floors?

EVAN OLSON: Three floors.

TAD HEUER: I think it has to be the -- I think that it has to be that it's non-conforming at 63 percent. It's 23 percent over 63 percent. You're not non-conforming in that respect.

TIMOTHY HUGHES: It's not non-conforming? That's minor.

TAD HEUER: It's not really, it's not going to impact your petition. It's just made no sense.

ELIZABETH OLSON: The wording of

that is -- yeah.

THOMAS SCOTT: 5099?

TIMOTHY HUGHES: It's 34 something.

THOMAS SCOTT: It says 5099 on the certified plot plan.

ELIZABETH OLSON: Oh, I can answer that question, I think. The Cambridge portion -- we live in Somerville and Cambridge.

EVAN OLSON: It's nice to pay taxes in two towns.

TIMOTHY HUGHES: That's exactly what it is.

EVAN OLSON: Good catch.

TAD HEUER: So the Cambridge portion of your house on the 5,000 square lot is 3400?

ELIZABETH OLSON: Yes.

TAD HEUER: And the house takes up 63 percent of the Cambridge side of the lot. The house predominantly is in Cambridge?

EVAN OLSON: Yes, we are Cambridge

resident, yes.

TIMOTHY HUGHES: So they have open space in the town of Somerville.

CONSTANTINE ALEXANDER: Further questions from members of the Board at this point?

THOMAS SCOTT: I think the petition is nice and it has very architecturally pleasing windows.

CONSTANTINE ALEXANDER: Anyone here wishing to be heard on this matter?

(No response.)

CONSTANTINE ALEXANDER: The Chair notes no one wishes to be heard. I don't believe there's anything in the file. No letters in the file. So are we ready for a motion?

The Chair moves that this Board make the following findings:

That a literal enforcement of the provisions of this Ordinance would involve a

substantial hardship to the Petitioner. Such hardship being that the structure as currently configured is not conducive to family use. A family being just more than husband and wife for purposes of what I just said.

That the hardship is owing to the fact that the shape of the structure -- we have a structure that is already non-conforming, and so that further changes and modifications, even ones that are desirable, require a Variance.

And that relief may be granted without substantial detriment to the public good or nullifying or substantially derogating from the intent or purpose of this Ordinance. In fact, the relief being sought is rather modest in nature. It is architecturally pleasing as testified to by one member of the Board. And that there's no neighborhood opposition, and generally it makes the house

itself more conducive to use by families with children, which is always a desirable thing in our city.

So on the basis of these findings, the Chair moves that a Variance be granted to the Petitioners on the condition that work proceed in accordance with plans submitted by the Petitioners. They're numbered 1, 2, 3, 4, and 5 which has just some aerials. So five pages. First page of which has been initialed by the Chair.

All those in favor of granting the Variance on the basis in these findings say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. Variance granted. Good luck.

(Alexander, Hughes, Sullivan, Heuer, Scott.)

(10:25 p.m.)

(Sitting Members: Constantine Alexander,
Timothy Hughes, Brendan Sullivan, Tad Heuer,
Thomas Scott.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9998, 2210 Mass. Ave. Is there anyone here wishing to be heard on this matter?

ATTORNEY SEAN HOPE: Yes. Good evening members of the Board, Mr. Chair. Attorney Sean Hope, 130 Bishop Allen Drive. Here me tonight is Mrs. Hong Liu and her family. Mrs. Hong Liu is the owner/proprietor of the Cambridge Inn House at Porter Square. It's at 2218 Mass. Ave. which is adjacent to 2210 which is the subject of our Variance tonight. We are requesting a use variance subject to Article 4 to allow us to use a rear portion of the property. It's about 30 feet of house, to use that in a manner consistent with the rest of the property, which is lodging for a bed and breakfast.

This case is somewhat unique. The property is located on a split zone. So the

first hundred feet is business A2, and the rear portion is Resident B. Unlike some other cases, this is not just a lot is split. The actual house is split. So the first hundred feet of the single-family house is Business A2, and it has all the allowed uses and you have the rear. I believe the actual lot line was because there was an addition prior to the 1970s. There was addition that actually moved the actual house. But nonetheless the house as now is -- the last 30 feet is Residence B. The first hundred feet is Business A2.

CONSTANTINE ALEXANDER: What's the house being used for now? Is it being used at all I should say?

ATTORNEY SEAN HOPE: It is being used. It has medical and office uses. And in 2005 when Mrs. Liu purchased the property there was dental offices and a host --

CONSTANTINE ALEXANDER: In 2005

you've purchased the property?

HONG LIU: Yes.

CONSTANTINE ALEXANDER: What have you done with the property since 2005?

HONG LIU: When I purchased the property in 2005, it was mixed use.

CONSTANTINE ALEXANDER: Yes, yes, we know that.

HONG LIU: That is offices and residence and owner/occupants.

CONSTANTINE ALEXANDER: What have you done with the property since 2005, do you continue to have that mixed use?

HONG LIU: Yes, I continue to have that mixed use until the dentist office moved out.

CONSTANTINE ALEXANDER: When did the dentist move out?

HONG LIU: Yes.

CONSTANTINE ALEXANDER: When?

HONG LIU: He moved out in late 2008.

CONSTANTINE ALEXANDER: 2008. And the building remained vacant or are you using it for other purposes?

