



August 1, 2018

By Electronic Mail to Jeff Roberts (jroberts@cambridgema.gov) and Liza Paden (lpaden@cambridgema.gov)

Planning Board
City of Cambridge
344 Broadway
Cambridge, MA 02139

Re: St. James Project; Special Permit

Dear Chair, Vice Chair and Members of the Planning Board:

We represent Oaktree 2013 Mass Ave LLC (“Oaktree”). With St. James Episcopal Church, Oaktree is converting the former car wash property at 2013 Massachusetts Avenue and part of the Church property at 1991 Massachusetts Avenue into a mixed use building with housing, a new parish hall space for the Church and a small amount of commercial space (the “Project”). The Planning Board issued special permit no. 241A for the Project, filed on April 29, 2011 (the “Special Permit”, which reauthorized the special permit previously approved in case no. 241, filed on January 15, 2010). This letter requests that at your meeting on August 7, 2018, as an administrative matter, you find that construction of the Project under the Special Permit has not commenced for “good cause” under Section 10.46 of the Cambridge Zoning Code.

Following the issuance of the Special Permit, the Project was delayed by a series of lawsuits, including an appeal of the Special Permit and challenges to the City Historical Commission Certificate of Appropriateness and to Massachusetts Historical Commission review of the Project. Attached are a Chart and a Project Chronology summarizing and timelining those cases, which, even setting aside the appeal of the Special Permit, extended over a period of roughly seven (7) years. By last August (of 2017), all of those lawsuits were resolved in favor of the Project, and on September 25, 2017, Oaktree applied for its building permit so it could finally begin construction. The permit has not yet been issued. While the Inspectional Services Department recently acknowledged that the Special Permit remained in effect under Section 10.46 as of this April 21, 2018, even without consideration of “good cause,”¹ ISD and the City

¹ This conclusion results from the application of the usual two-year rule under Section 10.46, the additional four (4) years afforded by the State Permit Extension Act and the provision within Section 10.46 regarding direct appeals of a special permit.

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Solicitor have suggested we ask the Board to make the requested finding. The City Solicitor indicated to me that your consideration of this request and, assuming you agree, making the finding would be an appropriate process for determining “good cause” under Section 10.46.

The legal and factual bases for that finding are quite straightforward. The first factor is the seven (7) years of Project litigation. Massachusetts courts have consistently found that appeals of project approvals other than a given permit justify relief from the time periods for the commencement of the work stipulated under that permit.² As with the cited cases, the multiple appeals and lawsuits in our case challenged the validity of various Project approvals. Those lawsuits, baseless as they were, posed real impediments to the start of construction.

And, while that litigation alone is clearly good cause for delaying the start of work, good cause may involve other “legal impediments” to the commencement of construction. The facts here are that Oaktree applied for the building permit in September 2017, promptly after the resolution of the litigation; the City’s review of Project zoning appears to have commenced in February 2018; and ISD first inquired about the validity of the Special Permit around March 27, 2018, about six (6) months after the building permit application was filed and, significantly, about a month before the April 21, 2018 date referenced above. Over four (4) more months have now passed while we have actively and promptly responded to ISD’s requests for more analysis on this matter. Oaktree cannot commence construction without a building permit, and it would be remarkable if today, more than ten (10) months after Oaktree applied for that permit, there were any debate about good cause for its inability to start work.

Fortunately, this Board is in a position to end any such debate and to allow this Project, which the Board approved with extensive findings not once but twice, to proceed at last.

Thank you very much for your consideration.

² See also *Smith v. City of Waltham*, 2004 WL 1485140 (2004), noting:

“[R]elief from time limitations given in cases ... where a legal impediment exists to the use of a benefit, should also be given where an appeal from the granting of a [special permit] creates equally real practicable impediments to the use of a benefit.” *Belfer v. Building Comm’r of Boston*, 363 Mass. 439, 444 (1973). Significantly, other courts have followed *Belfer* to find tolling of applicable construction periods where a party has been unable to proceed under one permit while appeals were pending on related permits or approvals. See, e.g., *Hadley v. Casper*, 15 Mass. L. Rptr. No. 5, 109 (September 16, 2002) (finding the appeals of three special permits and an order of conditions frustrated development under a variance not appealed); *Neilson v. Planning Bd. of Walpole*, 9 LCR 57, 59 (2001) (Misc. Case No. 253156) (recognizing failure to use a special permit was the result of an appeal of an order of conditions).

