

BOARD OF ZONING APPEAL FOR THE  
CITY OF CAMBRIDGE GENERAL HEARING  
THURSDAY, MARCH 25, 2010 7:00 P.M.  
in Senior Center  
806 Massachusetts Avenue  
Cambridge, Massachusetts 02139

Constantine Alexander, Chair

Tim Hughes, Vice Chair

Brendan Sullivan, Member

Tad Heuer, Member

Douglas Myers, Member

Mahmood Firouzbakht, Member

Ranjit Singanayagam, Commissioner of  
Inspectional Services

Sean O'Grady, Zoning Specialist

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P R O C E E D I N G S

(7:05 p.m.)

(Sitting Members: Constantine Alexander, Tim Hughes, Tad Heuer, Douglas Myers.)

CONSTANTINE ALEXANDER: The Chair will call this meeting of the Board of Appeals to order. And the first case we're going to hear is a request for an extension. The case involves 42 Water Street in Cambridge. Petitioner being Catamount Holdings, LLC. The petitioner was granted a variance on April 29, 2009, and by operation of law that variance must be acted upon within one year. Sir, come forward.

We have a letter in the file I believe. Before you introduce yourself I'll read the letter. It's addressed to this Board from the law firm of Goulston and Storrs, Deborah Horowitz, H-o-r-o-w-i-t-z.

"Dear members of the Board: As you know, in this decision in the

above-referenced case --" the case we have before us --" the Board of Zoning Appeal granted variances for the construction of a multi-story residential condominium building, including 392 units. The variance was granted on April 29, 2009 and are set to expire on April 28, 2010 unless extended by the BZA. As we have discussed with the BZA in the past, the project requires significant coordination with third parties, including the MBTA in connection with the relocation of the Lechmere T stop. We have made progress with the MBTA and continue to make progress in other aspects of the development as well. We, therefore, respectfully request that the BZA extend the effective date of the variances for six months, until October 28, 2010."

That is the request. And we have, for the record, would you identify yourself?

BRIAN LAWLOR: Yes, my name is Brian

Lawlor. I'm principal with Symmes, Maini & McKee. We're the architects, engineers for the project.

CONSTANTINE ALEXANDER: Anything you wish to add to what's in Ms. Horowitz's letter?

BRIAN LAWLOR: No, I don't believe there is.

CONSTANTINE ALEXANDER: Any questions or comments from any other members of the Board?

The Chair moves that this variance, the effectiveness of the variance be extended for six months, until October 28, 2010. All those in favor of the extension say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Four in favor. Extension granted.

(Alexander, Hughes, Heuer, Myers.)

(A discussion held off the record.)

(7:05 p.m.)

(Sitting Members: Constantine Alexander, Tim Hughes, Tad Heuer, Douglas Myers.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9877, 55 Magazine Street. Penthouse units on fifth and sixth floors. This was continued in an earlier session.

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

(No response.)

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

We have a letter in the file from Developmental Resources Architecture Planning and Urban Design addressed to the Cambridge Building Department.

"Mr. Singanayagam: Please withdraw our request for a Special Permit for the penthouse unit No. 55/65 at 55 Magazine Street." And the rest is just reciting what relief they're going to seek.

Any discussion?

The Chair moves that this case be withdrawn in accordance with the request of the petitioner. All those in favor say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Four in favor. The case is withdrawn.

(Alexander, Hughes, Heuer, Myers.)

(A discussion off the record.)

(7:10 p.m.)

(Sitting Members: Constantine Alexander, Tim Hughes, Tad Heuer, Douglas Myers.)

CONSTANTINE ALEXANDER: The Chair will next call -- we'll take two cases in tandem because they both involve 12 Shady Hill Square. Case No. 9563 and 9651. These are cases that have been continued in past sessions.

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

(No response.)

CONSTANTINE ALEXANDER: The Chair indicates that no one wishes to be heard. I believe there's a letter in the file from the petitioners. Yes, it's on the letterhead of a law firm of Rackemann, R-a-c-k-e-m-a-n-n Sawyer and Brewster signed by Eric, E-r-i-c W. Wodlinger, W-o-d-l-i-n-g-e-r addressed to this Board.

"On behalf of the petitioners in the

above-entitled matter and by agreement with Christian Habersaut (phonetic), Esq. representing Stonehouse holdings, LLC, I hereby request a continuance of the above matters now scheduled for a hearing on Thursday, March 25, 2010 to allow the closing by purchase and sale agreement between the parties in implementation of their settlement agreement. I am pleased to inform the Board that the Stonehouse and the Shady Hill Square Association, Inc. have executed a purchase and sale agreement for the property which has been the subject to dispute and expect to close on the transaction within the next 45 days." This letter is dated March 22nd. "We are currently awaiting the revision of a restriction in favor of the City of Cambridge which is being prepared by the City Law Department. And as you know, CPA funds have been appropriated by the City Council to

assist in closing this transaction. Kindly continue the hearing on this matter to the latter half of May 2010. I hope to be able to inform you of a title settlement prior to that time."

Anyone wishing to be heard on this matter?

(No response.)

CONSTANTINE ALEXANDER: No one wishes to be heard.

Comments from members of the Board. No comments.

The Chair moves that -- by the way, they requested the later part of May. Is that available?

SEAN O'GRADY: Yes, we can do May 27th.

CONSTANTINE ALEXANDER: This is a case not heard. I can't sit on May 27th.

The Chair moves that the two cases be continued until seven p.m. on May 27th. A

waiver of time for a decision already being in the file, but the motion would be made on the condition that the petitioner modify the signs relating to both these hearings to reflect the new hearing date.

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

(Aye.)

CONSTANTINE ALEXANDER: Four in favor. Both cases continued.

(Alexander, Hughes, Heuer, Myers.)

(A discussion off the record.)

(7:10 p.m.)

(Sitting Members: Constantine Alexander, Tim Hughes, Tad Heuer, Douglas Myers, Mahmood Firouzbakht.)

CONSTANTINE ALEXANDER: The Chair will call case No. 8741, 220-226 Hurley Street. Is there anyone wishing to be heard on that matter? Please come forward.

And those in the audience who have trouble hearing can come closer if they like. For the record, identify yourself for the stenographer.

ATTORNEY JASON MANEKAS: Jason Manekas, M-a-n-e-k-a-s for the petitioner Husam Azzam, H-u-s-a-m A-z-z-a-m.

HUSAM AZZAM: I'm the petitioner, Husam Azzam, A-z-z-a-m.

CONSTANTINE ALEXANDER: Let me, since this case is contentious, let me just frame if I may the issues as I see them. I

would like to focus the discussion on the issues that are really before us.

This case arose because when you applied for a certificate of occupancy on the two unit residence built on one of these two lots, a certificate of occupancy was denied because the Commissioner, the then Commissioner determined that a merger had taken place for Zoning purposes under the common law, and that the certificate of occupancy could not be granted because the structures were built in violation of our Zoning By-Law. You took an appeal. Do you agree so far with what I've said?

HUSAM AZZAM: No.

CONSTANTINE ALEXANDER: You took an appeal. And this case came before this Board, the five members of the Board. None of the five of us were on the Board at that time. And the Board upheld the decision of the Commissioner. Said the merger had

occurred and therefore the refusal to grant a certificate of occupancy was proper. You took an appeal to the courts. And the case -- Land Court to the Appeals Court. And the Appeals Court reversed or found that -- or remanded -- ordered the case to be remanded to this Board mainly because of, at least in its decision, the Board did not deal with the arguments, that -- you weren't counsel at that time, the arguments as to why there was no merger. And the arguments centered on the definition of lots according to our Zoning By-Law.

ATTORNEY JASON MANEKAS: I was counsel at trial.

CONSTANTINE ALEXANDER: You were, I'm sorry.

ATTORNEY JASON MANEKAS: That's okay. Not at inception of this case, but I was counsel on the trial.

CONSTANTINE ALEXANDER: Were you

here for the Board of Appeals?

ATTORNEY JASON MANEKAS: I was not.

CONSTANTINE ALEXANDER: The Appeals Court said, and I'm going to read from the decision, that the argument was made about why the definition of lot, and we'll get into that or you will get into that, overrides the common law notion of merger. And the Court stated that the Board, this Board, implicitly rejected the argument that was made on your behalf in upholding the Commissioner's determination that the two parcels had merged into a single lot for Zoning purposes. However, the Board did so without any discussion of the meaning of the clause upon which Azzam relies. Although the Board is entitled to some deference in its construction of its own ordinance, the failure on the part of the Board to explain its interpretation of Article 2.000 which is the definition of a lot, renders the dispute

at review exceedingly difficult.

The Court also goes on to say that the City did not explain, and nothing in the record explains what procedure one must undertake in order to designate a parcel of land identical ownership throughout as a separate lot for Zoning purposes.

And then finally the Court says, on this record we are unable to ascertain how the Board construes the clause upon which Azzam relies.

So the case before us tonight, and the issue in this case, we have another related case, is your arguments as to why, again, maybe the same argument, maybe different arguments, why the definition of lot or any other argument you may make overrides in the notion of merger. And then we will addressing those arguments in rendering our decision will make specific findings supporting your arguments overruling the

Commissioner or rejecting them.

Further, what I would like to do since you are challenging a determination of a Commissioner, I think it's appropriate that I read into the record, you have a copy, a memorandum supplied to this Board by the Commissioner explaining the basis for which the certificate of occupancy was not granted. In other words, the decision you're challenging. It's signed by Mr. Singanayagam, but I should point out for the record that he was not the Commissioner at the time of the denial of the certificate of occupancy, his predecessor was. And I apologize, this memo is a little bit long and I'm not into dramatic reading, but I think it's important for the record. It's going to be a part of the record, but the people in the audience should understand, because they don't have a copy of this, understand the position of the Commissioner. And then,

again, to just give you an opportunity in your remarks and specifically address these, if you wish, and any other arguments you want to make.

The letter is addressed to the Board of Appeals dated March 25th referencing this case: "I am providing this memorandum in connection with the remand order from the Massachusetts Appeals Court and BZA case No. 8741. The Land Court has required the Board to make new and further findings in light of the opinion of the Appeals Court. Specifically, the Land Court remand order states" -- and there is a quote. This is a statement from the Land Court. "-- in its revised decision, the Board shall make determinations and factual findings addressing the application to the land of Azzam at issue of the definition of lot as set forth in Article 2.000 of the Ordinance which provides that a lot is a 'parcel' of land

identical ownership throughout, bounded by other lots or by streets, which is designated by its owner to be used, developed or built upon as a unit.

"The Board, in its revised decision, shall offer its interpretation of the Ordinance concerning:

"i, the meaning of the said definition particularly as it relates to the issue of whether or not there has taken place as to the locus merger for Zoning purposes.

"And ii, that the procedure required for an effective designation and whether or not such a designation has taken place as to the locus."

Continuing: "The Board in its original decision in this case upheld the Commissioner's determination that the two lots in question had merged by operation of law when they came into common ownership in 1950." It references the decision. See BZA

case No. 87.1 attached thereto. It's not attached.

"In the original hearing the property owner argued that the lots had not merged because he had not designated them to be used, developed or built upon as a unit. The argument was made in reference to the language in Article 2 of the Zoning Ordinance related to the definition of lot. The final decision of the Board rejected this argument in a wholly definition of determination that the lots had merged, and thereby implicitly rejected the property owner's argument. The property owners have often suggested to this office that the designation provision and the definition of lot could be used to defeat the common law merger doctrine. It is this office's interpretation that this provision must be read in the context of other interesting legal requirements such as minimum lot size, lot area per dwelling unit,

and a legally mandated undersized or otherwise non-conforming lot. If the City Council had intended to override the Common Law Doctrine of Merger, it should have done so explicitly and should have provided more detailed provisions as to the process required for designation. The purpose of the designation provision in the definition as we have long interpreted it, is to permit a property owner who owns two or more contiguous lots, some or all of which are conforming lots, to choose to designate the lots to be used, developed or built upon as a unit in order to take advantage of the combined as-of-right building envelope for the combined -- for the designated combined lots. This occurs fairly frequently when large land owners seek to design a project by masking the structures of their desire while satisfying setbacks and open spaces and other dimensional requirements on contiguous lots

in common ownership. The designation process itself occurs at the time of the submission of the Building Permit application where no other Zoning relief is required. By designating two or more conforming lots be seen as a single lot for Zoning purposes in the Building Permit application, the owner thereby commits those lots to the satisfaction of the overall dimensional requirements for the project. Further development on the otherwise conforming lots is thereby restricted on the unbuilt portions of the overall site, and it is in order to confirm this future restriction that the 'designation' in the definition of lots must be made by the owner at the outset of the original project.

"I believe that this interpretation is consistent with the Common Law Merger Doctrine which obligates a Cambridge property owner to use adjoining land within

his control to avoid or reduce a dimensional non-conformity. It is also consistent with other provisions of the Zoning Ordinance in the Board's original decision. This would create a conflict with the explicit minimum lot size requirement of the Ordinance that applies to any lot no matter how it is 'designated' by the property owner. It would also contravene the provisions of Article 5, Section 5.12 which provide in relevant part that no part of the lot as required for existing buildings or uses may be used to comply with the lot or yard area requirement for a new building or use.

"Finally, it would be inconsistent with Article 5, Section 5.21.1 of the Ordinance which states that lots of less than the required area for the district in which they are located, and which have been duly recorded with or deed with the Registry of Deeds by the application provisions of this

or any prior Ordinance, the minimum lot size or lot width regulations need not apply, but the floor area ratio and the minimum lot area regulations for each dwelling unit shall be applicable.

"With respect to the property at 220-226 Hurley Street, the two under-sized lots merged in 1950 when they first came under common ownership. The deed for the second lot, 220-221 1/2 Hurley Street was recorded on May 17, 1950. So the minimum lot size requirements established by the Ordinance in 1943 of 5,000 square feet in a Residence C-1 District apply to the combined lots. The minimum lot area requirement of each dwelling unit in the C-1 District is 1,500 square feet. The total area of the combined parcels is 7100 square feet. This is sufficient only to accommodate the four residential units, thus rendering the two additional units built on the 7,100 combined lot illegal."

And there's a footnote that I won't read. It's not relevant, I think, to the thrust of the position of the Commissioner.

"Because these two lots were non-conforming, the property owner could not 'designate' either of these lots separately in a manner that would increase the non-conformance. It has been our interpretation after consultation with the Law Department that too much must be read into the definition of lot to conclude that the City Council intended to override the provisions of this Ordinance, and the Common Law Merger document where there is a clear application of the term designate and the definition as described above."

I'm through reading. Now it's your turn to talk.

ATTORNEY JASON MANEKAS: I appreciate it. Thank you members of the Board. I feel bad having created more paper

in this case, but I feel it may help the members kind of walk through the argument. It's not a lot of new material, but in essence I have a few tabs that are the deeds to the property, a few decisions I'm going to refer to, and I think it would be helpful for members to have that in front of them. And I have a couple extra copies for members of the Board, I'd like permission to see that in connection.

CONSTANTINE ALEXANDER: Permission granted. But with respect to the court cases in particular, you know, we would not have read them in advance, and to the extent they're meaningful to the argument.

ATTORNEY JASON MANEKAS: I'll try to make reference to them.

CONSTANTINE ALEXANDER: Yes, please do or summarize them accurately. If you had extra copies, I would suggest you give one or two to members of the audience.

ATTORNEY JASON MANEKAS: Sure, I do have an extra if someone would like one.

CONSTANTINE ALEXANDER: Go ahead.

ATTORNEY JAMES MANEKAS: At the inception of your statement, Mr. Chairman, the background was fairly consistent as to why we're here with respect to challenging the decision of the Commissioner. I think it may be helpful to members since this panel was not involved in the prior case to sort of fill out the background just a little bit very briefly, then you can paint a variance argument and kill two birds with one stone. By way of background, there's a deed in your package to each lot.