HONG LIU: Oh, it's always a mixed use for residence and --

ATTORNEY SEAN HOPE: I'm sorry, excuse me, you're asking what is it being used for now?

CONSTANTINE ALEXANDER: Yes.

ATTORNEY SEAN HOPE: Mrs. Liu's family is living in the rear of the property so that -- it's a family business. And in the front -- do you have any current commercial tenants?

HONG LIU: Yes. I have commercial tenants and I have resident tenants.

CONSTANTINE ALEXANDER: So you're using it as a lodging house now in part? Or a bed and breakfast if you will, right now?

HONG LIU: Two rooms.

CONSTANTINE ALEXANDER: You are?

HONG LIU: Yes.

CONSTANTINE ALEXANDER: And you've begun doing this for how long?

HONG LIU: I use this for -- I basically continue the use -- the previous owner have been using it for residential use and office use.

CONSTANTINE ALEXANDER:
Residential for his or her own purpose?

HONG LIU: No, he had a rental.

CONSTANTINE ALEXANDER: No? He had a bed and breakfast?

ATTORNEY SEAN HOPE: Some of this confusion, we were before the License Commission. So the property is not permitted to be able to be used as lodging. That's why we're here. Mrs. Liu, because of the Victorian style housing and the number of rooms, she did have month-to-month renters that were staying there. So there was a discrepancy between is this a lodging house,

are you having month-to-month renters or your family living there? The idea was she wants to use the property as a lodging house. And she does have month-to-month tenants living on the third floor --

CONSTANTINE ALEXANDER: I just want to understand whether there's been up until now, because I think it's relevant, whether there's been a violation of our Zoning By-Laws by using this as a lodging house in part, perhaps not in whole but in part since 2005. I haven't gotten an answer to my question yet.

HONG LIU: Well, the question is that I purchase it and it was a mixed use. And it was for short term, so weekly, monthly use and offices. And I continue that use when I purchase it.

CONSTANTINE ALEXANDER: You never used it as a bed and breakfast where people can rent the rooms by the day or the week?

HONG LIU: Well, I started using that about last year, and then the business was very bad. And then -- in wintertime. And then always starting about this year, 2010 and I started thinking to do the B&B. And then I kind of tried out to see whether it would work or not. And then my father passed away. And I was in the process. I got in contact with, you know, trying to do this and then -- then I'm a school teacher and I was distracted and then until this time --

ATTORNEY SEAN HOPE: And I think part of the discrepancy was the front first hundred feet is business A2 where lodging allowed.

CONSTANTINE ALEXANDER: Lodging is allowed?

ATTORNEY SEAN HOPE: Lodging is allowed. So, intransigent accommodation under 4.31. So it doesn't allow for hotel, but it does allow for lodging, so that's the

desired use. Still, you know, it's the rear of the property and it's one parcel. So the Commissioner felt like we should come before you because how do you separate, you know, slice a house in half. You got to use one for the other.

I'd like to speak to the hardship. I think the hardship has to do with the shape and the topography such that the house is actually split into two contrasting units. You can't have both, but in practical terms. I'd also like to turn out the A2 District and that North Cambridge corridor of Mass. Ave, if you look across the street, there are several uses that are mixed use on Mass. Ave. I think it has to do with the commercial nature of Mass. Ave. The fact that it's a main thoroughfare with bus and traffic there. But if you look at the six adjacent parcels, three across the street and two next, one of which Mrs. Liu owns, they're all used for

commercial purposes. And so we're just trying to just keep in character with that, but at the same time this rear portion is in Residence B which lodging is not allowed. So we wanted to be able to use that for that purpose.

TAD HEUER: Maybe I just look at the file, but the other abutting -- is this lot deeper than your other adjoining lots?

ATTORNEY SEAN HOPE: It is. And I'm assuming when they actually made the lot line a hundred feet, the other lot in the area, and you can look, they're about between 90, 80 and 100 feet. And this is the only one that's 150 feet in length. So the other ones aren't cut in that same way. There are some maybe that veers a foot or two that's cut by the lot line. But I think this is an irregularly shaped lot which is why the house is actually turned into Res B. Also Rindge Terrace, there's like a little cul-de-sac in the back, and as you

know, some parts of Cambridge the lots are oddly shaped as it is in this case.

TAD HEUER: And you have essentially a flag lot next to you, right? I'm seeing parcel 19897.

ATTORNEY SEAN HOPE: Is that to the left?

TAD HEUER: It's closer toward the Porter Square side of --

ATTORNEY SEAN HOPE: Okay.

TAD HEUER: So you have the one that fronts on that half is 2200 Mass. Avenue. And I guess this is 2198. But its frontage is being claimed only through that flag lot; is that right? So the building itself is entirely in Res B I presume.

ATTORNEY SEAN HOPE: Yes. Because have you actually looked at the lot line -- at least.

TAD HEUER: I'm talking about two and then the item, the house right.

HONG LIU: Yes.

ATTORNEY SEAN HOPE: This is --

HONG LIU: That's the neighbor
Mr. Rinaldo (phonetic).

ATTORNEY SEAN HOPE: That
actually --

TAD HEUER: You can see it better
here. See, here it is.

ATTORNEY SEAN HOPE: Yes.

TAD HEUER: So this property,
although I presume is Res A, the driveway.

HONG LIU: Right. I can say
something about that.

TAD HEUER: Is that residential?
Res B.

ATTORNEY SEAN HOPE: Yes.