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Very truly yours,



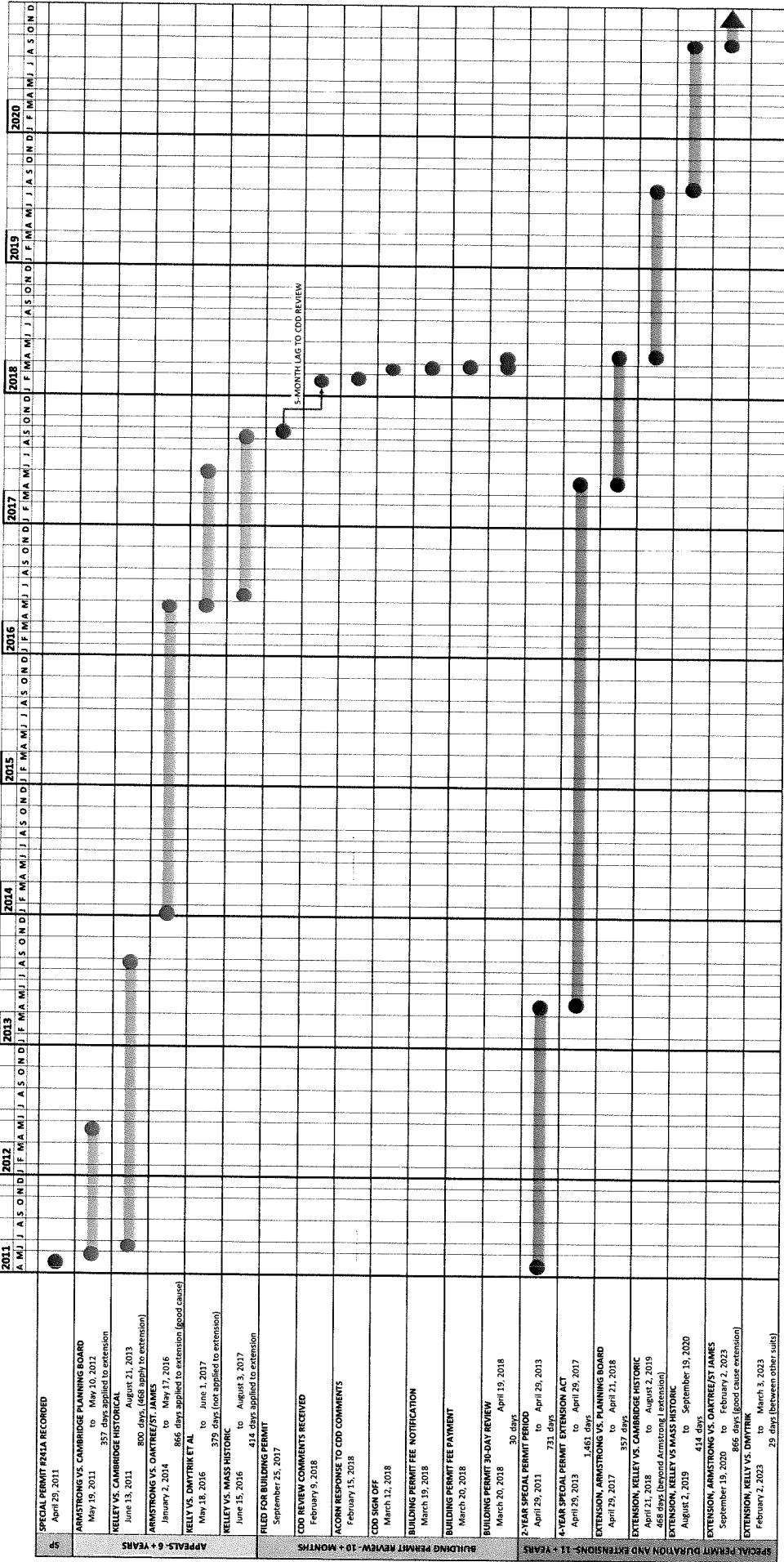
Peter A. Caro

cc: Nancy Glowa, Esq.
Ranjit Singanayagam
Dennis J. Carlone
The Rev. Holly Lyman Antolini
Jeffrey Zinsmeyer
Robert Orsi, Esq.
Phil Terzis

St. James Place – Project Litigation

| <u>Case/Parties</u> | <u>Court Filed</u> | <u>Docket No.</u> | <u>Nature of Case</u> | <u>Dates Filed and Resolved</u> |
|--|--------------------------|---------------------|---|---------------------------------|
| <u>Armstrong, et. al. v. Cambridge Planning Board</u> | Middlesex Superior Court | C.A. No. 2011-1754 | Appeal by neighbors from grant of special permit. | May 10, 2011 – May 10, 2012 |
| <u>Kelley, et. al. v. Cambridge Historical Commission</u> | Middlesex Superior Court | C.A. No. 2011-2074 | Action by neighbors alleging that the Cambridge Historical Commission improperly issued Certificate of Appropriateness for the project and that the Mass. Historical Commission failed to enforce restrictions applying to the project. | June 13, 2011 – August 21, 2013 |
| <u>Armstrong, et. al. v. Oak Tree [sic] Development, LLC and St. James Episcopal Parish of Cambridge</u> | Middlesex Superior Court | C.A. No. 2013-04481 | Action by neighbors under M.G.L. c. 214, s. 7A seeking equitable relief blocking the project on the grounds that the Mass. Historical Commission failed to conduct a proper review. | January 2, 2014 – May 17, 2016 |
| <u>Kelley v. Dmytryk, et. al.</u> | Middlesex Superior Court | C.A. No. 16-1383 | Action by <u>Kelley</u> plaintiff seeking to overturn settlement of second <u>Armstrong</u> case | May 18, 2016 – June 1, 2017 |
| <u>Kelley v. Mass Historical Commission and Oaktree Development, LLC</u> | Middlesex Superior Court | C.A. No. 1681CV1700 | Action by neighbors seeking equitable relief enjoining Oaktree from pursuing the project and mandamus against the Mass. Historical Commission requiring it to withhold approval of the project. | June 15, 2016 – August 3, 2017 |

SAINT JAMES PLACE: PROJECT CHRONOLOGY



APPEALS - 6+ YEARS

BUILDING PERMIT REVIEW - 10+ MONTHS

BUILDING PERMIT DURATION AND EXTENSIONS - 11+ YEARS