CONSTANTINE ALEXANDER: Which table is that?

ATTORNEY JASON MANEKAS: Tab 7 and Tab 8 are the two deeds. And I don't believe there's going to be much dispute between the Commissioner's office and ourself to some of

the history in this case.

But essentially, the Gouveia family acquired one of the parcels in 1942. And that was the parcel that at the time in 1942 they acquired it, it had four units on it. It had a three-family in the front with a single in the back attached, and that parcel is 224-226 Hurley Street. So in 1943 the Gouveia family owned 224-226 Hurley Street. There are four units on it. At that time Zoning doesn't even exist in Cambridge. Zoning wasn't adopted until 1943, the first Cambridge Zoning Ordinance.

In 1950, the Gouveia family had an opportunity to acquire the adjacent parcel. One parcel is 3500 square feet, the other one is 32 (inaudible). I don't think anyone disputes that, and the Deed's in here. So in 1950 the Gouveia family acquires this vacant parcel. And there was nothing on the parcel at the time. In fact, it had been acquired

by the City of Cambridge through a tax taking. And the reason they purchased it was to use it as a commercial parking lot. So, during discussions with the City of Cambridge, who owned it at the time for the tax taking, they decided they would purchase it provided they receive a Variance at that time to use it as a commercial parking lot, which was not a permitted use at the time. So, in a residential area, they wanted to take this adjacent vacant lot because it is a commercial parking lot. And what I've attached as tabs, Tabs 3 and 4 are the Variances granted by the predecessor to this Board. And as you can see, they were granted permission to use it as an open air parking lot --

CONSTANTINE ALEXANDER: That's the first decision, right?

ATTORNEY JASON MANEKAS: The first decision, yes.

Essentially it gave them a Variance for a small period of time. And then the second one extended into indefinite. The first one was issued for a five-year period and they came back to renew it and it was renewed.

So, when they acquired this property, they used it and intended to use it obviously for a completely separate use, a commercial use. And the Variance actually required that this lot be fenced, paved, supervised and they put restrictions on what this lot could do. And after the 50s when they obtained the second variance, for every year after that, they've been required, the Gouveia family, to go to the City of Cambridge and to obtain and retain a commercial parking license, which they did, no one has disputed that. All the way up until Mr. Azzam has come by to acquire both lots.

So, historically that's how the Gouveia family used it. There's references in my

memo to Ms. Freidas, she's the daughter of the Gouveia family. She ended up being the one that Mr. Azzam purchased both the lots from. There were actually nine brothers and sisters on the Deed, but the Gouveias owned both lots in 1950, and that's when the Commissioner's office says they merged and that exists all the way up to Mr. Azzam acquired it.

When he acquired the two lots, a condition of the purchase and sale was that he bought the two lots on the condition that he obtain a Building Permit to put two single family structures on 220-226 Hurley Street. The question is well, how can he do that? Because currently you're required to have a minimum lot size of 5,000 square feet and it only has 3500. Well, the reason is there is a grandfathering provision in Cambridge, Section 5.21.1, it's referenced in the memo. And it basically says, I'll paraphrase it,

that if you have a lot that existed in the Registry describe by meets and bounds, it was recorded at the Registry, and it was a legal lot at the time that was done, then we're going to grandfather that lot in, provided it meets certain minimum limitations. Still going to have 20 feet of frontage. It's still has to have a certain floor area ratio, a minimum lot area regulations, etcetera for each dwelling. So it didn't give it carte blanche to do whatever you wanted with the property. It basically said if you recorded it and did these things before the passage before the change of Zoning and it was of record, we're going to exclude you from minimum lot size essentially. And so there was testimony in this proceeding, and I've attached the testimony as an exhibit, Exhibit 2 by Ms. Freidas as to what her family did historically. But eventually she testified, and it's in the record that I've

given this Board, she basically said, we was always thought they were two lots. It was a commercial parking lot and it was separated by a fence. In fact, as I was getting up in age, my brothers and sisters wanted to put a house there for me to live in. And that was the plan; they were going to move me over to that lot and we were going to develop that and put a house there, but we didn't have the time or the money or the desire so we ended up marketing them. They actually marketed them as two separate lots for sale. Mr. Azzam came along and purchased both lots. He intended to develop the vacant lot into two, single-family condos and to renovate the four-family needed some work. The one in the back ended up being determined structurally unsound and had to be raised. So, that was by way of background.

What happens Mr. Azzam purchases the property -- actually before he purchased the

property, and this will be in the Variance application, he applies -- he has Ms. Freidas the current owner apply because it was a condition of the sale. So, Ms. Freidas signs two building permits. There were two building jackets at the Commissioner's office. She signs one to renovate the -- she signs one to put the two single-families on the vacant lot.

At that point there are certain inspections done. Mr. Azzam ends up closing on the properties, and he then receives building permits for the two, single-family structures and starts construction for those two family structures. He then turns to the Building Department again, and before construction is very far underway he gets a permit -- and you correct me if I'm mistaken. I don't want to misstate something. He obtains a permit for 224-226, the adjacent lot, to renovate and raise the structure in

the back. So, he gets Building Permits for both lots, get the applications due reference, they're both signed by Ms. Freidas as she gives her address. There's a actually a Variance requested for this in 2002 before this ever comes up before the Board because in order to raise the single-family that's attached to the three-family on 224-226, he needed to go in and get a Variance from FAR and certain dimensional requirements. I believe it's Case 8527 before this Board. And in doing that, the Inspectional Services Commissioner says why don't you come in with just a plan of the whole thing with all the structures you're proposing and that way we know what's going to be on the lots. And the plan was submitted. He actually received a Variance in part for the two, single-families to, you know, to include basement space which is above six-feet, eleven. He includes some dimensional requirements for the four units

on 224-226. And then he continues to build. He ends up building all the structures. All are six units two and four are finalized. Series of inspections obviously are completed. And he then actually obtains COs for all six units. I believe that's what he was referring to earlier when he said they weren't issued. He received a six COs. And then there was a complaint to the Commissioner's office that these two lots had merged. At that time the Law Department investigated and the Commissioner's office ended up rescinding the two COs for the two single-family structures on 220-224 and allowed the other four on 224-226 to stay.

That was the sort of factual background, and I apologize if it's repetitive. This Board is a little new to the case so perhaps a flip through.

So at that time obviously the structures now exist. The COs are now

revoked and there was an appeal to the Board. And the appeal to the Board was that mergers shouldn't apply here. And as Mr. Alexander said that went up to the Land Court and the Appeals Court and it's now back down before this Board.

What happened after that, just to finish the background, and we can get back to the argument, is there was obviously a tear down order for these two structures. It's a significant hardship to my client, especially financially. So, he then approached the Board and sought a Variance. This Board granted that Variance, finding a hardship and that was then appealed by Heather Hoffman who went to the Board, and the Board upheld the Variance. And Ms. Hoffman appealed to the Land Court. And again, the Land Court determined that she didn't have standing. The Appeals Court found that she did have standing. Said that the Land Court

hadn't addressed the merits of it, and that the Board hadn't made significant findings and remanded that to that Board. So here we are -- in 2004 all of this occurred. Here we are 2010 almost six years later, we're right back where we started. Meanwhile these structures are sitting there vacant, being taxed by the City. And the two lots are still and always have been taxed separately. And the city has viewed them as two lots but for this merger argument --

CONSTANTINE ALEXANDER: Can I stop you for the moment so we're clear?

ATTORNEY JASON MANEKAS:  
Absolutely.

CONSTANTINE ALEXANDER: We have another case after this case involving the variance that you alluded to. It's fair to say, I believe, that you -- to get to where you want to end up, you need to win either one of those two cases. Either we overturn the

Commissioner's determination --

ATTORNEY JASON MANEKAS: Correct.

CONSTANTINE ALEXANDER: -- and then you have two separate lots, and you're entitled to (inaudible.)

ATTORNEY JASON MANEKAS: Right.

CONSTANTINE ALEXANDER: Or alternatively if we turn the appeal down, uphold the Commissioner, you then have a second chance, a second bite at the apple, where you ask for the Variance and we'll consider that in the next case. And if we were to grant you the Variance you request, subject to whatever appeals are the core, you end up with where you want to be.

ATTORNEY JASON MANEKAS: Either one will allow us to preserve those units and not destroy them. That is correct.

So, back to the merger argument. We essentially think there really are two critical points and revolve around this

Section 5.21.1 and, you know, we cited repeatedly and it's part of this opinion. Basically the section itself is intended to be a grandfather provision for these historic lots, which existed before Zoning. Which these lots are. And when you read 5.21.1. It talks about duly recorded lot, less than the minimum lot size required. It says basically that if you meet these conditions, the minimum lot size and width may not apply, but you have to satisfy the Commissioner. I don't believe anyone has ever challenged in the history of this case that we meet the specific mandate of 5.21.1 as far as historic and meeting those certain requirements. The argument, though, is the 5.21.1 does not destroy this concept of Common Law Merger. It was never the intention of Cambridge when it grandfathered these lots to say that well, if you meet these provisions, you're okay and you can put two dwelling units on, Mr. Azzam.

But outside our Cambridge Zoning Ordinance there's this Doctrine that, well, we didn't specifically mention, still applies here. And that's been the logic, and I think it's the logic in this memo submitted by the Commissioner tonight which is what we never intended to destroy that. And I think that's obviously for the Board to determine.

And in the first instance I would say that the Court, and we have attached to this package the last Tab 9 is a Land Court decision, the Sylon (phonetic) case, and in Sylon it's almost identical facts which is why I attach it. It's Tab 9, it's a Land Court decision. And basically in Sylon what the Court was confronted with was a Zoning Ordinance that provided a grandfather provision for lots that were prerecorded at the Registry before the inception of Zoning that satisfied certain requirements but not lot size. And it basically said that if you

are grandfathered, you could put up, like in this case Mr. Azzam, two lots. And the argument there was well, wait a second, that's all fine and good that the grandfather provision lets you to do that, but what merger? And the Court said, hey, if the town wanted to put a restriction on it saying that provided they're not in common ownership, it would have added into, in this case 5.21.1. And in fact, you know, in our memo that we've given you, and in this case, you know, we've argued that there are towns who have done that. Towns who have said you're grandfathered if, you know, A, B and C are met provided the lots are not in common ownership with other lot. And those decisions have been upheld. In fact, the legislature in Massachusetts under Chapter 40(a) which is the Zoning chapter, actually adopted a grandfather provision that says, you know, if your lot is a certain size and not in common

ownership, you're grandfathered. And that unfortunately doesn't apply here because we don't meet those statutory requirements. But the argument being that Cambridge was free when it set up its grandfather provision to do what the legislature did which is add that requirement and say provide it's not a common ownership. But it didn't. And that was one of the arguments that we made unsuccessfully to the prior Board and it was remanded here to this Board. And, again, it is one of the two central issues for this Board I think to resolve, which is under 5.21.1, since it doesn't say provided there's no common ownership, you know, is a lot such as this grandfathered at all? Or is Cambridge going to say, and I believe there's a reference in the appeal, they've explicitly acknowledge the merger but not explicitly, and in the Sylon case it was going to be explicit and that's where the grub is. So,

I think it's ultimately traditional for this Board to interpret its own by-laws and decide whether these old historic lots, provided they meet all these other requirements, you know, can satisfy two units this case.

And with respect to the Commissioner's opinion, I believe they cite 5.-- they argue in this letter, I think two very brief points. The first point is this: 5.12 applies. Which says you can't use part of a non-conforming lot to help another lot. Or, you know, you can't use part of a lot that renders one lot non-conforming to save another lot. And that makes sense. That if you have, you know, two bad lots, you can't -- I'm sorry, if you have a good lot and a bad lot, you can't take from the good lot and make the bad lot good, and then say oh, but the other lot was grandfathered. That was probably not very articulate.

But let's say you have Lot A which is

fine. You've got a building on it, that's great. And you own Lot B adjacent to it, and it's not fine. And you want to take land from A and add it to B. Well, you can do that as long as you don't then destroy what's on Lot A. You can't make Lot A non-conforming. That's what 5.12 says. You can't render it non-conforming. In this case I don't think it's applicable for a very simple reason, that we're not taking a conforming lot, 224-226, and making it non-conforming. 224-226 since 1942 has always been non-conforming. It was non-conforming in 19 -- as soon as the Zoning was invented in 1943, it's been non-conforming. It's always had four units. Still has four units. It hasn't changed in any substantial way. It's always been non-conforming. No one is trying to steal land from that to make it non-conforming which is what 5.12 gets at. So I would point that distinction out with

respect to this argument. The other argument in here is --

CONSTANTINE ALEXANDER: Before we get to the other argument.

ATTORNEY JASON MANEKAS:  
Absolutely.

CONSTANTINE ALEXANDER: We're going to --

ATTORNEY JASON MANEKAS: No, no. On this letter.

CONSTANTINE ALEXANDER: On the lot argument?

ATTORNEY JASON MANEKAS: Yes.

CONSTANTINE ALEXANDER: Let's for, I think, for ease in understanding why don't we address each argument first. It's not likely to probe you a little bit on that.

ATTORNEY JASON MANEKAS: Sure.

CONSTANTINE ALEXANDER: I think you're making too much of Section 5.21.1. Its intention really is to preserve

non-conforming lots when you adopt a Zoning Ordinance, puts some restrictions on it. But it was to make it clear you had a non-conforming -- historically a lot that was legal when the Zoning changed, that that lot was not going to become illegal in terms of being undersized. But I think it's a stretch to say the City Council also wanted to do away with the Common Law Merger Document. The Common Law Merger for Zoning purposes is a different function, a very important function, and that is in any community to get rid of undersized lots so that if a -- one person acquires two lots side by side, and one of them is undersized, that that non-conformance disappears by virtue of being merged into the conforming lot or the other non-conforming lot as the case may be. But the point being known, that's a valid, legitimate concept. It's a Common Law Doctrine in the course of courts oppose that.

And it strikes me that before we can overrule that, the City of Cambridge or any other community wants to overrule, you've got to be explicitly, it's got to be clear that that's what you intend. I don't see anything in the definition to me, I'm testing this, that persuades me that that's what the City Council had in mind when they adopted 5.21.1. That they wanted to do away with the Common Law Merger Doctrine.

ATTORNEY JASON MANEKAS:

Regrettably the Zoning Ordinance does not address it one way or the other.

CONSTANTINE ALEXANDER: That's true.

ATTORNEY JASON MANEKAS: Which is unfortunate because if they had, we would have the answer to the question. So I acknowledge that.

All I can say to that point is the following -- and the Commissioners obviously

already disagreed with this petition. The legislature in Massachusetts says, wait a second, the this Common Law Doctrine Merger can be pretty damaging. We're going to set a statutory grandfather extension, and in it they say provided it's not in common ownership and preserves in the merger argument unless (inaudible). And that's 40(a) Section 6 is not applicable in this case. The courts have then said that now that we know there's Common Law Merger and the legislature has created a grandfathering exception, it specifically talks about common ownership, we're going to leave it to the towns and municipalities in Massachusetts to do what they want with that. They can adopt a grandfather provision or not. It's up to them.

CONSTANTINE ALEXANDER: You're absolutely right.

ATTORNEY JASON MANEKAS: In

Cambridge adopted one, 5.21.1. And the real question now is unlike other cities and towns, they're grandfather provision doesn't say you're grandfathered provided you're not in common ownership like the legislature has said. They've simply omitted that language. The question is did they omit it intentionally and thus they are grandfathering? And, again, there aren't many lots that were set up before 1942 that qualify and still meet other requirements and still have lot frontage, etcetera. So, (inaudible) it doesn't open a flood gate lot. It's a fairly unique circumstance going back 65 years, but the question is by their not including that language, was it a purposeful omission and thus we're correct and, therefore, they've adopted grandfather which they didn't have to do, Cambridge was protected by merger. It didn't have to adopt the grandfather provision at all, but it did.