TAD HEUER: Okay. So, essentially
everything that's behind this lot line should
be Res B and actually has its own lot?

ATTORNEY SEAN HOPE: Yes.

TAD HEUER: Except you are the only

property on this block that's actually forced into the two lots as to your structures. The primary use of your structures.

ATTORNEY SEAN HOPE: Yes. In this snapshot as you look further.

TAD HEUER: Yes, that's okay.

BRENDAN SULLIVAN: Sean, what's the Department's definition of lodging?

SEAN O'GRADY: Yes, I know it's difficult. Lodging is like single room occupancy.

BRENDAN SULLIVAN: Single.

SEAN O'GRADY: Single room occupancy. It's for --

CONSTANTINE ALEXANDER: Like a rooming house kind of?

SEAN O'GRADY: I'm sorry?

CONSTANTINE ALEXANDER: Like a rooming house?

SEAN O'GRADY: It's a rooming house. It's where you stay for an extended period of

time, but you don't have a unit, you have a room. Then the --

BRENDAN SULLIVAN: And share a common facility.

SEAN O'GRADY: Yes. I mean, there's different iterations of it, but you are something less than your own unit. That is, your room might have a bathroom in it, but it's something less than a unit, your room.

BRENDAN SULLIVAN: And a bed and breakfast is an owner-occupied structure that also has people who would rent a bedroom for a night or a number of nights.

SEAN O'GRADY: That's the difference. The bed and breakfast, you can stay in one night. A lodging house you have to stay like a month to month.

BRENDAN SULLIVAN: Typically a weekly basis or a monthly basis or something.

SEAN O'GRADY: We say monthly.

BRENDAN SULLIVAN: Okay. And what

throws you from a bed and breakfast into a hotel category would be if it's not owner occupied.

SEAN O'GRADY: That's the major.

CONSTANTINE ALEXANDER: That's not in the Zoning Ordinance itself. That's how you --

SEAN O'GRADY: Well, it's owner occupancy is a requirement in the Ordinance -- well, if you give me a minute I can find it. When we were going through it, we were very careful about our language.

BRENDAN SULLIVAN: So anyhow, getting back to what's before us, Doctor Gaelin (phonetic) used to have his dental practice in the front building and then he would rent out rooms to other dentists and then he built his residence in the back. And so he lived on-site in the back.

The Petitioner came in 2005, bought the building, continued the practice of renting

to dentists, I guess, because they were still there and wanted to continue. And that the third floor which became vacant for some reason or another was then rented out to individuals, rooms at the third floor. Whatever number of rooms were there. And then Doctor Gaelin left in 2055 when you bought the property or was he there after?

CONSTANTINE ALEXANDER: I thought I heard 2008, but maybe I'm wrong.

HONG LIU: He stayed there for like two years.

BRENDAN SULLIVAN: Two years. And then he moved out a couple years ago and then your family has moved in to continue that residency; is that correct, from what I understand.

HONG LIU: Doctor Gaelin lived one room off the first floor and in the basement level. And then he rented to two people on the first level.

BRENDAN SULLIVAN: Okay.

HONG LIU: And then that's why I have a friend -- people who know the property and who know the area. And then they always send a guest (inaudible) and the property has always been mixed use as a dentist. When I purchase it, even until today I still have eight electrical bills, eight gas bills because there are dentist office, doctor. And then he's still in North Cambridge. He's the -- and three offices. Duraclean, medical use. And then the other is a mail order. And then third floor has two residents. And second floor has one resident, and the back has two residents. So I have totally like eight, nine mix use.

TAD HEUER: So, Mr. Hope, I guess the question that everyone's trying to get at if I can say, are we curing an improper existing use or are we granting an approval for a use that would like to be started?

ATTORNEY SEAN HOPE: We had this question at the License Commission and yes, the difference between if someone's a month-to-month renter or if their family or if they're using a lodging house, it is very difficult because of the changing nature of the use to actually say what it was. It was -- the view of the License Commission, we had to refrain from what might be a misuse until we came to the Board to be able to actually -- because lodging is allowed in the first hundred feet. So we were allowed to do that. Now you have to still apply to license --

CONSTANTINE ALEXANDER: So what you're saying in view of the License Commission, you have a violation -- the current use is in violation of our laws? In so many words.

ATTORNEY SEAN HOPE: In so many words.

Now, you know, we argued back and forth whether the parents were -- but the whole point in the rear they definitely could not use the way we wanted to use it. So we felt if came before the Board, got a Variance to use the full property, because it's one piece as a lodging house, then we'd have to go back before the License Commission, they have an application to do that. But without doing the application there were reasons -- her father died. Why she started to use it in certain ways, and then she didn't apply for it, so we figured the best thing to do was to get clean. Because the idea is we really want to full property if her family moves out. And you have lodging in the front part, it's difficult to maybe even rent or other uses or even the medical use. Because under BA-2, you could use -- a bank could be there, a real estate office. It's not just for lodging. So it made sense to get the desired use. You

know, we have full neighborhood support as you'll see in the file. You know, Mrs. Liu has a family-run bed and breakfast adjacent to it. It's run well. It's established in the neighborhood. So we felt the best way to do --

BRENDAN SULLIVAN: But ultimately going forward, Mr. Hope, is the intent of the Petitioner to incorporate this building as part of the Cambridge Inn?

ATTORNEY SEAN HOPE: No it's a separate entity owners, separate ownership.

BRENDAN SULLIVAN: Totally separate. So the Cambridge Inn is going to remain the Cambridge Inn?

ATTORNEY SEAN HOPE: Yes.

BRENDAN SULLIVAN: And the purpose before us is to sanctify, to put our imprimatur on a lodging --

ATTORNEY SEAN HOPE: Yes.

BRENDAN SULLIVAN: -- for the entire

which again goes back to the definition would be on a renting out rooms --

ATTORNEY SEAN HOPE: Yes.

BRENDAN SULLIVAN: -- with shared bathrooms, shared kitchen facilities.

CONSTANTINE ALEXANDER: The only thing sought is a bed and breakfast not a rooming house. Which is --

BRENDAN SULLIVAN: Well, there's a little bit of mumbo-jumbo going on.

CONSTANTINE ALEXANDER: I know. I'm aware of that.

BRENDAN SULLIVAN: That's why I'm trying to get clear as to exactly what's going on.

CONSTANTINE ALEXANDER: I think what's clear is your petition says you want to operate a bed and breakfast, not a rooming house. If we grant you relief it's to operate a bed and breakfast.

ATTORNEY SEAN HOPE: In the actual

posting that we were changing view as a lodging bed and breakfast. So the lodging house is defined as Sean was saying, by the Commission and in the Ordinance as distinct from a motel, a hotel, or a transient occupancy. So --

BRENDAN SULLIVAN: But a bed and breakfast can only be if it's owner occupied.

TIMOTHY HUGHES: Well, so far we haven't found any of that in the Ordinance. And we found a list of the differences in the tourist hotel and a hotel and a lodging house. But we don't have them defined in the Ordinance. The only one that's defined is lodging. The rest of them don't even show up in the definition.

CONSTANTINE ALEXANDER: I don't see any reference to lodging in your application. In your advertisement I should say. It is to change use occupancy from medical office, single family residential to a bed and

breakfast inn not owner occupied. Where does the word lodging come from?

ATTORNEY SEAN HOPE: So, Mrs. Liu on her own had filled out the application. But the copy of the application that I believe was submitted and --

CONSTANTINE ALEXANDER: You haven't advertised properly for a lodging. We can't consider a lodging tonight because it wasn't advertised for a lodging.

ATTORNEY SEAN HOPE: Can we look at the actual application? The copy that I received and I was looking at had lodging on it. I can't speak to what --

TAD HEUER: It's crossed out.

CONSTANTINE ALEXANDER: It's been crossed out.

HONG LIU: Lodging is bed and breakfast.

CONSTANTINE ALEXANDER: No, no. Not for purpose of the Zoning By-Law. It's

completely different. That's the discussion we've been having. And what you have in the application is exactly what's in the advertisement. So I don't think, in my judgment, if we grant relief tonight, it is simply to operate a bed and breakfast not owner occupied. You cannot use it as a lodging house, basically a rooming house. If you want that, you have to come back with another application, another advertisement. You can do it.

ATTORNEY SEAN HOPE: So, you couldn't make a decision on the property being used as a bed and breakfast?

CONSTANTINE ALEXANDER: Yes.

ATTORNEY SEAN HOPE: Not owner occupied.

CONSTANTINE ALEXANDER: Yes.

TAD HEUER: Well....

CONSTANTINE ALEXANDER: I'm still mystified about this owner occupied notion

comes from. I couldn't find it anywhere.

TIMOTHY HUGHES: I can't find it anywhere.

CONSTANTINE ALEXANDER: I thought it was an administration interpretation.

SEAN O'GRADY: I couldn't find it because --

CONSTANTINE ALEXANDER: I think it's probably your interpretation -- not yours but the building office interpretation.

ATTORNEY SEAN HOPE: It's not in -- bed and breakfast is not termed in Article 4. It says bed and breakfast, the term is not Article 4. And that in the initial application it was lodging bed and breakfast. I do think that the common sense meaning of a lodging --

CONSTANTINE ALEXANDER: Nice try. Not a common sense.

You asked for relief for a tourist house

and existing dwelling, hotel or motel or a lodging house. But your advertisement said you're going -- you said I just want to do a bed and breakfast. You haven't gone as far as you might have gone with respect -- not you, but your client -- with respect to the relief being sought.

TAD HEUER: So I mean --

HONG LIU: It doesn't matter. If you give me lodging, I'll take lodging.

CONSTANTINE ALEXANDER: No, we're not going to give you lodging.

HONG LIU: You'll give me what?

ATTORNEY SEAN HOPE: Only bed and breakfast. The advertisement didn't say --

TAD HEUER: Here's my thought at the moment. Either that the advertisement is essentially a nullity because they've asked for a non-existing category of relief which means that we can't be here at all. That doesn't seem to make sense. And I also seem

to recall previous cases in which we have subsumed the citation of the ordinance section, but we've subsumed the advertised narrative, the subsection that is being cited and said that citation of a section is sufficient. I believe Mr. Hope was before us in that matter, which I contested this and I was overruled by my fellow board members I believe on a tailoring shop or something similar.

ATTORNEY SEAN HOPE: Right. And it was taking the broad category of uses, you were trying to define it whether it was going to be for dry cleaning and it was for laundry.

CONSTANTINE ALEXANDER: That's right.