And in doing that we could, A, rely on it because it doesn't say provided there's common ownership. Or did they intend to open it up for lots such as these that fall within the --

CONSTANTINE ALEXANDER: But my point to the 5.21.1 has a different purpose. Its purpose was -- forget about merger and two adjoining lots coming together. If there is a non-conforming lot, undersized lot in the City of Cambridge, the 5.21.1 says that that lot is not going to be destroyed for purposes of (inaudible) subject to certain conditions as set forth in that section.

You know, I think I'm still having trouble. It's a legal phrase to say that this language -- there's a very valid independent meaning associated with this section that has nothing to do with the Common Law Merger. So I don't think you have to lead this section to say that you intended to do away with

Common Law Merger. That dealt with a different issue, different problem. And now you're asking us to say oh, also by the way, it also has the effects of doing away with the notion of merger. But we're faced with the fact that it's not explicit as we all recognize. We also have a history in this city, according to the Commissioner of not interpreting the section as you wish it to be interpreted. So we have an administrative history and interpretation of this statute which you are asking us to overturn. And as you well know, we do give deference, we're entitled to give deference, not blinding deference, but deference to the interpretation of the Zoning Ordinance for the people who live with it day in and day out.

ATTORNEY JASON MANEKAS: The last issue I would make on this portion of the argument is your statement assumes that there's some different scheme if you want to

omit merger. I submit to the Board that there is not. This is how you do it. Merger only applies to non-conforming old lots that don't meet the dimensional requirements.

CONSTANTINE ALEXANDER: That are adjoining.

ATTORNEY JASON MANEKAS: I understand. But the only difference from us benefitting from this provision and not benefitting is the fact we own the adjoining lot. Otherwise I think everyone will acknowledge that we're fine. We fall under the grandfather. We can put the units there. It's only but for the common ownership that we don't. So, I just want to point out the notion that there should have been some explicit commentary or merger, it belongs in a different section of the Cambridge Zoning Ordinance. Again, I'm not putting words in your mouth. It's a little bit of misnomer. Had this just said provided on common

ownership, we wouldn't be here but the section would apply, and it doesn't. And I would submit to the Board the section still applies. We couldn't -- even if we didn't own the adjoining lot we couldn't build on it but for this section. This issue of grandfathering provision is the only one you have. It doesn't belong somewhere else. It's in the dimensional table. It exempts you from the certain dimensional requirements, and it's simply we either yes, we own the adjoining lot and -- as I said earlier, some people have specifically added that language and some haven't. And in the silent case that town didn't, and the court said there's no merger, because the city's adopted a grandfather provision, they could have added language but they didn't. So where else could it be? You know, they didn't have to do it. We could go back and forth but I'll finish with that point.

CONSTANTINE ALEXANDER: Let me ask members of the Board if they have any questions on this argument?

TAD HEUER: I mean --

ATTORNEY JASON MANEKAS: I was going to address the definition of lot.

CONSTANTINE ALEXANDER: Yes, I know, but before we go there I wanted to see if we want to include in our discussion on this.

TAD HEUER: I guess I could see if you had two lots in common ownership that were adjoining that were both undersized non-conforming and if they merged, continued to be a non-conforming lot, that perhaps in that situation the merger would still be eligible for grandfathering because you're going from two non-conforming lots into a larger but still non-conforming lot and the City wouldn't have intended to destroy your ability to build there and said just go build

a park. But I guess I'm still confused as to why in this situation where you would have a lot that becomes conforming if the two lots merge, the City doesn't have an interest -- I mean, that's the whole point of Zoning, right? We want to eliminate non-conformities for the lots in setbacks and building heights and everything else. So if the building burns down, you don't get to rebuild the building -- if you did it yourself or if you decide to knock it down yourself, you don't get to come back and say well, it was non-conforming before, I'd like it to be non-conforming now. You end up with a clean slate and the lot is what the lot is. Why wouldn't that have been the intent at the time of the City in passing an entire Zoning Ordinance? And as the Commissioner says, we read the provision in the context of the entire Ordinance of its non-conformity and in that situation where you do have a merger that

eliminates non-conformity because I don't think no one would disagree that if this is a merger, you have a fully conforming lot, correct?

ATTORNEY JASON MANEKAS: If it's merged we have a conforming lot?

TAD HEUER: If you have a single conforming lot. But that wouldn't have been the desire of the City. And the point that the Chairman says if you have a lot sitting alone by itself somewhere, you don't want to destroy someone's ability to do something because it's their only lot available. But when you have paired lots that are adjoining and they create a conforming buildable lot, that's the whole point of what we're trying to get to. That's our, that's the attempt of the Zoning Ordinance. Why isn't that a reasonable interpretation?

ATTORNEY JASON MANEKAS: Well, the short answer is I believe when Cambridge

adopted a grandfather provision specifically, you're now -- had the Gouveias put the vacant lot in the name of a child or of a trust --

TAD HEUER: Trust.

ATTORNEY JASON MANEKAS: Or anybody else --

TAD HEUER: Of course.

ATTORNEY JASON MANEKAS: -- we wouldn't be here. So there's the fictional argument of ownership of the lots. And Cambridge comes in and it says and creates zoning in '43. By the way, when you have these lots we're, going to grandfather you and we're going to continue to develop them. And you're now assuming that at the time in '43 when they did this, they're saying you're good, you're good, you're good. Oh, you own two, you're no good. You're good, you're good, you're good. And that could have been the intent. The Commissioner believes that

was the intent. But we don't believe because Sylon and the courts have said when you're going to go out and grandfather laws, you should be specific in what it is you want to grandfather. So we believe the omission is either intentional or binds them like in Sylon. But more importantly from a financial standpoint, an equitable standpoint, you know, if A owns a lot, he's good. B's good. C's good. D owns two, sorry. And that could have been the intent of zoning to prejudice that person to exclude them from developing.

TAD HEUER: Isn't it to advance the goals of the City for a more uniform usage of land? Doesn't the City have an interest? It's not saying C is disadvantaged and prejudiced. It's saying that the City's goal is to have none of these regardless whether C is A, C is B or C is X. They don't care who the owner is per se. They care that

land that is set-up like a jigsaw and it doesn't look like a jigsaw anymore. The ideal of zoning, whether it's practical to Cambridge, is that everyone has a conforming size lot and conforming streets and it kind of looks identical, right?

ATTORNEY JASON MANEKAS: I agree with all of the things you've made except for the fact that they said we can't have jigsaws, that's fine. But the City has said if you meet A and you have recorded by '42, and if you meet minimum lot frontage, and if you meet floor area requirements. And if you meet every dimensional requirement but lot area, then you're good. And I think that applies whether you own adjacent land or not. And this Board can find contrary to that. But we think that this provision affords us the ability to preserve it. And maybe this is the good segue. I don't want to cut anyone on the Board off, but to preserve time it

brings us to the second argument. And the commissioner said earlier -- I'm sorry, the Chairman said earlier that well, you have to uphold precedent.

Well, the second part of this argument, and this is what the Appeals Court remanded and their language was pretty specific. The Appeals Court commented that you had to interpret Article 2.0. It's on the first page of the memo. It's indented in bold on the bottom of the page, page one. In Article 2.0 defines lot. At the bottom of page one. It's a parcel of land in identical ownership throughout bounded by other lots or streets which is designated by its owner to be used, developed or built upon as a unit.

And in that definition, we've argued, allows the owner to preserve the ability to develop or build on a lot, to designate it for a use. Earlier when you read the Commissioner's opinion and the Commissioner

talked about well, this is only for conforming lots. Where if you're Harvard University, you can set aside a dormitory I believe was the argument of the Appeals Court. So Harvard can somehow use this and we're going to designate it as a dormitory and thus preserve it. And the Appeals Court comments, and I'll read a footnote from the Appeals Court because I think it's germane. That that argument, the City asserted that it allows property owners to designate certain lots held in common ownership as separate lots only if the lots are conforming. Which is similar to what the Commissioner said.

Since Azzam relies on the doctrine not to revive or create two lots out of what would otherwise be a single lot for zoning purposes, but to demonstrate that the two parcels he now owns were never merged into a single lot, the assertion of the City, even if true, would appear to have no bearing on

the instant case.

So the Appeals Court has already given the Board some guidance and we've attached the decision here, and they've said, well, wait a second, this has to have some meaning. There has to be -- and I think the charge was to give the meaning of the definition as it relates to the issue whether or not it's taken place as to locus merger for zoning purposes. And two, the procedure required for an effective designation, and whether or not a such a designation was taken place as to the locus, meaning Azzam's property. So, the Appeals Court is given somewhat of a mandate or a little bit of guidance perhaps to the Board or suggestion would be a better word than guidance, to say all right, you've had this definition of lot. You're allowing an owner to designate it to be, you know, as such as a developable parcel. How does one do that?

TAD HEUER: Can I designate a non-conforming lot as a buildable parcel just because I want to?

ATTORNEY JASON MANEKAS: I'm sorry. What, the question was?

TAD HEUER: I have a non-conforming lot and I say I hereby designate this buildable. Does that mean anything legally?

ATTORNEY JASON MANEKAS: I don't believe you can do that.

TAD HEUER: Okay.

ATTORNEY JASON MANEKAS: The reason I think it applies here is because in 1942 when the Gouveias owned one of the lots as a four dwelling property, they then acquired 1950 the adjacent lot. And when we looked to what the intent of the Gouveias was which I think was pretty clear, they got a Variance at the time to use as a commercial parking lot. Segregated it by fence, and they maintained it as a separate piece the entire

time. In fact, in the recent decisions by the Land Court and the Appeals Court, the Land Court actually found that they always intended to keep it as a separate parcel. Not only a separate parcel, but a completely different non-permissible use in East Cambridge, a commercial parking lot in the middle of a residential area. It was fenced in and used as such. In fact, there was an argument made well, the Gouveias parked a car there. And I don't care if you park a car there or not. That doesn't destroy what you're using it for or how to designate it.

So earlier in the background when we talked about the Gouveias, I think it's pretty clear from the Variances, it's pretty clear from Ms. Freidas's testimony that they never intended them to be two simultaneous lots.

So getting back to your question, well, how can you take a non-conforming lot and

designate it to be buildable? You can't. Unless back before Zoning was invented or at the time you acquired it, it had the benefit or protection of some either grandfather provision or it was otherwise buildable or conforming at the time. So, when we look at -- let's go back to 5.21.1. It says hey, if you have this lot, that was existed or recorded prior to 1942, which it was. No one disputes that. And you meet these requirements, we'll exempt you from the minimum lot size if it's for your lot. And then we look at the definition, and the lot says well designated by anyone to be used, developed or built upon to be held differently. And in this case I would submit to the Board that when you look at the history to this, that's what happened. They were always maintained as separate parcels. And in fact, when Mr. Azzam took them, he took them at separate descriptions and deeded one

to a condo association and one to himself to be developed. Now we get back to what does this mean and was this the -- were these lots, do these lots satisfy? And, again, when the Chairman said earlier well we want to do deference to our predecessor Board, I've attached, I think it's important Tab 5, the package in front of you, the decision of this very Board from 1991. It's the Lafferty (phonetic) decision. And in essence I'll leave it to Board members to review if they like. But Tab 5, it's a very short decision by this Board, involved two lots, Seven and Nine Field Street, and essentially the person -- if you look at -- the decision's all of four paragraphs. But it basically says the owners wanted to construct a dwelling on Seven Field Street which was a vacant lot and Nine Field Street had a three family. Similar to our facts. And up until 1948 the parcels were in separate ownership. But in

'48 they became merged. So in 1948 the two parcels become merged under Common Law Merger. And the question before the Board was when this person goes to build, well, can he do it or not? And the Board actually follows exactly the procedure we want. The Board says well, you designated them differently. You held them separately. They were taxed separately. And our parcels are still being taxed separately. And we're going to let you do it. So this Board, this Board has allowed almost the very facts we have to be done by the person under the by-law at the time which is the same provision we're dealing with now.

CONSTANTINE ALEXANDER: In 1991 would the definition of lots is the definition we have today, hasn't changed.

ATTORNEY JASON MANEKAS: Hasn't changed. Yes. I believe it's been this way since '68. So it hasn't changed. And they

say you designated differently.

In fact our facts are actually better than this case. In this case at some point in 1986 or '87 before he came in before the Board to argue your similar argument, the City actually changed its decision and taxed him at one parcel. Which to this day hasn't happened in our case.

So even though they came in a common ownership in '48, even though they were then taxed as one parcel which ours wasn't, the Board said no, no, you designate it. So, I think that, you know, when you look at precedents, I think there is precedent to allow it. I think ultimately the fact that this was designated for commercial use and always held for such for 50 plus years, and even the Freidas family thought they could build on it. They marketed it as two separate units, two separate lots. And actually, in hindsight had somehow acquired

them back in 2004 as two separate parcels, two different names and then down a year or two later probably wouldn't have had the problem, but nobody had the, you know, the hindsight it would have been the simple end around. But I don't think that it was the best approach. Because I think they always thought it could be built on. Mr. Azzam always thought it could be built on clearly. And we think that when you look at the definition and you look at how the Board previously interpreted it and you look at what the Appeals Court said, we don't know what this Board will ultimately determine, but apparently this Board needs to determine how someone can designate a lot to be used and develop as a unit and what that impact of that is applies to 5.21.1. We think under these facts we get there.

CONSTANTINE ALEXANDER: In the Lafferty decision which you cited to us,

which is the first time I seen it.

ATTORNEY JASON MANEKAS: Yes.

CONSTANTINE ALEXANDER: This was not referenced in the Appeals Court decision. Was it brought to the attention of the Appeals?

ATTORNEY JASON MANEKAS: It was not brought to the attention of the Appeals Court. It was brought to the attention of the lower court, the Land Court.

CONSTANTINE ALEXANDER: The Land Court?

ATTORNEY JASON MANEKAS: Yes.

CONSTANTINE ALEXANDER: And the Land Court voted to uphold the decision of the Commissioner, and our decision, too.

ATTORNEY JASON MANEKAS: The Land Court did, yes.

CONSTANTINE ALEXANDER: The Land Court, knowing about the Lafferty case which supports your position, nevertheless did not

support your position?

ATTORNEY JASON MANEKAS: My memory is that the Court did not allow us to introduce the Lafferty case. We're going back years. But we believe we were at side bar. We tried to introduce the Lafferty case. I don't know whether it was evident. We had the decision. The Court said, I'm not letting it in evidence. I think it was an evidentiary reason. We made an offer of proof that said well, the Lafferty case which showed this and the Land Court said we're excluding it from evidence. And they excluded it.

CONSTANTINE ALEXANDER: Was it before the Court?

ATTORNEY JASON MANEKAS: Clearly Judge Piper in the Land Court would rarely -- you know, I'm standing at side bar saying, Judge, I want to get this in evidence. And his determination was no, not letting it

into evidence. And, therefore, it was not before the Appeals Court properly because it wasn't part of the record because he excluded it.

CONSTANTINE ALEXANDER: What happened before the Board of Appeals when the Board -- you weren't here then.

ATTORNEY JASON MANEKAS: I was not here. Mr. Azzam was.

CONSTANTINE ALEXANDER: Mr. Azzam, was the Lafferty decision supports the intention of the Board?

HUSAM AZZAM: No, I do not know. I did not know about it.

ATTORNEY JASON MANEKAS: I believe our office discovered it when we got the case after that. You know?

So, you know, the notion that this only applies to conforming lots, it's not what it says. You know, we can talk about explicitly say. It doesn't say you can designate a

conforming lot. I don't believe as Mr. Heuer I don't know if I pronounced that correctly allows to take a non-conforming lot that doesn't have all of our circumstances, that doesn't meet the grandfather provision and make it buildable. But I believe in this instance it's an appropriate way for the Gouveias to preserve this lot under the grandfather provision under the definition of lot and to allow Mr. Azzam to keep rather than tear down the two units. So, that would be the end of my argument with respect to the merger unless the Board has questions.