TAD HEUER: And it seemed that the Board was saying that the citation of the Ordinance section was sufficient to allow an individual reading the posting to understand and go to that section of the Ordinance,

believed that the Ordinance was what was being cited on not necessarily the description as long as the description was reasonably descriptive of the Ordinance section itself.

So, I mean, I understand where the Board is going and I certainly think the advertisement could be clearer. And it's put us into a bit of a quandary. But given the fact that bed and breakfast apparently is a non-existing category, and I can't imagine they'd be applying for a nullity of relief, I would be more inclined in that case to try to give meaning to the application and therefore to look at the request for 31.1 which is what's cited. That's just me.

ATTORNEY SEAN HOPE: It's actually 4.31-I.

TAD HEUER: I, sorry.

TIMOTHY HUGHES: Right. Transient accommodations which includes lodging house,

hotel, motel and tourist -- and a tourist house. You know, I don't know what a tourist house is. It's not a bed and breakfast. There's no promise of breakfast there.

CONSTANTINE ALEXANDER: By the way, are you proposing if we were to grant you the relief, are you going to modify the exterior of the structure at all?

HONG LIU: No, not at all. That's one thing. My family bought the property simply because we want to help keep the Victorian homes, and that's one of the reason North Cambridge Stabilization Committee when they heard about me, I went to their meeting on September 22nd. I was listed as second to talk to them what I'm doing, and they give me full support. Mr. Clary said if necessary he's going to, you know, show up. I said no, no need because it's nine o'clock. And then Denise Chilson across the street, and she said, you know, I support you. And

Councillor.

ATTORNEY SEAN HOPE: Ken Reeves.

HONG LIU: Ken Reeves. And then my other neighbor, Craig Kelly.

ATTORNEY SEAN HOPE: To the left or the right?

HONG LIU: Yeah. Craig Kelly. And then he e-mail me several times, and even today he said you have my support and you shouldn't have any problem. I went around and I collected 33 --

CONSTANTINE ALEXANDER: We have all of those. All of those talk about --

HONG LIU: Now, the thing is that --

CONSTANTINE ALEXANDER: Now, wait, let me finish, please.

They all talk about a bed and breakfast, and we'll go back to our definition of what we have. The people are saying we support a bed and breakfast. I don't hear anybody saying I support a lodging house, which is a

different form of occupation. It is different, for example, than your inn next-door. There is a need for Cambridge for bed and breakfast, and I think it's desirable in that area. And that's what your neighbors are all saying. The question is should we go farther and allow you to do something other than a bed and breakfast which is what you're asking us to do.

HONG LIU: No, actually I was thinking to 100 feet that's Zoning allowed. You can allow me to do whatever the Zoning for the first 100 to do. I just change medical doctor use, offices, residence to this lodging use for bed and breakfast or transient house.

TAD HEUER: But that's allowed by right, correct?

ATTORNEY SEAN HOPE: Right, exactly. Lodging house specifically spelled out in 4.3-I. And so we were asking

for an expansion of that use. And so, if there's a different interpretation in, you know, subjectively and, you know, in Hong's mind, then that's different. But what the Board can request can extend what's allowed as of right the first 100 feet for the remaining 30 feet of house to be able to utilize that. Now, if we go to the Commission and they say bed and breakfast is actually different, then you use, you know, at that point we'd be forced to use in the manner of lodging house, however they define it, or to come back before the Board and do something different. And that's based on what was applied for. And what was applied for was based on what was used as of right. So we wanted to continue that as of right use for the first 100 feet remaining, and that was the nature of the petition here. And if there's a difference between bed and breakfast and lodging house, I think that has

to be defined with the actual License Commission, because bed and breakfast doesn't exist in the code. I understand we couldn't ask for relief that you couldn't grant.

HONG LIU: And I also have my application, I always put in lodging/bed and breakfast. That's the licensing category. And when I fill in the form, I always put in lodging and bed and breakfast.

TAD HEUER: So how did it get crossed out? The form that I'm looking at it says lodging, bed and breakfast and lodging is scribbled out with two lines.

HONG LIU: You see this is my change from lodging.

TAD HEUER: Right. In our version it's changed to include the words "not owner occupied" at the bottom.

HONG LIU: It's owner --

CONSTANTINE ALEXANDER: What you

have here is different then what was filed with the City of Cambridge.

HONG LIU: How can that be true?

CONSTANTINE ALEXANDER: I'm just reading what we have right here. Stamped, sealed. You're showing us something --

HONG LIU: And my owner is occupied. My --

CONSTANTINE ALEXANDER: What we have, you have to have your application before us. Your application is not consistent with what you've just given us.

ATTORNEY SEAN HOPE: This is what they have.

CONSTANTINE ALEXANDER: I don't know where that came from. But that's not -- this is it. And it talks about as Mr. Heuer's pointed out, lodging is deleted and it talks about a bed and breakfast in not owner occupied. And that's exactly what you put in your advertisement.

HONG LIU: Someone changed not owner occupied. I don't know, because it's always intended as owner occupied. (Inaudible.) And you don't have to do the back of the attachment. I just keep on using because even if you give me bed and breakfast, my own, my family will still going to occupy the back of the house. And I'm not changing -- it's existing structure, it's existing lot, and everything is the same. It's just change of the use.

CONSTANTINE ALEXANDER: Anything further, Mr. Hope?

ATTORNEY SEAN HOPE: I would ask, I mean, because I think the practical definition if her family lives in the rear or not, I feel if you could decide on in favorable -- if you feel comfortable to decide on the application you have before you, I think the effective use for what Mrs. Liu is asking for will be preserved. So

if you feel comfortable in terms of voting on the application before you as written or if not --

CONSTANTINE ALEXANDER: The application as written is a bed and breakfast not owner occupied.

ATTORNEY SEAN HOPE: And to Mr. Heuer's point if you could look at the section, if you feel comfortable --

CONSTANTINE ALEXANDER: The point is you have, you brought 4.31-I has a broad list of kinds of places for owner inhabitants. You've come before us with the application asking for a narrower subset, i.e. a bed and breakfast, whatever that's supposed to mean, not owner occupied. That's all the world put on notice. All the letters of support talk about a bed and breakfast not owner occupied. And the question we're wrestling with is to go farther than what you've asked for in your

application and what your neighbors have supported. I'm personally troubled by that, but I'm only one person.

ATTORNEY SEAN HOPE: I'd love to hear the opinion of the other members.

CONSTANTINE ALEXANDER: Just for the record and let me just say that we have a considerable number of letters of support, all of which are supporting a bed and breakfast use. I don't see any letters of opposition. We do have a letter I should read into the record from the City of Cambridge Traffic Parking Transportation Department. It's actually a memo to Ranjit. It says, "The owner of 2210 Massachusetts Avenue, Hong Liu has indicated to me that she wishes to convert a building at it 2210 Mass. Ave. from a commercial residential use to lodging use. According to our records, 2210 Mass. Ave. has no parking spaces registered. If the site is converted to residential use,

it will not trigger the parking and transportation demand management ordinance. If the parcel is used for non-residential, parking must be registered with this department and may trigger the parking and transportation demand and management ordinance. If the proponent converts the site to lodging use, it appears from the ortho photo that space on the lot could accommodate at least seven parking space. I recommend she provide this department a parking layout plan and register the final number and use of parking spaces."

So, this is to advise you that you have other issues apart from Zoning that you're going to have to deal with if we grant you relief.

HONG LIU: This, I went there because Ranjit, after Mr. O'Grady give me those information, in the process filling the form, Ranjit send me to the parking and I

talked to the gentleman and he gave me this aerial. And also he found that in the previous Zoning it was requested 15 when they do the medical. And then they gave us seven, and that's where the seven comes from. And then in my info -- the occupancy of the building I think he determined --

ATTORNEY SEAN HOPE: Right, that is 12 spaces.

CONSTANTINE ALEXANDER: Just educational. I think we're ready for a vote?

TIMOTHY HUGHES: Well, I don't know what are we voting on?

CONSTANTINE ALEXANDER: I'm going to get to that in a second. I'm not sure of it myself.

TIMOTHY HUGHES: Are we voting on extension of 4.31-I.

CONSTANTINE ALEXANDER: I'm going to propose to make the motion, subject to other people's input, to make the motion

consistent with the advertisement and the application which is to limit the Variance to a bed and breakfast and not owner occupied.

TAD HEUER: What does that mean?

TIMOTHY HUGHES: But you're limiting it to a non-existing category under 4.3-I.

CONSTANTINE ALEXANDER: It's a non-existing category. It is not. There's a broad number of uses that can be done under 4.31I. And as the application is written, the Petitioner doesn't want to go the full length. She has advertised for a subset. It doesn't have to be a defined category within the Zoning By-Law. It is a certain limited use, not as broad as might have been permitted, but is a limited use as to what she's asked for. I think we can only give what she's asked for. That's my view.

TIMOTHY HUGHES: What is it?

CONSTANTINE ALEXANDER: How would

you make the motion then? Bed and breakfast would be as defined by the City of Cambridge. It doesn't have to be something that's specifically in the category within the Zoning By-Law. You could look to definitions, common sense definitions outside of the Zoning By-Law because that's what the Petitioner's requested.

TIMOTHY HUGHES: So, we're calling it a tourist house?

CONSTANTINE ALEXANDER: Yes.

SEAN O'GRADY: And we consider those changes -- we consider those terms interchangeable.

CONSTANTINE ALEXANDER: Bed and breakfast and tourist house?

SEAN O'GRADY: And I can't for the life of me find that language. I just don't know where it is.

BRENDAN SULLIVAN: It's probably skewed and clouded the discussion the fact

that she owns a bed and breakfast next-door, and that which she has solicited opinions from neighbors that they probably rightfully or wrongly assume that it's a bed and breakfast, as I sort of did. And it may not have come out very clearly in lodging house or do people understand the fact that a lodging house was, you know, technically functionally different than a bed and breakfast and a motel. However, the section cited properly in -- I think that's what I think they're asking relief from, the initial application, and probably the discrepancy and what have you, would probably be somewhat attributed to the naivety to the applicants and not being, you know, astutely legal and technical in the application. But probably the intent is to continue what the present use is and probably said, and put it in the right box however you guys decide. So where I land on the thing is that she has cited the right

section, and what is the overall use, whether somebody is there daily, two or three days, a weekend, a week or something like that, or it's the same person over a period of weeks. The effect is probably exactly the same.

TAD HEUER: Sean, is the language you're looking for that 4.31-I is tourist house in an existing dwelling? Is that where you were drawing the language of owner occupancy from?