CONSTANTINE ALEXANDER: Do you have any questions? Go ahead, Tad.

TAD HEUER: When in your opinion does the merger attach? So I take it that your argument would have to be that it doesn't attach at the moment a second property comes into common ownership, but that would be the logical moment that it does attach. Can you

walk me through that?

ATTORNEY JASON MANEKAS: Sure. I believe the case has said at the time you acquire ownership.

TAD HEUER: So, regardless -- I mean, it's kind of technical but kind of not. If merger occurs at the instant the properties come into common ownership, so I own property A, property B I recorded at the Registry of Deeds. And the moment it stamps there is merger? Would that be accurate?

ATTORNEY JASON MANEKAS: It happens upon acquiring the property. Sure, you can say it's stamping. I think where did they get the Variance? The answer is they did it in conjunction with the acquisition of the property. The fact that there's a lapse between days and weeks between the stamping of the deed and the stamping of that it does disservice to the concept of designating lots of separate uses. You actually can't get a

Variance until you have ownership, so there is a little bit of I think a fiction there. But I understand your technical point which is they recorded the deed before they recorded the Variance, yes. And they would in every case. And they actually can't apply for the Variance until they have an interest in the property.

CONSTANTINE ALEXANDER: According to the deed they can transfer ownership, that doesn't --

ATTORNEY JASON MANEKAS: Right.

TAD HEUER: But in this case we have a situation where you're saying it's commercial on one side and it's residential on the other. So, I mean, does any of that really matter if the merger occurs at the moment the properties come in common ownership? It may be evidence of an intent or maybe a designation, but does that do anything to defeat the argument that merger

occurred because merger occurs when property comes into common ownership and the law sees them as such?

ATTORNEY JASON MANEKAS: You would think it does. The Appeals Court is implying that it does. Under your by-law the way it's set-up, if an owner falls under the grandfather provision, otherwise and designated it as a separate use and preserved it. And it's actually a subjective (inaudible) according to the Appeals Court. But the owners subjectively wanted to develop it separately. And otherwise with the grandfather provision then yes, I think they can do that. That's what the by-law allows them to do. That's what Mr. Lafferty was allowed to do by this Board. That's what the person in Sylon was allowed to do. Yes, I think it does.

TAD HEUER: How long does somebody -- is there a latitude component to

this or can I do with it whatever I want?

ATTORNEY JASON MANEKAS: In this case they get a Variance for a commercial use. It's not applicable here. It's a good question. And it raises the Inspector of what the Appeals Court is saying, how do you designate a lot in Cambridge? How do you do it? These people clearly used it for something different. They acquired it is a commercial parking lot. Used it as such up until the point where we have this issue. Fenced off, completely separate. Separate use and everything. So what is it that they needed to do in order to comply and benefit from the grandfather provision by designating it as a separate lot? What's the procedure? What's the protocol?

And in the Commissioner's letter, and I read it briefly, it suggested you would do it when you apply for your relief. You would designate it as such if it was a conforming

parcel. But it doesn't say only conforming parcels can designate this or have this component. So I don't know how the Board would do that. I don't know if the Board would set-up and require the Commissioner set-up a form for designation or just say until the person does something different -- when I say does something different, there are cases where the person has then taken two non-conforming properties and put them into one deed with one description. There has been cases where they've then developed them jointly as one project. And there's been cases where the person has done something to interfere with the separate designation or they would be contrary to it. And the courts have said that when the person does that, you can't benefit from this anymore. You can't merge them in a deed and then undo it. And this gets back to you can't take a conforming lot

or assembled lots that you otherwise could have built on into one lot and then change your mind and cut them up into little pieces. You can't go back and undo that. And I think that's what the footnote I read earlier is getting at. Mr. Azzam's not taking a conforming lot and cutting it up. He's taking two non-conforming lots and saying they've always been non-conforming, they're always separate. You're benefitting from the grandfather provision. They're designated for a separate use the entire time. No one ever joined them in any way, shape or form to destroy anything of what you've done to issue what the definition of the grandfather provision would be. So I don't think -- I think that you probably don't need a person to come in and say, here's how I want to designate it as long as they don't do something contrary to keeping them as separate uses.

Had the Gouveias, you know, merged the deed and just recorded it as one deed or gone down to the City of Cambridge and said tax me as one parcel, then I would submit that they've destroyed their concept of having the ability to somehow designate it for such. And then once you do that, because of merge you can't undo it. You can't then cut it up and go back and undo it. So I think that that would be the way it would be interpreted, but it's up to the Board members to decide what exactly this means in relation to this lot, separate use, this grandfather provision.

CONSTANTINE ALEXANDER: Further questions from members of the Board before I open it up to public comment? If you want to ask now, Tad, I'll wait.

TAD HEUER: No, I'll wait.

TIM HUGHES: One comment that you're saying that the grandfathering thing was like if you have one parcel, then you're good. If

you have one parcel, you're good. But if you have two parcels, I'm bad. I'm not sure I understand how you apply that here when one parcel was before Zoning and the second parcel was acquired after Zoning. It wasn't like somebody owning two parcels prior to Zoning being overlaid on the property that it would be called bad if it wasn't grandfathered.

ATTORNEY JASON MANEKAS: The second parcel, the vacant lot, the commercial parking lot that was acquired in 1950, that lot existed before Zoning was implemented and had been recorded prior to it. So the Gouveias took a deed in 1950, but the prior deed that established that lot existed prior to 1943.

TIM HUGHES: It wasn't the institution of the Zoning Ordinance in '43 that would have said that these two lots are bad? That you're penalized if you acquired

one after only. It's grandfathered in and of itself. And the other one is grandfathered in and of itself. But Zoning didn't come in when they were joined. I mean, the Zoning intervened between them acquiring the two lots. So I don't see that as making any sense to me, that particular argument.

And then I just have one other question that we're referring to all of this, you know, as these mergers having happened in 1950 when they acquired the second lot. Now is there a concept of merger that exists when Mr. Azzam acquired the two lots together? Because they were already there.

CONSTANTINE ALEXANDER: If there was a merger, it happened in 1950 there would still be designation.

TIM HUGHES: But if there was no merger in 1950, you can argue they weren't merged in 1950. You could still argue they merged as soon as he took common ownership of

the two lots.

ATTORNEY JASON MANEKAS: You could. And the way he took common ownership was to maintain the separate identity of the two parcels.

TIM HUGHES: That I understand.

ATTORNEY JASON MANEKAS: And thereafter develop them separately. So, yes, you know, the City has argued, and I think correctly, that in 1950 would be the applicable time. But theoretically when Mr. Azzam acquired them, even though he acquired them separately and developed them as separate parcels, they would be two mergers. The same argument would apply that clearly prior to thinking they were two parcels and developed them separate at two parcels. As far as the intent to develop them separately, etcetera, we think that all intent is also in the record but we think we have to go back to 1950.

CONSTANTINE ALEXANDER: We're open to public comment. I'm going to start by asking Ranjit or Sean do you wish to add anything beyond what's your memorandum?

RANJIT SINGANAYAGAM: I just want to let you know that the fact that they're interpreting the Ordinance as you described earlier. And there's an addendum from the Law Department to the previous Commissioner basically discussing the Board's issue about merger.

CONSTANTINE ALEXANDER: This is the one I read. No, it's not. It's a different one.

This is a memorandum that was given to Mr. Bersani, the person who made the determination of revoking your certificate of occupancy from Nancy Glowa, G-l-o-w-a from the Legal Department dealing with the issue of merger and advising Mr. Bersani that the merger had occurred. So I'm going to

summarize the memo. It's long.

ATTORNEY JASON MANEKAS: I'm sorry, is there a date on the memo?

CONSTANTINE ALEXANDER: Sure. I'm sorry, it is dated December 5, 2003. I know this is in the file. Thank you for bringing it to my attention. I've seen this already. This is not a new thing.

ATTORNEY JASON MANEKAS: I believe I've seen it before as part of the file.

CONSTANTINE ALEXANDER: Anything else or that's it?

RANJIT SINGANAYAGAM: That's it.

CONSTANTINE ALEXANDER: Okay. Anyone here wishing to be heard on this matter? Please come forward and you've been here before. Give us your name and address, serial number.

THOMAS JOYCE: My name is Thomas Joyce, J-o-y-c-e. I live at 183 Third Street in Cambridge, and I have a letter here from

the East Cambridge Planning Team that I'd like to read.

CONSTANTINE ALEXANDER: Is that the letter? I'm going to read it into the public record. It's about a one paragraph letter?

THOMAS JOYCE: It's a one paragraph letter dated --

CONSTANTINE ALEXANDER: I'll read it. You can read it now, go ahead.

THOMAS JOYCE: "Dear Mr. Alexander and members of the Board: With regard to the findings of the Land Court regarding a reconsideration of the BZA determination that the additional structures on this lot are in violation the existing Zoning Ordinance, the East Cambridge Planning Team remains wholly in favor of your original decision. These lots should be considered as merged for Zoning purposes, and there are two too many dwelling units. East Cambridge is a very densely populated neighborhood, and

any diminution of open space is greatly missed."

And I'd like to add a personal comment or actually ask a question to be considered. In my profession I'm a title examiner. I've worked in the Middlesex Registry of Deeds for Boston law firms for 25 years. I have reviewed the documents in this case.

Mr. Manekas -- sorry if I'm pronouncing your name incorrectly -- just stated these projects were developed separately.

However, the parking plans show that the parking for the buildings at 224-226 are located on the lot for 220-222. And if you're developing a condo unit and putting the parking on the building, the lot for the building next-door, I would question whether or not that would be considered developed separately since they were built at the same time, created two separate condos, but the parking is merged between the two. I just

ask you to consider that fact.

CONSTANTINE ALEXANDER: Let me ask you a question in terms since you asked us a question. It may be so as the East Cambridge Planning Team says that East Cambridge is densely developed. But we're talking about a question that's city wide in this application. It applies to Brattle Street as well as East Cambridge.

THOMAS JOYCE: Yes, sir.

CONSTANTINE ALEXANDER: And what troubles me there is a benefit to the common law motion of merger, get rid of undersized lots. But there's a flip side, and that's a trap for the weary. You have someone -- and this is a perfect example perhaps of that trap. You have someone, not a lawyer, owns a piece of property and seven years later he or she has an ability to acquire the lot next-door. Not knowing any better, they buy the same name that they own the first

property. And lo and behold the lots are merged. And they find much to their dismay later that they can't do something to the lot that they might like to do. And in fact, last month we had a case before us involving a very famous professor of law at Harvard Law School, although not a real estate lawyer who may have fallen into that same trap. Bought the adjoining property and all of a sudden it merged, and that caused problems when he wanted to make it separate parcels.

So given that, why shouldn't we sympathetic to the petitioner's argument that we should look at the Common Law Merger Document in the context of how our Zoning By-Law's written and not necessarily give great deference to encouraging Common Law Merger? How would you, if you were sitting here, how would address that?

THOMAS JOYCE: Well, I would see two issues here:

First of all I would think that anybody who purchased a piece of land without being represented by a real estate lawyer, is making a fatal mistake right then and there. So if the property owner didn't understand that buying the lot next-door, that the merger could come into play, his attorney certainly should understand that. And in this particular case we have Mr. Azzam who has purchased real estate throughout Cambridge and has developed many properties in Cambridge. So granted, if it was just a homeowner buying the house lot next-door, not represented by a lawyer and getting caught in the system, I could see that maybe that person would deserve some consideration on that fact. But when you have a real estate developer represented by a very experienced real estate attorney, in that situation I don't know that I would give the same weight to the comment that you're asking.

CONSTANTINE ALEXANDER: Okay.

Anyone else wishing to be heard?

HEATHER HOFFMAN: Hi. My name is Heather Hoffman. I live at 213 Hurley Street which is directly across the street from the subject property. And you have my testimony in the -- when this case was first before you. I would like to correct a few of the misstatements of fact that my brother at the Bar Mr. Menekas made.

In fact, a variance was not applied for for a commercial parking lot when the vacant lot was bought. What happened was that the Gouveias started parking cars and the city shut them down. They were -- they then applied for a Variance. So they did not buy this with any notion that they were going to be applying for a Variance.

I would also point out that it's not just that the people who lived there parked their cars, who lived at 224-226 parked their

cars there, but in fact in a monument to the old world that I miss, there was a clothes line. And so I always knew, because it squeaked, that there was clothes line that went from 224 all the way across the parking lot, which visually tied them together as being common.

CONSTANTINE ALEXANDER: Wasn't there nonetheless a chain link fence between?

HEATHER HOFFMAN: There was a chain link fence, but how many people have chain link fences around their gardens? A chain link fence doesn't make something separate. It means that you're keeping, you know, stuff in or out. You know, people put chain link fences to make a dog run in their backyard. That, I don't find that determinative. I can tell you that visually it was pretty clear that it was all one.

And I would also just make a comment on the Field Street decision. In fact, that was

brought up before this Board in the original --

CONSTANTINE ALEXANDER: This is the Lafferty case?

HEATHER HOFFMAN: Yes. And not discussed by the Board to my recollection. Having read it, I would say that no matter what it says, the language is clearly the language of Variance. When you're making a legal decision on what the Zoning Ordinance means, you do not say request for relief. Request for relief means Variance because that's what Variances were all about.

So, no matter what the legal posture was, it was treated as a Variance application and that is how the Board decided it, assuming that the decision is accurate. And I will assume that the decision accurately reflects what was done at the Board.

And I would also point out one other thing. This is an unfortunate matter that

has afflicted a few lots in Cambridge. Another one in East Cambridge that was continued the same night that you heard the case involving Professor and Mrs. Tribe. The Assessing Department did not keep up with the ownership of this property. Now, at the time that all of this came up, I spoke -- and I cannot remember exactly which people I spoke with. It would have -- I think it was Mr. Singanayagam when he was the Zoning Specialist, but it could have been Mr. Bersani. In any event, the -- I was told that the Inspectional Services Department did in fact check to see who owned the property next-door. And because the Assessing Department had incorrect information showing that there were different owners for these two parcels, they assumed they were not merged. Now if the City had people look a little more closely, they would have noticed that the City had

declared this merged. They assessed 220-222 1/2 as undevelopable. And I looked around and I did some investigation, I talked to the Assessing Department, and I discovered that that was code for merged lot. I can tell you that elsewhere on Hurley Street there's another place where there are two separately described parcels that were merged, same designation, and no one tried to say that the little one was a separate lot even though the City was assessing it separately. It has happened all over this City. And this was declared merged, I don't know how long before. But it was also the assessed value reflected an undevelopable parcel.

Now, I found the designation undevelopable. I would be very surprised that an experienced real estate developer who also as Mr. Joyce did not say worked for Inspectional Services for ten years did not also find that, and didn't also wonder why the

City would possibly be assessing a buildable lot for such a tiny amount of money. There were a whole lot of reasons to put someone who wanted to know on notice that there was something going on here. And I think that what happened was that, you know, I'm sorry I didn't figure it out far ahead. I'm a title examiner. I'm not a zoning lawyer. So once I figured it out, I brought it to the attention of Mr. Bersani immediately. I certainly did not delay out of any malice. Had I figured it out earlier, believe me I would have been down there earlier, but I didn't.

So anyway, you did it right the first time. Please do it right again. Thank you.

CONSTANTINE ALEXANDER: Thank you. Anyone else wishing to be heard?

Go ahead.

JOHN PAUL: Yeah. My name is John Paul. I live at 90 Spring Street. I just

want to come out saying --

CONSTANTINE ALEXANDER: Where is 90 String Street?

JOHN PAUL: I'm sorry, 90 Spring Street, East Cambridge. Just around the corner from his property.