SEAN O'GRADY: Tourist house in existing dwelling, yes. Well, there's actually -- that backs it up. There's actually better language somewhere. And I'm not sure if it's in here -- there's another issue which is the sort of clash between the Licensing Commission. Because it originally came in under the Licensing Commission, and there's a default when we see -- if you have a residence, which that was, and you have more than three unrelated

people in it, then you default to lodging house. So they started talking about lodging house. And so I think there's probably some attempt to service them and service us. And that's why there might be a distinction. If she has a bed and breakfast --

CONSTANTINE ALEXANDER: Whatever that is.

TAD HEUER: How about a tourist house in existing dwelling?

SEAN O'GRADY: If she has a tourist house in an existing dwelling, other than the fact -- but that doesn't really require owner occupancy.

TIMOTHY HUGHES: No, it doesn't.

SEAN O'GRADY: If she were granted tourist house in existing dwelling, then I believe that that covers lodging house because you could have people come into a bed and breakfast and just stay.

TIMOTHY HUGHES: Stay for a month.

TAD HEUER: But the problem is if it doesn't, because if you look at the Bus A, 1, 2 and 3, a tourist house existing dwelling is no and a lodging house is a yes by right.

SEAN O'GRADY: Right. So what they're saying is we're okay as long as you stay a month. But if you want to stay shorter than a month, then there's turnover and it's considered to be more egregious, and so we say no to it.

And what I'm saying is the reverse. If you say yes to the lodging house or the hotel, then you could have guests of one day. Or like a lodging house of a month, and you have those sort of hotels that people that live in them for years.

BRENDAN SULLIVAN: I mean the Y could be considered a lodging house.

SEAN O'GRADY: Yes. And in fact, I think it is.

TIMOTHY HUGHES: It's long term for some people.

TAD HEUER: A tourist house in existing --

BRENDAN SULLIVAN: Tourist house is a tourist would have an address. Whereas, a lodging house, this is their primary -- well, I guess if somebody came for a semester or something. There are so many variables out there.

CONSTANTINE ALEXANDER: Tourist house and existing dwelling, bed and breakfast. That's the common sense --

SEAN O'GRADY: We consider that to be, yeah.

CONSTANTINE ALEXANDER: That's what a bed and breakfast is.

TAD HEUER: Okay. If that's true, tourist house in an existing dwelling/bed and breakfast is not allowed by right in either a Res B or a Bus A2, which means this

application if we grant it, would grant the right for a bed and breakfast in the rear and not in the front; is that right?

TIMOTHY HUGHES: No. If we grant it, we're granting it for both.

TAD HEUER: It would be granted for the entire property?

TIMOTHY HUGHES: That's what they're asking for.

ATTORNEY SEAN HOPE: It's one house. It's just a split zone.

TAD HEUER: But originally you were saying what you wanted was to make the rear in conformance with the front. What I'm saying is really what we would granting is to allow the entire front and back to be used for a new purpose.

CONSTANTINE ALEXANDER: That's what they're asking us to do.

ATTORNEY SEAN HOPE: And that would also be consistent with what's happening next

door. It's different than what we presented because of the definition of lodging house and we come to that conclusion. But I think the practical effect of what would be happening on the property I don't think is any different. If this was a lodging house and we were working on that definition, the first 100 feet would be as of right and it would be just the 30 feet. And I believe tourist house and bed and breakfast is the definition we're going to be working under and what we would be using, we would need a Variance for the entire property. But in terms of the practical effect, I think, we want to be accurate, I think that is accurate. That tourist house, bed and breakfast as is defined which would require a use variance which we did apply for.

CONSTANTINE ALEXANDER: For the entire property.

ATTORNEY SEAN HOPE: It would be the

entire property, and that's what we're seeking to get as opposed to three quarters of a house and then the rest of the house.

TIMOTHY HUGHES: But you could still use the three quarters of the house as a lodging house as a matter of right. So you get pretty much be able to use it the way you want to use it if we give them the bed and breakfast. I don't know where this owner occupier stuff comes in.

SEAN O'GRADY: Well, the existing dwelling speaks to it, but there's actually --

TIMOTHY HUGHES: Sort of but not really.

SEAN O'GRADY: Well.

CONSTANTINE ALEXANDER: Yes, you got to stretch --

TIMOTHY HUGHES: Who's existing dwelling. It just says it's an existing dwelling. It doesn't say your existing

dwelling. There's no pronoun that defines it.

CONSTANTINE ALEXANDER: You're right obviously, Tim. But I think sort of you can divide the intent was the word your should be implied there. It wouldn't make any sense otherwise.

SEAN O'GRADY: I'm wondering also whether the language that I'm thinking of actually comes from the Licensing Commission. I don't know that. I'm second guessing myself now because I expected it to be in Article 2.

CONSTANTINE ALEXANDER: Well, let's go.

SEAN O'GRADY: Just one other tip off. The other thing is that if you're a hotel, there's hotel taxes. And if you're a lodging house, you got to be licensed. Just so that whatever we do here, there's repercussions that happen at Licensing.

ATTORNEY SEAN HOPE: Yes.

TIMOTHY HUGHES: So we're calling it a B&B.

TAD HEUER: No, we're calling it a tourist house existing dwelling.

TIMOTHY HUGHES: All right. There is no B&B. Tourist house with existing dwelling.

CONSTANTINE ALEXANDER: That's actually -- you joke. That's exactly how I think the motion should be made. We grant the Variance for a tourist house in existing dwelling.

TIMOTHY HUGHES: I like that.

CONSTANTINE ALEXANDER: For the entire structure. I leave you to worry about the fallout later.

TIMOTHY HUGHES: Let the Licensing Commission sort it out.

SEAN O'GRADY: I would say this: The petitioner has asked for a waiver of, to

the extent that it exists, a waiver of that happening to be owner occupied.

CONSTANTINE ALEXANDER: Where does that come from, the requirement that you be owner occupied? Unless you imply tourist house and dwelling, that means owner occupied.

SEAN O'GRADY: I wish that I could just point that out, but I don't want my failure to be rubbed off on her.

HONG LIU: Owner occupied is just for the safety because you always have some manager, resident manager. And then right now my family members live here. And even if they live here, I still plan to have a nightshift manager. So that's why I request the waiver in that irregardless of my family, whether they will be here or not, I will have a nightshift manager to make it very, very safe. And that's the main reason.

CONSTANTINE ALEXANDER: Well, we

could -- I just throw it out. We could grant the Variance with a condition that it does not require -- that we don't define with dwelling unit to require that the property be owner occupied so long as there is adequate security by a third party to provide for the safety of the occupants of the structure. We could go that route.

SEAN O'GRADY: Limited to this case?

CONSTANTINE ALEXANDER: Yes.

SEAN O'GRADY: Yes, I'm fine with that.

TAD HEUER: Are you going to enforce that?

CONSTANTINE ALEXANDER: Other members of the Board want to comment?

SEAN O'GRADY: It's just as enforceable as the other condition which is even harder. Then I've got to establish relations.

CONSTANTINE ALEXANDER: Ready for a

vote?

TIMOTHY HUGHES: Yes, I've been ready.

CONSTANTINE ALEXANDER: The Chair moves that this Board make the following findings with regard to the Petition before us:

That a literal enforcement of the provisions of the Ordinance would involve a substantial hardship to the Petitioner. Such hardship being that the ability to use this property fully for residential purposes is not possible.

That the hardship is owing to circumstances relating to the fact that this property is in a split Zoning district, and which makes use of the property very difficult. You're dealing with both residential and business zoning restrictions.

And that relief may be granted without

substantial detriment to the public good or nullifying or substantially derogating from the intent or purpose of this Ordinance.

This finding would be made on the basis that what the Petitioner proposes to do is to, in her words, to use a bed and breakfast not owner occupied, but in the words of our Zoning Ordinance is to have a tourist house in an existing dwelling. So on the basis of these findings, the Chair moves that a Variance be granted to the Petitioner to allow use of the entire lot for a tourist house in an existing dwelling on the condition, however, that if that tourist house is not owner occupied, that you must provide alternative, adequate security arrangements and the kinds of security that owner occupancy would provide.

TIMOTHY HUGHES: I like that.

CONSTANTINE ALEXANDER: All those in favor of granting the motion so moved say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor.

(Alexander, Hughes, Sullivan, Heuer, Scott.)

CONSTANTINE ALEXANDER: Five in favor. Variance granted.

(11:10 p.m.)

(Sitting Members: Constantine Alexander, Timothy Hughes, Brendan Sullivan, Tad Heuer, Thomas Scott.)

CONSTANTINE ALEXANDER: We have one more case. The Chair will call case No. 9999, 1380 Massachusetts Avenue. Is there anyone here wishing to be heard on the matter?

(No response.)

CONSTANTINE ALEXANDER: The Chair notes no one wishes to be heard.

The Chair would note for the record that the Petition is not right for a determination by this Board. The Petitioner is seeking a Special Permit for a fast food establishment in the Harvard Square Overlay District, and under Section 20.53.2 of our Zoning By-Law they must seek an advisory opinion from the Harvard Square Advisory Committee. And no such opinion has been sought. Or if it's been sought, it has not been delivered.

The Chair would therefore move -- we need a waiver of notice for time of decision. Did they sign one?

SEAN O'GRADY: Yes, I got a waiver.

CONSTANTINE ALEXANDER: The Chair moves that this case be continued on seven p.m. on December 2nd. Is that the date we have?

SEAN O'GRADY: Yes.

CONSTANTINE ALEXANDER: December 2nd. On the condition -- the Chair noting that this is a case not heard. That a waiver for time to decision, if necessary in any event has been signed. And that the Petitioner modify the sign on the premises to indicate both the new date and new time.

And finally, that the Petitioner seek an advisory opinion from the Harvard Square Advisory Committee. But that if such opinion is not rendered within 30 days from the request by the Petitioner, that as is consistent with our past practices, this Board will hear the case nevertheless and assume that the Harvard Square Advisory Committee, such that it is, has no opinion on

this matter.

All those in favor of continuing the case on this basis say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor.

(Alexander, Hughes, Sullivan, Heuer, Scott.)

(Whereupon, at 11:15 p.m., the meeting adjourned.)

C E R T I F I C A T E

**COMMONWEALTH OF MASSACHUSETTS
BRISTOL, SS.**

I, Catherine Lawson Zelinski, a
Certified Shorthand Reporter, the
undersigned Notary Public, certify that:

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, skill and ability.

IN WITNESS WHEREOF, I have hereunto set
my hand this 14th day of October 2010.

Catherine L. Zelinski
Notary Public
Certified Shorthand Reporter
License No. 147703

My Commission Expires:
April 23, 2015

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