As an architect, I want to come up highly in favor of this gentleman being granted the C of O. I think it's a fine development. It's good looking property which is very much in character with the neighborhood in terms of scale, material and design. And I know that there are a number of my neighbors who feel similarly. And I know a number of other architects within Boston/Cambridge who also think of -- they're fine properties. And I think it would actually be a great detriment to our neighborhood if they were forced to be torn down. And I think that fine, mistakes may have been made. I think it's regrettable

that the City didn't pick up on that before the gentleman was allowed to have somebody design and then build those properties. That would have been the time to catch it if there really was a problem. And I think that also the fact that since they've been taxed separately, we should respect that. They are separate properties. And I think personally what's in the best interest of this neighborhood is to have those properties well maintained and to have people living in them.

CONSTANTINE ALEXANDER: I just want to repeat what I said before, that if we were to deny the appeal, it doesn't mean these buildings are coming down. We have another case coming immediately following this. And possibly, I have no idea, and it's possible that we will grant relief in that case which would allow the buildings to stand.

JOHN PAUL: That would be good.

CONSTANTINE ALEXANDER: I just want to point out it doesn't just rise and fall on this case.

JOHN PAUL: Okay.

CONSTANTINE ALEXANDER: There are two cases. But your point's well taken.

JOHN PAUL: Okay, thank you.

CONSTANTINE ALEXANDER: I saw another hand up. Yes, sir.

ANDREW RICHARDSON: My name is Andrew Richardson, and I live at 176 Third Street, right around the corner from the properties in question. And I walk by them several times a day with my dog. I would like to speak in favor of the case Mr. Azzam has brought in front of you, and encourage you to allow the buildings to be -- to stay. And actually in terms of the merging aspect I think attorney here made a good case, argument to that to the City does not explicitly say that they are merged. I think

I should say I'm an architect myself and we go through the code a lot. Research and advise clients. And that seems like that should be something that's in there. And as well as I think when people buy a property next-door, there are a number of older families in the neighborhood that may have bought a lot next-door without, you know, the sophistication of hiring an attorney or whatever. So nobody buys a lot next-door thinking they're not going to be able to develop it. I mean, nobody would do that. So in fact if the intent of the code is to make more conformity, they'll just have it bought under some kind of corporation or whatever. So that just does not make sense to me. So, I just would speak in favor and hope that the buildings remain.

CONSTANTINE ALEXANDER: Thank you very much.

MARK JAQUITH: Hi. Mark Jaquith,

J-a-q-u-i-t-h, 215 Hurley Street. I'd just like to point out that it is my recollection that when Mr. Azzam first developed these properties, he put all six units in the same condo -- same condominium, and later when he realized that there might be a problem, separated them into two separate condominiums. And also the fact that the parking for 224-226 is on the opposite property, pretty clearly means that it doesn't take that much brights to see that they were developed as a single unit and merged.

And also reiterate the point that the City having assessed them as 220-222 as undevelopable also adds more weight to that.

CONSTANTINE ALEXANDER: Thank you.

MARK JAQUITH: Thanks.

CONSTANTINE ALEXANDER: Anyone else wishing to be heard?

(No response.)

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

You have an opportunity to make closing remarks.

ATTORNEY JASON MANEKAS: Sure, and I'll be very brief and appreciate the Board's patience.

With respect to parking that's currently there, initially there was one off street parking space and now there are six. And between the two properties is a drive. And in order to put six spots on there, there is an easement for the association to add an easement on the other lot for one of the parking spaces. And the dividing line is down the edge of the driveway I believe. It stops at the center of the driveway. And there's an easement for I believe that you can walk along the driveway and get to a parking spot. So there's an actual easement for them to do that. It hasn't been quoted as one

project. It's a minor point, but that's the way it was set up for the added parking. So now there's six off street spots instead of one.

CONSTANTINE ALEXANDER: Excuse me, I've closed public testimony.

HEATHER HOFFMAN: I understand. He's making a factual misstatement.

CONSTANTINE ALEXANDER: I closed public testimony.

HEATHER HOFFMAN: Okay.

ATTORNEY JASON MANEKAS: Mr. Azzam informed me that there was a prior Variance in this case in 2005, 2007 that allowed that parking arrangement and parking plan. And when he went in in 2002 to get the Variance, he did have a plan showing the four condos. The two single-families, the property line and the easement. And actually got a Variance for a parking space I believe to make it compact.

HUSAM AZZAM: Something more compact. The location where in front of the Board as part of the Variance.

ATTORNEY JASON MANEKAS: The last point is that I believe Ms. Hoffman, from the Lafferty appeal was really a Variance. I don't think it's a major point. Here was an appeal to the Board where the Commissioner said it's one lot, you can't build. The person sought relief from the Board to build, and the relief was granted saying that he could treat them as two lots and build on them. So I don't believe it was a Variance case. It came up on the same posture as Mr. Azzam. Again, I do appreciate the Board's time on this first matter.

CONSTANTINE ALEXANDER: Thank you. I think we're ready for deliberations.

I'll offer some thoughts at the outset. And we'll hear some other people's thoughts. We spent a lot of time tonight talking about

the actual specifics of this matter. The history of when the lots were acquired, whether there was parking, how the parking got there. Etcetera, etcetera, etcetera. But there's a -- that's a secondary issue or an issue we get to only after we reach a first issue, which is an issue of citywide importance to Cambridge. And that is, does the Cambridge Zoning Ordinance by its terms override or repeal or plant the common law notion of merger?

You made the arguments. You cited -- in other words, the first part of your case you cited two sections of the Zoning Law that you believe support your position. 5.21.1 and the definition of lot.

Speaking only for myself, I'm not convinced. I hear you. I think you made frankly a very persuasive arguments. But I just don't get there. It strikes me if we're going to override the common law notion of

merger, there should be something specific from the City Council that tells us, hey, we don't want mergers in these circumstances or we don't want common law merger at all. They didn't do that. We get there by, to my mind, strained constructions of the two sections of the Ordinance which have meaning separate and apart from the merger. So I can't -- unless there's evidence presented to me, which there hasn't, showing that that was the intent of the City Council, I have to fall back -- I personally fall back on how this by-law, these sections have been interpreted by the people who as I say do it day in and day out. We have a memorandum from Mr. Singanayagam and memos from the Legal Department saying Cambridge never intended to override, overrule or repeal or limit the common law notion of merger.

The Lafferty case I think is troublesome. I mean, I think you're

absolutely right. It's not a Variance case. It's a case that's right in point, first of all, it's almost 20 years old. It has no reasoning to it and it wouldn't stand up on appeal. If our prior decision didn't stand up on appeal, this decision wouldn't stand up on appeal. And I just don't find it meaningful. I think we have 20 years of experience in Cambridge since then. And Mr. Singanayagam has dealt with that in his memorandum.

So, as I come out, it's a troublesome case. I am bothered by the trap for the unwary that the common law merger has. But I need something more persuasive than I've heard tonight to find that the Commissioner's decision was incorrect. So I for one would vote to reject your appeal and uphold the decision of the Commissioner.

Other members want to offer their views or we go to a vote?

TIM HUGHES: I agree with the Chairperson in that I'm not moved that the position of merger on this case should be overruled. I think that the department, the Inspectional Services Department acted appropriately, and I think that the -- the case, the Tribe case where possibly they walk into this with blinders on, the merger caught them off guard, that the appropriate relief for that was not to come and argue against the concept of merger, it was to come here and argue for the subdivision of the property.

CONSTANTINE ALEXANDER: They accepted --

TIM HUGHES: -- back to the two original properties.

CONSTANTINE ALEXANDER: They accepted the doctrine and sought and obtained a Variance to subdivide the lot.

Other members want to comment?

MAHMOOD FIROUZBAKHT: I'm troubled

by this notion of designation. And in this particular case I do find it somewhat convincing that, you know, if there are certain steps to be taken, you designate a certain, you know, law as a separate developable lot. That the lot, a lot of those correct steps were taken in the form of Variances issued by this Board. So, I am -- I reflect on that. And, however, you know, the fact that the Commissioner and the Building Department weren't privy to the entire sort of project and the case and background, and that's the determination that they sort of came to, I guess in my mind, it's difficult for me to not acknowledge that there is deference to be paid to that background and to that expertise that I think they're sort of specially situated to make those kind of determinations.

CONSTANTINE ALEXANDER: Anyone else wish to comment?

DOUGLAS MYERS: Well, I agree with the Chair and the opinions of other members about the Ordinance. That for merger, to eliminate the Doctrine of Merger and the interpretation and application of this Ordinance, the City Council would have to be explicit on the subject. I would also share the opinion of Mr. Hughes that if and responding to the Chair that I do believe that although merger doctrine can have unfortunate affect, the cure for it is Variance. And this Board is receiving unfortunate events in the context of a Variance proceeding.

I don't think that this -- I don't think that whatever designation did or did not occur when the Gouveias obtained a variance for the commercial use of this property in any way destroys the application of the Merger Doctrine to the present appeal. And also, I do believe that the -- I just share the

Chair's view on the significance of the Lafferty case.

CONSTANTINE ALEXANDER: Tad, do you wish to speak or no?

TAD HEUER: I agree. I think the purpose of the Zoning Ordinance is to eliminate the non-conformity. But I understand that there are numerous ways to [align] that property, take the property and process it under trust laws and different names, but I think the intent of the Variance is to take property as it defines them. And it defines them in the posture where there are two adjoining owners of substandard lots. The intent of the Ordinance was to create a more orderly system in the use of land in the City of Cambridge. It is the intent that the City had to make sure that that is effectuated to the great extent possible when properties merge. I don't think that in this situation, although I agree with everyone else, that the

circumstances are unfortunate. That the proper relief would be to find the merger did not occur. I think it's been stated by other members the correct relief based on hardship not to attack the merger doctrine directly. I think there are too many circumstances unattended that we don't have before us that play out over the course of the future elsewhere in the City with the doctrine that doesn't express the overturned statute. I think there is still room for common law in the age of statutes and I think this is one of them.

CONSTANTINE ALEXANDER: Thank you.

I think we're ready for a vote.

Everyone having spoken.

The Chair will move that the appeal of the petitioner be granted, and that the decision of the Commissioner of the Special Services be overturned on the basis that the Common Law Doctrine of Merger has been

overridden by actions of the City Council, both through its definition of lot and through its Section 5.21.1.

And that the lots not having been -- by virtue of those sections that it is also been a designation by the petitioner to keep these lots separate. Designation being a whole series of events going back to 1950; namely, the use of the one lot as a commercial parking lot consistently throughout.

The fact that there were separate deeds, separate tax bills and separate building permits applied for.

So on the basis of all the foregoing, the Chair moves that the appeal be granted. All those in favor of granting the appeal say, "Aye."

(No response).

CONSTANTINE ALEXANDER: No one votes in favor. The appeal is denied.

I think we need to make further findings

as to why we denied the appeal.

I will offer some, and please other members can join in. I think we would move that we make the following findings:

That there is nothing in the definition of lot that supports and suggests an intent to override the Common Law Doctrine of Merger. And similarly that was true of Section 5.21.1.

If anything, the definition of merger to commit land owners to combine lots in suggested in the memorandum of the Commissioner.

I move that we find historically this definition has not been construed by the Inspectional Services Department to override the concept of merger. As again supported by the memorandum applied to Mr. Singanayagam.

We move that the definition that's cited, definition of lot contains no mechanism for designating non-conforming

lots not to be substituted with a merger document. Which again suggests that it's a definition of lot which is not intended to override the concept of merger.

And finally, that based upon the foregoing and after taking into account the benefits to the community arising from the Common Law Doctrine Mergers, benefits that presumably give rise to the creation of the document itself, this Board believes that the Commissioner's decision that a merger took place when the adjacent lots came into common ownership is correct.

Any other findings people would like to add to that or put it to a vote?

TAD HEUER: My question is whether in the Appeals' Court opinion they note that they "the state did not explain that the record explains the procedure one must undertake nor a decision made in partial to the land and identifying throughout separate

lots for Zoning purposes. Is it the opinion of the Board that because of the conclusion we agreed to, does not necessarily in this case because to get there, any such designation, definition needs to apply, but to the extent one needs to be supplied is the conforming lots has been done so prior to the (inaudible.)

CONSTANTINE ALEXANDER: Yes.

DOUGLAS MYERS: I think the Commissioner's memorandum is before the Board tonight and it has addressed that point in the language that it used and there's nothing there that's inconsistent to the ruling of the Board tonight.

CONSTANTINE ALEXANDER: That's right.

All those in favor of making the findings that I've just cited and Mr. Heuer has commented, say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor.

(Alexander, Hughes, Heuer, Myers, Firouzbakht.)

(8:40 p.m.)

(Sitting Members: Constantine Alexander, Tim Hughes, Tad Heuer, Douglas Myers, Mahmood Firouzbakht.)

CONSTANTINE ALEXANDER: The Chair will call case No. 8840, 220-226 Hurley Street. Is there anyone here wishing to be heard on that matter?

ATTORNEY JASON MANEKAS: Yes. On behalf of the petitioner, Husam Azzam, Jason Manekas, M-a-n-e-k-a-s counsel.

CONSTANTINE ALEXANDER: Again, Mr. Manekas, just to move this along, we granted a Variance the last time, this Board, not the five of us, to allow you to have the

structures on the property. That Variance was appealed and the court granted the appeal. But I'm going to read from the Court's decision.

"The Court decided that the decision, our decision granted a Variance was insufficient as a matter of law. The Board's decision contains no findings with respect to whether the relief to be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the Ordinance.

"It is well settled, says the Court, that a mere recital of the statutory prerequisite or each of these prerequisites has been met is inadequate to support a Variance."

And the Court further stated in a footnote: "The Board's failure below to make a requisite findings does not

necessarily mean that the evidence put before Azzam could not support the findings. A question on which we express no opinion.

"On remand the Board may address the question in the first instance."

So, the Court didn't get into the merits of the Variance. It says as a matter of law we didn't do our job right the first time. So go back this time we're going to do the job right. I hope your prerequisites for the Variance and why we should grant the Variance -- however you wish. But that's what I see the focal point of this case.

ATTORNEY JASON MANEKAS: Thank you, I appreciate it. I have a package, and in essence a lot of the materials are already within the file but this is sort of a concise way to hand you them. It has the prior decision in it as a tab. It has the copy of the Appeals Court as a tab. I just believe it may be helpful for the Board to have it in

front of it, the entire package.

And when I say "the entire package," I'll specifically comment that Tab 2 is the decision by the prior Board that found it insufficient, lacking the proper findings.

Tab 3 is the decision of the Appeals Court which you just quoted from.

Tab 4 was the initial application sheet submitted by Mr. Azzam to this Board.

Tab 5 is testimony from Mr. Azzam and Mr. Hong his architect before the Land Court. Sworn testimony that may be referencing.

Tabs 6 and 7 are additional materials that were submitted to clarify calculations before this Board.

And Tab 8 was the final submission with all of the calculations. This Board may recall, I am flipping through the file, there were an issue about whether the -- I think the total area was calculated correctly or not. There were additional submissions by

Mr. Hong to this Board, and they all contained in the tab.

And Tab 9 is a supplemental report submitted to this Board. In fact, the majority of the tabs, but for the trial testimony and Mr. Azzam and Mr. Hong that was sworn under oath, are all the things from the prior file.

And the only other exemption is Tab 10. Is a BZ application by Mr. Jaquith and Ms. Hoffman who are abutters that live across the street who received a Variance to I believe tear down and reconstruct their house. I believe it's just a reference to it in my memo where they cite a hardship that qualified for a Variance for their lot directly across the street. Probably not germane in large part other than showing the abutters across the street actually received a Variance from the dimensional requirements, and that that property was

similarly situated across the street, etcetera. So there's just that.

So this is sort of a nice, I think, comprehensive package for the Board. If we need materials, we're not going to be flipping through the file.

But I think we've already discussed a bit of a background in this case. And one of the factors clearly is whether there's a substantial hardship, you know, as a result of what's occurred in this matter. And I would submit to the Board and there's been discussion of it in connection with the case 8741 previously, so I won't try to rehash it too much. But, you know, this was clearly a situation that would warrant relief from the Board in that you have a purchaser, Mr. Azzam, who came upon the two lots being marketed as separate lots. Put them under agreement through a purchase and sale that specifically said okay, I just got to make

sure we get a building permit for the vacant lot to put two structures on it before we close. He got the building permit with the help of the current owner. He then went through a process of inspections, construction, finally obtained certificates of occupancy. And as I'm sure this Board can imagine, is set forth in the trial testimony we attached, has spent hundreds and hundreds of thousands of dollars to go through this process.

With respect to the financial hardship, without the Zoning relief in light of the prior decision, the remedy may be the removal of the two structures. We would like to think that there may be some equitable relief provided by the Court, but ultimately I think it's this Board's job in the first instance to decide whether there's some equitable right that exists. And I think the way the Board can exercise some equitable right or

remedy is whether you're looking in the Variance action in Chapter 40(a) in determining whether we would apply for it.

And so what I've done in the initial memo here is part A on the first page just walks through the procedural history and essentially the tabs.

Part B, I actually go through some of the trial testimony and hit some of the highlights of the trial testimony as to the shape, the soil conditions on the property and the hardship that Mr. Azzam would achieve. And, again, you have the sworn testimony before you.

CONSTANTINE ALEXANDER: Is that testimony consistent with the testimony that was given before our Board in which our Board relied upon to find the hardship?

ATTORNEY JASON MANEKAS: It was consistent and actually elaborated on. Mr. Azzam, as this Board may or may not know,

has a civil engineering degree. He's obviously studied soils. He was actually -- the building inspector -- I'm sorry, building inspector with the City of Cambridge for approximately seven years. And he explains in his testimony what the conditions were when he came upon this properties. High levels of clay. High concentrations rather than clay that is not shared by all of the properties in the surrounding area. Difficulties with compaction. He explained in his testimony, how he had to sink underground tanks, etcetera. And he goes through sort of the history of construction on this lot. What was discovered and what had to be done.

TAD HEUER: What's the importance of the soil conditions as to the number of dwellings on the lot?

ATTORNEY JASON MANEKAS: As to the total number of dwellings on the lot?

TAD HEUER: Yes.

ATTORNEY JASON MANEKAS: I'm not sure the soil conditions would be germane other than as far as locating structures. It's possible that if this Board determines, in fact, we've been working with the Building Department to try to perhaps achieve this. The Board ultimately determines that if the buildings need to be torn down, then Mr. Azzam theoretically would have the right to locate the four structures on the property and maybe come into where those four structures could be located. So the soil conditions and the difficulties of construction would only relate if he wanted to relocate the structures on the property.

But I agree with Mr. Heuer I don't think it changes the number of dwelling units per se on it as the clay being there.

So, the -- you have before you then sort of an outline of his testimony which is

consistent with that before the prior Board. And we've given it sort of a ground that if the Court -- I'm sorry, if the Board is going to write a decision, you may want to use some of these points from either the testimony or the prior documents as part of its findings in connection with the Variance which is what the Appeals Court is apparently requesting.

CONSTANTINE ALEXANDER: Primarily the Appeals Court wanted us to address third of the three parts of the Variance; namely, derogation from the intents and purposes.

Because the Board in its decision did deal with hardship, and the Court didn't challenge that. They said when it came to the third prong, the derogation, the Court didn't -- I mean, the Board did nothing.

ATTORNEY JASON MANEKAS: Whether it derogates from public interest?

CONSTANTINE ALEXANDER: Yes. I think you had should address that in

particular.

ATTORNEY JASON MANEKAS: I'd be happy to do it.

When you look at this project as a whole and you look at what the Variance will achieve in these two structures, what Mr. Azzam has done is he's taken a delapidated four-family and a commercial vacant parking lot, renovated the four dwelling units and the -- if you've not been by the property, single-family units on it. What he's done is not only consistent with the character of the neighborhood in that the lot, 220-222 is similar to all of the other lots in the neighborhood as far as size. It's not as if there is a tiny postage stamp lot surrounded by two acre lots. When you walk down Hurley Street, the parcels and the structures are all very similar and uniform. This is consistent with that. The lot size is consistent with that. The units on it are

consistent with that. Again, it's only the common ownership that changes this from actual compliance with the by-laws.

In addition, we spoke earlier about parking, there were four units there earlier with one parking space, and now there are six parking spaces. So he's added five parking space to this. With respect to the impact on the neighborhood, there's two units, you know, may have some impact on parking although they have their own spots, but he's also added additional spots in connection with the overall development. So, when you look at the development of what's there today and whether it, you know, fits in with the surroundings, it derogates from the by-law, I would submit that the only issue, the only reason it would derogate from anything is this merger concept, the fact that he owned the adjacent lot. If anyone else had purchased this and put these structures

occupied with parking, they would be in complete compliance with the by-laws.

So as far as these structures derogating from that, they're fine. It's just the name on the deed that's the problem. So again as far as, you know, the ability to park there, the size of the structures, the location, the size of the lot, I don't believe any of that derogates from any of the by-law requirements in this case.

And I think you're right, I don't know that the Board critiqued the hardship element per se, but I would submit to the Board that there's no evidence before you of this Board, and in fact, I think it's contrary evidence actually that Mr. Azzam undertook this to hood wink the department, spend thousands of dollars and hoped no one caught it. Clearly that's not the case.

When you look at the building permits and Ms. Freidas signed all of them. She

listed her address next-door. As I said in case 8527, there was one plan that showed all six dwelling units. And that was done, you know, before the COs were issued and rescinded.

So clearly when the Inspector was out there looking at structure A and then structure B on 222-224 and 220-226, the Inspectors saw the development and knew they were both by Mr. Azzam. The documents reflect that.

And I just submit to the Board that I think this is a case that does warrant relief from the Board in that form. And more importantly, without that relief I think that the penalty would be erroneous.

And, again, I'll rely on the prior documents. We've taken a lot of time up tonight. There is additional sworn testimony to the extent that the Board needs it to rely on requiring issued findings. We

tried to outline those to make the Board's job a little easier. We think this is an appropriate case for a Variance.

CONSTANTINE ALEXANDER: Thank you. Questions from members of the Board at this point? No questions?

I'll open it to public testimony. Please come forward. You want to read the letter again? Go ahead.

THOMAS JOYCE: Yes. Separate letter. And then a personal comment if I may.

"Dear Mr. Alexander and members of the Board: With regard to the order of the Land Court to reconsider the hardship to support the Variance granted in this case, ECPT has always been opposed to increasing density beyond that which Zoning allows. The Court found that the BZA's decision did not make findings that would permit the two additional dwelling units on these lots."

It is signed by good wishes Barbara Broussard, President of the East Cambridge Planning Team.

And my personal comment here is that in the issue of asking for a Variance, the first question is what's the hardship? And the only thing I could see in this case that would even remotely be described as a hardship would be the financial cost to have to tear down these buildings that were already built. But I would --

CONSTANTINE ALEXANDER: Is that a hardship to you?

THOMAS JOYCE: Not in my personal opinion, no.

TAD HEUER: It's not a financial hardship which is one of the things we can look at in a Variance?

CONSTANTINE ALEXANDER: Is there a financial hardship? I think he proceeded in good faith. I don't think anyone has

suggested otherwise. In good faith he constructed these properties. And after sinking his money into it and building these structures which there's neighborhood testimony that they're a benefit to the neighborhood, to ask him now to tear them down and lose an entire investment, that is a financial hardship.

THOMAS JOYCE: Look, I would suggest that somebody who worked for the Building Department should have known better. And as a developer, he should have known better and his attorney should have known better. And it, I'm not swayed by that argument of a financial hardship with somebody with that level of experience developing properties in Cambridge. Sorry.

Thank you.

CONSTANTINE ALEXANDER: Thank you. Anyone else wishing to be heard?

SALLY GIBSON: My name is Sally

Gibson and I live at 145 Fifth Street. And I just wanted to say that I agree with my friend who sits next to me, John Paul. I'm also an architect and I feel that the buildings are quite suitable to the neighborhood and we're just -- we'll be very happy to see them occupied.

CONSTANTINE ALEXANDER: Thank you. Anyone else wishing to be heard?

HEATHER HOFFMAN: Hi. I'm still Heather Hoffman and I still live across the street at 213 Hurley Street.

If -- I wrote more than one letter that's already in your record and I testified when this was originally heard. So you have all of that. And I actually dissected the finances. According to Mr. Azzam's sworn statement, on the building permits he spent \$85,000 to build each of those three-story buildings with full basement. And I showed what money came in and what money went out.

And that was before he had sold everything.

I mean, four units have already been sold. That's the maximum that's permitted on this. I don't care how high the water table is. Trust me, I had three and a half feet of water in my basement a couple weeks ago. It's not unique to his property. His property is flat. The Board said it was narrow, and I am amazed that 71 by 100 feet could be considered narrow or small in East Cambridge.

My property is 5,000 square feet. It's an original East Cambridge lot, 50 by 100 feet. My next-door neighbor, Mr. Vellucci has a lot that's 75 by 100 feet. It has a three-family on it, and this Board denied his request to put a fourth unit, which would have been permitted under the lot area per dwelling unit provisions on the ground that it was too dense. He was asking for something significantly smaller on a bigger

lot than what is across the street from me. And by the way, I supported that, that because I thought that it was modest and it was in keeping with something that we care a lot about, and that is number of dwelling units.

In addition, I would point out that in the original proceeding an entirely new application with entirely new information was submitted at four o'clock on the day that the decision was made. The public has never seen that. I've never seen it. It's -- and public testimony was closed. We were never allowed to make one comment on that in the original proceeding.

And something that came up in the earlier case is that I don't know really know how does one -- how do we deal with factual misstatements when -- once public comment is closed? There is in fact no easement --

CONSTANTINE ALEXANDER: Now, wait a minute.

HEATHER HOFFMAN: Okay.

CONSTANTINE ALEXANDER: I know you believe there was a factual misstatement. But I think you've also heard the decision from the Board. If there was, if you're correct, it didn't have any impact on it.

HEATHER HOFFMAN: No, I understand. But I'm asking, for example, in the application that the public never saw that the decision was based on, what if there were more factual misstatements? There was new application precisely because the original one was so wrong.

CONSTANTINE ALEXANDER: That's why people have a right to appeal our decisions to the Court as you well know.

HEATHER HOFFMAN: Yes. As I did.  
Yes.

CONSTANTINE ALEXANDER: Fine. But anyway, if there were factual misstatements and you feel or any person feels that's

weighted in our Board in that decision.

HEATHER HOFFMAN: No, that's fine. And I would say also that this was -- there is nothing about the shape of this lot, about the flat topography of this lot, about anything that has to do with this lot that justifies having two units beyond what Zoning permits.

Now, I have a 5,000 square foot lot, and I have one unit and it's about 2100 square feet. The dimensional variances that I got had to do with reusing my existing foundation. So I'm right up against the sidewalk. But I didn't ask to build something bigger than what Zoning allowed. I could have built three units and I could have built something, you know, half again as big. So, I don't -- I would feel really hypocritical if I had asked for that kind of variance and then but not him. And I didn't.

And so, I think it is really important

not to overburden the number of dwelling units in our neighborhood.

Thank you.

CONSTANTINE ALEXANDER: Thank you.

MARK JAQUITH: Mark Jaquith,  
J-a-q-u-i-t-h, 213 Hurley Street.

In regard to the Variance that we got, a good portion of why was to preserve the contiguous open space that is our backyard. And that's been one of the goals of a lot of folks in the neighborhood and the city in general. And of the purpose of the merger doctrine to not overburden, to not increase density where it can be avoided.

And I would say that the major unfortunate event in this case is merely timing. That the building permits and C's of O shouldn't have been issued several years back when they were. And so now here we are.

And in addition, in terms of financial

hardship, I believe that Mr. Azzam is in bankruptcy at this moment getting certain amount of relief from that.

CONSTANTINE ALEXANDER: I don't want to hear about that.

MARK JAQUITH: Okay. Very good. That's all.

CONSTANTINE ALEXANDER: Sir.

ANDREW JENKMAN: (Phonetic.) My name is Andrew Jenkman. I live at 176 Third Street. And I would argue that the neighborhood has benefitted from the development that Mr. Azzam has done. It's very much in keeping with the scale and the character of the neighborhood. I would say if anything, it should be held up as an exemplary development all across Cambridge. There's been a lot of houses since rent control was abolished, where developers come in, they'll buy a house. They'll gut it but they'll just throw up vinyl siding, cheap

vinyl windows. They won't do anything interesting, anything new and then they'll sell them off. Whereas what Mr. Azzam did, he should be commended. He bought a rundown property. He didn't just do that. He put up nice siding, nice windows, balconies. I mean, it's like first class development. The houses next-door where they're town tower houses, they are interesting and unique contributions to our neighborhood which I think the direction I would like to see the neighborhood go in. I think it's good for the property values of the neighborhood and just for the overall character. It's very thoughtful and he went through the effort to hire an architect and came up with a creative design, which I think that's the direction I would like to see set and that precedent set. I don't want to walk around the neighborhood and see empty lots that are underutilized where they could be a nice home for people.

If I wanted to see empty lots, I would live in Framingham. I live in East Cambridge. I like the density. And I think most of my neighbors agree. We walk around and we like the community that the density brings. I would argue that I think Mr. Azzam did the right thing, and I think the Variance should be granted to allow for the dwelling to continue.

CONSTANTINE ALEXANDER: Thank you. Thank you, sir.

RHODA MASSE: My name is Rhoda Masse, I live at 211 Charles Street a few blocks from these houses.

To me it doesn't matter if they're pretty houses, beautiful houses if they're in character with the neighborhood or if Frank Gary came in and designed them. To me the Zoning Code, the Zoning Regulations are written to be followed and they should be followed. And someone who worked for

Inspectional Services and then had experience developing property, and should have known that what he was doing was not in fitting or should at least have determined that before things were built. I feel very badly that he may lose money, but I think that it's a disservice to the neighborhood and the City. And I think that if -- it sends a message. It says go ahead and build it because once you get it built, you can go up to the BZA and you can say, you know, I didn't know. And the BZA will grant you a nice Variance and will say let it stay up. It's, its a benefit to the neighborhood. I don't think it's a benefit to the neighborhood to say that.

Thank you.

CONSTANTINE ALEXANDER: Let me just since you took the time to come down here, let me spend two minutes addressing some of your comments.

RHODA MASSE: Sure.

CONSTANTINE ALEXANDER: Just so you understand where we're coming from or where we have to come from.

RHODA MASSE: Sure.

CONSTANTINE ALEXANDER: It's not a matter of us upholding the Zoning By-Law. There's a whole procedure recognized -- created by state law that says under certain circumstances, a Board like ours can vary, that's the word variance. Can vary the Zoning By-Law --

RHODA MASSE: That I understand.

CONSTANTINE ALEXANDER: To deal with that very strict legal standard.

RHODA MASSE: Yes.

CONSTANTINE ALEXANDER: But if that standard is applied it's basically to correct an injustice that would occur if we blindly applied our Zoning By-Law under all circumstances.

And this gentleman did seek Variances before with respect to this project. And he did get a Building Permit from the City. And he even got a certificate of occupancy, and low and behold you heard from the prior case.

RHODA MASSE: It was reversed.

CONSTANTINE ALEXANDER: It turns out that it was reversed because there was a determination that a mistake had been made.

That's a lot different than someone who goes ahead and builds something and says see if you catch me. And if you catch me, then I'm going to go seek a Variance. I want to put this in context.

RHODA MASSE: Yes, I mean, I know that. But still to my mind watching this all unfold, as I have watched it for the past five years, to me it's inescapable that it's in my mind, that there is a bit of see if you catch me in this. And I would like to see the Zoning regulations upheld. Okay? Thank

you.

CONSTANTINE ALEXANDER: Thank you very much.

Anyone else wishing to be heard?

JOHN PAUL: Yes, very briefly.  
John Paul, 90 Spring Street.

It is my understanding that if I had chosen to develop the one lot with those two tower houses on it, it would be okay under grandfather Zoning.

CONSTANTINE ALEXANDER: No, you need to get a Variance because the -- well, no, because the lots merged. I'm sorry.

JOHN PAUL: But if those lots were not merged --

CONSTANTINE ALEXANDER: I don't know for a fact if you were the person who bought that separate lot, whether you might need Zoning relief as well.

JOHN PAUL: Okay.

CONSTANTINE ALEXANDER: Probably

you would because it's an undersized lot. Usually if it's an undersized lot, you're going to have some sort of Zoning problems that are going to require a Variance. I mean, am I wrong? If I'm wrong, correct me.

HUSAM AZZAM: If I may.

CONSTANTINE ALEXANDER: No, go ahead.

HUSAM AZZAM: In his scenario he -- buildings are meet Zoning, all the Zoning requirements. If it was a separate lot, did not merge, the two buildings were built, they were built by right without any variances.

ATTORNEY JASON MANEKAS: If John Paul had bought it in 1950, and then put these two structures on it, we wouldn't have an issue.

When we talk about the public good and detriment and derogation from the CO, if he -- if John Paul had purchased them in 1950

and put these structures up, he wouldn't need relief. So the only derogation from that by-law is a fact that there's a merger in the next lot. They don't require relief otherwise.

MAHMOOD FIROUZBAKHT: Because it's a non-conforming lot had been grandfathered in.

HUSAM AZZAM: I think his question is if they bought --

ATTORNEY JASON MANEKAS: The answer to your question is if this was -- if 220-226 Hurley Street was the only lot at issue, and it always been owned by John Paul, and he didn't have any other lot in common ownership, he could look to 5.21.1 because it was recorded prior to '42 and satisfies those other requirements; frontage, no more than 1500 square feet for unit, which it does, then he could build. So by virtue of 5.21.1 he could do it.

I believe, just to be technical, I believe in case 8527 it was a variance to allow the basement to seven feet instead of six-eleven. So it may require the benefit of that, but assuming his basement was six-eleven or there wasn't a prior Variance, he may have an issue. Yes, those structures could exist but for a merger, you don't require relief but for the merger doctrine.

CONSTANTINE ALEXANDER: That's sort of a muddy analysis.

JOHN PAUL: And with that said, the technical physical quality of the way that landscape was developed within this City which has a precedent of having many, many buildings which are built within the blocks and which is part of the natural character and historical character of this neighborhood, that this gentleman's development would be entirely legal and would be seen as entirely proper irrespective of whether somebody

likes the aesthetic or doesn't like the aesthetic. I that's not the issue.

Thank you.

CONSTANTINE ALEXANDER: Anyone else wishing to be heard?

(No response.)

CONSTANTINE ALEXANDER: The Chair notes that no one else wishes to be heard. Public testimony will be closed.

Any closing remarks?

ATTORNEY JASON MANEKAS: Sure. I'll just mention I believe Ms. Hoffman commented on how there was some additional submissions to the Board back in 2004. I'd just like to comment that this was noticed for public hearing. The Appeals Court basically said come back to the Board and do it again. Notice of public hearing so the public has an opportunity to speak. So to the extent that in 2004 someone may not have seen something, again, I was not part of it. I do believe the

record is the record that tonight be their opportunity.

CONSTANTINE ALEXANDER: I think you're right. It's in the file. It may not be in the record timely back in 2004, it's in the file now. So I'm not moved by that point.

ATTORNEY JASON MANEKAS: Sure. And I'm not sure that Ms. Hoffman is necessarily germane to our variance except to show that she received it. But I do believe that her Variance allowed her to put up a 2100 square foot home as opposed to 12 or 1500 square foot home. Notion that she didn't exceed the requirements and doesn't necessarily require building, I think that may have been a misstatement of the -- but, again, at this point we're content to rely on the record before the Board.

CONSTANTINE ALEXANDER: Thank you.

I think we're ready for a decision time. I'm going to suggest that we follow a slightly

different procedure than we generally do. The fact that this case has been embedded by this Board the first time in the Variance. So we need to find in a number of areas we made findings. We can't change them but we have already done that. We didn't make all the findings and that's why this case got reversed by at Appeals Courts. I'm going to suggest, I'm going to put a motion on the table right now and see if we can discuss, debate, modify this motion and then take a vote on it. I think it will focus our discussion a little better. If other members of the Board don't want to proceed this way -- does anybody care?

All right, and let me make the motion and then let's debate that so we have something specific to debate.

I move that the Board find that a literal enforcement of the Ordinance would involve a substantial hardship to the

petitioner. In that, a two-unit residential structure constructed in good faith could not be occupied. Thereby causing the petitioner not only a substantial financial loss, but also an ongoing financial burden to maintain the structure and to avoid hazards to the abutting properties.

I move that we find that the hardship is owing to circumstances relating to the soil conditions, shape or topography of the such lands and especially affecting such land but not affecting generally the Zoning District in which is located.

In that, as the Board previously found in BZA cases 8527 and 8840, one, the lot which for this purpose is a combined lot, is a unusually shaped.

Two, the lot contained a legally non-conforming structure in an unusual position on the lot.

Three, there is a condition of wetness

in the soil of the lot making development beneath the building on the lot impractical.

I move that the Board find that based upon the conditions I suggest we impose on the Variance, desirable relief may be granted without substantial detriment to the public good or nullifying or substantially derogating from the intent or purposes of our Ordinance.

In that Section 130 of our Ordinance which sets forth the purpose of the Ordinance, include some other among other items, "the encouragement of housing." "The conservation of value of land and buildings." And "the encouragement of the most rationale use of land." All of which will be served by the Variance.

And that other items cited in Sections 1.30 such as "to lessen congestion in the streets," and "to prevent overcrowding of land and undo concentration of population,"

will not be thwarted by the Variance being sought. A potential adverse impact of allowing six residential units on the lot being outweighed by the facts and circumstances of this case.

By the furthering of the purposes of the Ordinance earlier cited.

Furthermore, this Board finds that although the addition of two residential units without off street public to diminish the ability of on street parking in the immediate vicinity of the site in question, the Board finds that based on the evidence presented by the petitioner, sufficient on-street parking should exist within walking distance of the site in question.

And let me say parenthetical this is all part of the record that went before the Appeals Court. It's in the record.

Consequently when balancing these facts with the benefit of allowing already

constructed in good faith structure to provide two additional living units, the residents of the City, the Board finds that there will not be substantial detriment to the public good.

Based upon these findings the Board finds that a Variance should be granted to the petitioner, to permit him to be reissued certificates of occupancy for the two-unit structure built at 220-226 Hurley Street provided the Inspectional Services Departments determines that this structure satisfies all of the conditions previously imposed in BZA cases 8527 and 8840.

That's what I would suggest we consider and debate and then vote on. Comments or go right to the vote?

MAHMOOD FIROUZBAKHT: Just focusing on the parking element, because I know that's an issue that came up recently. In aggregate how many additional parking spaces does this

development provide for in comparison to the number of units that are being added? From the original four, we would have six total units. Previously there was only one parking space for the four units, correct? And so here we would have six units, six parking spaces, and so in aggregate --

HUSAM AZZAM: (Inaudible.)

MAHMOOD FIROUZBAKHT: -- you've taken three cars off the street. So essentially you're adding three additional off-street parking spaces with this proposed development. So in terms of that element of sort of the effect on the neighborhood I just wanted to kind of clarify --

CONSTANTINE ALEXANDER: Thank you.

MAHMOOD FIROUZBAKHT: -- that point.

CONSTANTINE ALEXANDER: Other comments from members of the Board? Ready for a vote?

TAD HEUER: On the point of the shape of the lot, I think it might be useful to clarify now that the lot is merged the lot is essentially square, I believe; is that correct?

CONSTANTINE ALEXANDER: I believe it's still irregularly shaped but I'm not positive. Mr. Azzam.

ATTORNEY JASON MANEKAS: It's rectangular.

CONSTANTINE ALEXANDER:  
Rectangular?

ATTORNEY JASON MANEKAS: Larger.

HUSAM AZZAM: The merged lot --

ATTORNEY JASON MANEKAS: I don't know if it's isosceles or not. It's just the box.

CONSTANTINE ALEXANDER: Four right angles?

ATTORNEY JASON MANEKAS: Yes. I'm not sure if they're exactly four right angles

but it's a box shape.

CONSTANTINE ALEXANDER: Okay. It has four sides you're saying?

ATTORNEY JASON MANEKAS: It has four sides.

TAD HEUER: It's not necessarily narrow per se, it is narrow -- in context with the existing preexisting non-conforming structure on what used to be a separate lot prior to merger, therefore, returning it where any additional properties could be placed upon that lot due to the remaining space on that lot, even though it is a square lot for the City essentially.

CONSTANTINE ALEXANDER: I think that's a good point. The motion I made should be modified to reflect that as well. As well as Mahmood's comments as well.

TAD HEUER: Yes, I mean I think I'm in favor of granting the Variance. The only thing that is -- I think admittedly a bit

troubling to me is this question of asking for permission, begging forgiveness. In fact, in this case I can see that we have an existing structure that my sense having read the file and read the documents before us, it doesn't seem to have been one that was pursued in my mind in bad faith. That being said, the lots, if they merge in 1950, even if they hadn't, they certainly would have merged in 2000 when Mr. Azzam purchased both of them. And I think that, you know, again they may have had some good faith relief that they'd be designated separately. I think the lots did merge themselves. I would advise my -- if I were his attorney, I would have advised him and sought the determination.

And in that sense I think that it's a bit different than the situation a couple weeks ago where the Ash Street case where we had two pre-existing buildings on two lots that merged on the purchase of common owners.

Here we had a situation where we have a lot with existing building and a lot with no building, an empty lot. And I guess that maybe the technical question is how the merger occurred? One merge into the other? I would suggest that the unbuilt lot merge into the built lot rather than creating a combined lot structure. And to that extent I think that the merger of the lots into one piece benefit the built lot. That would be my view of it. It does raise some questions about whether or not there was a true -- whether beg and forgiveness case.

On balance, the financial hardship is both this equitable notion that I don't believe the petitioner was doing it in bad faith. And also I think counsel mentioned the result of the structure means entirely moot but you wouldn't like to hash forward on this without noting on this hesitation the place by an applicant or by quite frankly the

city Inspectional Services where we're forced to (inaudible) someone in good faith where otherwise in a situation where there's going to be (inaudible).

CONSTANTINE ALEXANDER: Well, the only reason I mention the notion of good faith is that if someone could have done it in bad faith, I don't think we would find a substantial hardship of removing the property. So, we may not findings of good faith, but I think there was an absence of bad faith.

So maybe the motion should be amended to indicate not a good faith proceeding, but you proceeded not in bad faith. I think that's fair. I haven't heard anything that would suggest otherwise.

TIM HUGHES: I agree. I think you could actually suggest that it was done in good faith when you consider all of the -- if you consider the entire file and all the stuff

that was gone through in terms of getting Variances for the FAR restructuring the dimensional forms so FAR concerned with. And that the thing that it really all hinges on is lot area per dwelling because of lot merger because of a substandard lot with a relatively conforming lot. I don't know if it was conforming entirely. But -- so I would think that if it had -- if there was -- I don't think there's any evidence of bad faith here. In fact, I think there's other hoops that were jumped through that you could say there was evidence of good faith here.

CONSTANTINE ALEXANDER: But we can get just where we want to get by saying he didn't proceed not in bad faith. And I think that satisfies Tad's concerns and I think we're okay with it. So I would suggest that's how we go.

TIM HUGHES: Okay.

MAHMOOD FIROUZBAKHT: Do we think

that we have adequately addressed the Appellate Court's sort of point that our previous findings contain no findings with respect to (inaudible) relief would be granted without financial detriment and... (reading document).

CONSTANTINE ALEXANDER: I thought I did by citing the purpose of our Zoning Board. Those sections granting relief would further and acknowledging that there are some that may not be further, and on balance we think that there's all the other facts that would nullify or derogate. I believe so. But, again, if other members don't feel so, feel free to beef up the findings.

TAD HEUER: I think I would just insert the words or insert the notion in that first page of findings that that would not substantially derogate from the express (inaudible).

CONSTANTINE ALEXANDER: The third

part, the third finding, all right. That will be incorporated when we write the decision up to acknowledge your point.

ATTORNEY JASON MANEKAS: I think, and I apologize, that Mr. Heuer was suggesting something about the shape. I think the actual application or merger to merge the two lots and change the configuration is actually part of the hardship in this instance. I'm not sure if that was the point you're getting at or not. But theoretically the Board could find as one of its additional findings that the merger, changing the shape of the lot or changing the square footage of the lot area as pertaining to dwellings could be actually the hardship in this case as part of the hardship. I don't know if the Board wants to do that. But I don't know if that's what you were suggesting earlier.

TAD HEUER: I was more attempting to

get away from the notion that a square lot, it's very difficult to describe as a non-conforming lot.

CONSTANTINE ALEXANDER: Ready for a vote?

All those in favor of granting the Variance on the findings proposed and the granting of the Variance say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. The Variance is granted.

(Alexander, Hughes, Heuer, Myers, Firouzbakht.)

ATTORNEY JASON MANEKAS: I'd like to thank the members of the Board. I know it was a long time. Thank you.

(A discussion off the record.)

(9:30 p.m.)

(Sitting Members: Constantine Alexander, Brendan Sullivan, Tad Heuer, Douglas Myers, Mahmood Firouzbakht.

CONSTANTINE ALEXANDER: The Chair calls case No. 9907, 366-B Broadway. Is there anyone here wishing to be heard on that?

Sir, give your name and address for the file.

GEORGE WHITESIDE: My home address?

CONSTANTINE ALEXANDER: Yes.

GEORGE WHITESIDE: My name is George Whiteside. I live at 12 Fresh Pond Lane.

CONSTANTINE ALEXANDER: You're here

seeking a Special Permit with respect to a yoga studio you wish to open to reduce the required parking, and also to install some windows in the rear of the building.

GEORGE WHITESIDE: Yes, I am.

CONSTANTINE ALEXANDER: Special Permit cases are different than Variance cases, much easier from your perspective.

GEORGE WHITESIDE: May I speak to that issue? I had -- previously my contractor and architect who were renovating the space, one had a child and the other has children at home and they both had to leave. Should I contact them and ask them to return and speak to the Variance issue?

CONSTANTINE ALEXANDER: It's not a Variance, it's a Special Permit.

GEORGE WHITESIDE: I mean the windows.

CONSTANTINE ALEXANDER: The windows? Let me, maybe I can help you move

it along. The big issue we have when you want to put windows in a setback, unfortunately you need a Special Permit. I understand from your application you're going to restore windows. The issues we consider, and the big issue is privacy. What's the impact on the people that abut the rear of the building? Are they going to have you staring in their bedrooms or vice versa?

GEORGE WHITESIDE: Understood.

CONSTANTINE ALEXANDER: What is the impact? You can tell us.

GEORGE WHITESIDE: I can tell you in my own architectural language. There were photos submitted with the application from the inside and the exterior and the side, there were many angles as we thought were useful. And essentially there's a back deck. This deck at the back of the building approximately 12 feet from the rear of the building. And then there's a wooden fence,

a solid fence which is 12 feet high? It's pretty high. And it rises above the level at which the original windows existed and above the windows that we're proposing would exist. And so there's no sight line to, as far as I can tell, I mean the windows obviously but to any of the first and second floor window units in the back. There's a playground on Lee Street. But the Historical Commission checked that there was not -- and submitted a letter that there's not a sight line, that the playground is not in any view of those windows.

CONSTANTINE ALEXANDER: Have you spoken with any of the neighbors?

GEORGE WHITESIDE: I did.

CONSTANTINE ALEXANDER: What did they tell you?

GEORGE WHITESIDE: This past weekend I went around to the immediate neighbors on 154 and 152 East Street and I

spoke -- today I actually went to West Street, our neighbor Mr. Robert Winters at 366 Broadway. And none of those folks had any issues or concerns with the windows going in. And in fact, I asked whether any of them would be willing to sign a petition on our behalf and some of them. I would like to submit that to the Board.

CONSTANTINE ALEXANDER: Sure.

I'll read the letters that are appropriate at the time.

GEORGE WHITESIDE: The letters you have are from the parking issue basically from our students. But this particular one I have for four people who signed.

There were a few others I spoke with who I didn't have the petition with me but they consented.

CONSTANTINE ALEXANDER: Your representation to us is no neighbor expressed unhappiness.

DOUGLAS MYERS: What about the neighbor who expressed concern about use of air conditioning units on the noise arising from them that might happen for windows be constituted and concerns about active use of the deck? Will you be able to make any estimates on the record tonight about those two issues to give the Board some assurance?

GEORGE WHITESIDE: Certainly.

That would have been Mr. Winters. And I know that because he actually came by this afternoon. I happened to be there. I asked him -- I introduced myself. Asked him if he was attending the hearing, and he said he could not. He raised those issue with me. There is not now any air conditioning or HVAC unit in the back of building where the yoga studio is. So we wouldn't ever require air conditioning and we're not installing it. In fact, the opposite. We would like heat. And so I told him that. And he also mentioned

that the area in back of the building is, I believe, he used the word kind of an echo chamber. He lives on one side and he can hear people across the way talking and doing whatever they're doing. His concern was about evening activities. So I told him that basically yoga is quiet, and we have two classes a day currently. I don't know whether we'll expand the hours. The evening class currently that we have at our current location in Inman Square is from five to seven p.m. And after seven p.m. or 7:15 maximum, there's no activity at our space. We may extend that a little bit, but certainly not, not much.

DOUGLAS MYERS: Is the deck area used?

GEORGE WHITESIDE: It is not used for classes, and it would not be used for yoga classes. It might be used for people to sit and have a cup of water or something, chat

quietly after a class. We don't know yet. But, certainly there would be no organized activities back there. And I told Mr. Winters the same. And that's -- that was the nature of the conversation. I should say that we had the conversation about some other matters, too. And at the end of it he told me that he was satisfied with my comments and wished us well.

CONSTANTINE ALEXANDER: What are the hours of operation? So at the end of the day you had said not much likely to go beyond 7:15 or 7:30. When would the first class be?

GEORGE WHITESIDE: Currently our class schedule is five days a week, Monday through Friday, weekdays. We have a class that runs six a.m. to 9:30 a.m. which I teach. And then we have class that runs from five p.m. to seven p.m. which my wife teaches. And we have a class Sunday morning from seven to nine. And that is essentially our

schedule. We may, as I mentioned, tweak it or expand it here and there, but those are our hours.

I should mention that or somewhat apologetically, I'm somewhat tired. I typically wake up at four, 4:30.

CONSTANTINE ALEXANDER: We'll try to get you out of here.

GEORGE WHITESIDE: That's my way of saying a bunch of them were here. A bunch of them left because they had to go to bed. They wrote statements. But we're not a late bunch. And to kind of answer the back door thought of the letter, I can say there would no ruckus parties, no dancing, you know, that kind of thing. And I think Mr. Winters was placated on that.

BRENDAN SULLIVAN: Average number of people at your class?

GEORGE WHITESIDE: Currently in a class we have we're at about 10 and 15

students.

CONSTANTINE ALEXANDER: This is Inman Street?

GEORGE WHITESIDE: Yes. We're on Inman Square on Hampshire Street. And the way it works, and I noted this in a statement I submitted, is the class time, if it's six to 9:30, people come in through the class period. They don't all arrive at once. So, for example, this morning I taught class from six to 9:30, and I believe I had 11 students who kind of came in over the course of the period. So it's really quite small. We hope that we'll have better attendance, but we rarely have upwards of 15 at the moment.

MAHMOOD FIROUZBAKHT: Do you have a sense of how most of your students get to your studio?

GEORGE WHITESIDE: Yes. My sense, and a bunch of them have submitted statements, is that most of them are local and

live relatively close by and walk or bike to class. There's the occasional one that takes the bus. There's a 68 bus would be stopping right in front of this location. And then there are a few who drive, but they don't stay that long. They stay typically an hour and 15 minutes. And at that time of morning when I teach, there are almost all spots on the street. Meters go into effect at eight. So people are generally out of there before the meters go into effect.

CONSTANTINE ALEXANDER: To grant the Special Permit on the parking that you're seeking, we have a general requirements we have to meet -- you have to meet, we have to find that you met them. But we also in Section 6.35.1 have special findings we have to make, and I want to make sure we cover that, make sure -- because I'll read it.

It says a Special Permit shall be granted only if the Board determines and

cites evidence in its decision that the lesser amount of parking will not cause excessive congestion, endanger public safety, substantially reduce parking availability for other users, or otherwise adversely impact the neighborhood or that such lesser amount of parking will provide positive environmental or other benefits to users of the lot and the neighborhood.

And then we take into account the availability of surplus off street parking in the vicinity, the proximity of MBTA transit station, the availability of public or commercial property facilities in the city. So just walk us through that a little bit so we can make those findings.

GEORGE WHITESIDE: Okay.

CONSTANTINE ALEXANDER: If you don't have it in front of you, I can give it to you.

GEORGE WHITESIDE: I was looking at

6.35.1.

CONSTANTINE ALEXANDER: The very first paragraph. It says any required minimum amount of parking, the next sentence. The Special Permit shall be granted only if the Board, blah, blah, blah.

GEORGE WHITESIDE: So one by one in terms of --

CONSTANTINE ALEXANDER: Briefly.

GEORGE WHITESIDE: In terms of excessive congestion, we're as I mentioned, we're in operation right now at 186 Hampshire Street in Inman Square. We're an established business. We have an existing parking variance which we were granted back in 2005.

CONSTANTINE ALEXANDER: Have you had any complaints from that property?

GEORGE WHITESIDE: We have none.

CONSTANTINE ALEXANDER: With regard to congestion?

GEORGE WHITESIDE: No. We want to move to a different part of the neighborhood, about three-tenths of a mile away. So, there's no substantial change proposed in terms of the parking load on the neighborhood. Everything has been copacetic where we've been. As far as I know, we've not had a single complaint.

CONSTANTINE ALEXANDER: The lack of parking will not engage in public safety. You told us that.

GEORGE WHITESIDE: It will not.

CONSTANTINE ALEXANDER: I think you addressed the substantial use parking. You pointed out that most of the people come by bicycle or on foot or.

GEORGE WHITESIDE: Yes.

CONSTANTINE ALEXANDER: And they come for short periods of time, and because there is public transit right in front of the building and further incentive for people not

to drive and park and clog up the streets. In fact, I think I will take notice that people who do yoga generally don't do that kind of thing.

TAD HEUER: You have a bus stop right out front of the door?

GEORGE WHITESIDE: We do. No. 68 literally right in front.

CONSTANTINE ALEXANDER: You've addressed that already.

GEORGE WHITESIDE: I can mention there is a municipal parking lot on Springfield Street in Inman Square which is a little over two-tenths of a mile away. A long city block up Fayette Street. And over and across and people can park there. Those are, I believe, maybe two hour coin fed. Put a stamp in your dashboard.

BRENDAN SULLIVAN: So your classes are early in the morning?

GEORGE WHITESIDE: Yes.

BRENDAN SULLIVAN: And then later on in the afternoon?

GEORGE WHITESIDE: Yes.

BRENDAN SULLIVAN: Nothing in between?

GEORGE WHITESIDE: Currently we do not. We -- I don't promise.

BRENDAN SULLIVAN: If there's a need for it.

GEORGE WHITESIDE: I won't promise the Board that we won't ever have a class in the daytime, but right now we don't.

BRENDAN SULLIVAN: Your presence and impact is really quite benign and really quite non-intrusive obviously.

GEORGE WHITESIDE: I feel it is. And maybe this would be a good moment to pass across the sheet of papers.

CONSTANTINE ALEXANDER: More?

GEORGE WHITESIDE: Yeah. These are additional statements that essentially our

students have written in support of the parking Variance which make similar points.

DOUGLAS MYERS: Typically how many students are present? How many people are present when the morning class opens at six o'clock?

GEORGE WHITESIDE: There's one lady who pointed out in a letter she has already submitted to the Board that she arrives typically around 6:15. And I believe she says in the letter there are very few. Typically five? Four, five, six.

DOUGLAS MYERS: And they come in after that?

GEORGE WHITESIDE: And they roll in slowly. And that's our method of teaching. It -- and our classes, I don't know how much you want to talk about yoga at this late hour.

TAD HEUER: No need.

GEORGE WHITESIDE: Our classes are silent. It's not the kind of class where I

stand in front of the room where I call things out. We do one of those on Friday morning. And essentially it's silent and people focus on breathing.

CONSTANTINE ALEXANDER: You have more you want to say?

TAD HEUER: You don't.

CONSTANTINE ALEXANDER: Why don't we go to the --

GEORGE WHITESIDE: I can say one more thing just briefly --

CONSTANTINE ALEXANDER: You waited all this time, you're entitled.

GEORGE WHITESIDE: In terms of off street parking, at our previous location I did look into the matter of how renting off street parking as an alternative to coming to you for a Special Permit, and there was none in Inman Square. The S&S Deli owns four lots and they're not open or amendable to renting spaces so that's out. Where we would be now,

three-tenths of a mile away, there is the Harvard Towers on Harvard Street but I telephoned them and was told they only rent to the residents. So that is -- was not an option. And in talking with my new landlord, as far as I know, there's nothing else available.

CONSTANTINE ALEXANDER: The Chair will note that we've received numerous letters of support for the petition. The Chair doesn't propose to read each and every one of them, but they will be part of the public record and incorporated as if I've read them.

GEORGE WHITESIDE: And there's also a few signatures from the abutters in support of the parking.

CONSTANTINE ALEXANDER: We have even more numerous letters of support. I'll open it to public testimony. I think you can sense where we're going. I think anybody who

speaks will only hurt the case. So do you really need to speak? Unless you're opposed? Anyone here opposed to relief being sought? I think we're ready for a decision.

GEORGE WHITESIDE: And the decision you're about to render is on the parking not the windows?

CONSTANTINE ALEXANDER: Both. There are more findings we have to make with regard to the parking than we do with the windows. So it's an overlay if you will.

Okay. The Chair moves that a Special Permit be granted to the petitioner to reduce the amount parking as set forth in the petitioner's application on the grounds that, and based upon evidence supplied by the petitioner, that the lesser amount of parking will not cause excessive congestion, endanger public safety, substantially reduce parking availability for the uses or

otherwise adversely impact the neighborhood. And on that basis for that would be as set forth in petitioner's presentation, that the nature of the activity is a yoga studio which tends to attract people who walk, it's a local activity. People walk or bike. That there in fact is parking on Broadway. In fact, that there is public parking in relatively easy walking distance. They find that there is public transportation specifically in front of the building, a bus stop in front of the structure, all of which would go to minimize the need for the parking that is set forth in our Zoning By-Law.

Further, that with respect to the permit, the Special Permit for parking and with regard to the Special Permit to open the windows that have been flagged, that the result of either of those activities will not cause congestion, hazard or substantial change in established neighborhood

character. That the development of the adjacent uses would not be adversely affected by what is proposed. And that is in regard to the windows, we pointed out that there have been windows there before. That there was a large fence, a high fence that would maintain the privacy of abutters. And that the times in which the premises would be used, particularly evening hours, there will be no use of the property in the late hours of the night with the noise, intended noise that can result from that.

That no nuisance or hazard will be created to the detriment of the health, safety or welfare of the occupants or the citizens of the city. In fact, it will improve the health, safety and welfare of the occupants and citizens of the city.

And that the use would not impair the integrity of the district or otherwise derogate from the intent or purpose of this

Ordinance.

The Chair would note there seems to be unanimous community support for this project. No letters of opposition that I'm aware of.

The petitioner further having represented to us that those who have not submitted something in writing, many people have been spoken to and no one has expressed any overwhelming objections to what is being proposed.

A Special Permit would be granted on the condition that the work proceed in accordance with the plans submitted by the petitioner. They're 1, 2, 3, 4, 5, 6, six pages of plans the first page of which --

GEORGE WHITESIDE: Sorry to interrupt. The floor plan of the interior of the space has changed since those plans were --

CONSTANTINE ALEXANDER: Interior.

GEORGE WHITESIDE: Interior.

CONSTANTINE ALEXANDER: That's not a Zoning issue.

GEORGE WHITESIDE: It has been submitted, put in the --

CONSTANTINE ALEXANDER: From a Zoning point of view, we don't get involved with the interior. So, you need to do that to get your building permit, that won't affect the Zoning. So the first page has been initialed by the Chair.

All of you who wanted to vote in favor of the petition, say "Aye."

(Aye.)

(Alexander, Sullivan, Heuer, Myers, Firouzbakht.)

(9:50 p.m.)

(Sitting Members: Constantine Alexander, Brendan Sullivan, Tad Heuer, Douglas Myers, Mahmood Firouzbakht.)

CONSTANTINE ALEXANDER: The Chair calls case No. 9909, 44 Follen Street. Is there anyone here wishing to be heard on that matter?

(No response).

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

The Board has possession of a handwritten letter signed by Vincent Panico,

the attorney for the petitioner. It says: Request for a continuance on case No. 9909, 44 Follen Street as attorney for Douglas Yoffe owner. I hereby request that a continuance be granted to the next earliest date.

What would the next earliest date be?

SEAN O'GRADY: June 10th.

CONSTANTINE ALEXANDER: June 10th.

The reason, just for the record, the reason we're continuing this case or why the petitioner has been asked to continue this case is that the accurate plans of what he proposes to do were not in the public file. And when we pass on these cases, we want to see the plans and we tie our relief to the plans submitted. So the petitioner should be made aware of our rule, reminded of our rule that accurate plans have to be in the public file by no later than five p.m. on the Monday before June 10th.

SEAN O'GRADY: Just to inform the Board we understand it is the intent the petitioner to actually file a new case. There were questions and defects in the advertising.

CONSTANTINE ALEXANDER: So we'll continue just mechanically but we don't expect to hear the continued case, but rather a newly advertised case?

SEAN O'GRADY: Yes.

CONSTANTINE ALEXANDER: The Chair moves that the case be continued to seven p.m. on June 10th on the condition that the petitioner sign a waiver of time for reaching a decision. And on the further condition that the sign on the premises be modified to reflect the new hearing date.

All those in favor of continuing the case on that basis say, "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in

favor. Case continued.

(Alexander, Sullivan, Heuer, Myers  
Firouzbakht.)

(9:50 p.m.)

(Sitting Members: Constantine Alexander,  
Brendan Sullivan, Tad Heuer, Douglas Myers,  
Mahmood Firouzbakht.)

CONSTANTINE ALEXANDER: The Chair  
will call 9908, 535-545 Cambridge Street.  
Is there anyone here wishing to be heard on  
that matter?

MARC RESNICK: Yes.

CONSTANTINE ALEXANDER: Come  
forward. You're looking for a Variance to  
construct an exterior staircase on the rear  
of the building and construct a roof deck.

MARC RESNICK: Correct.

CONSTANTINE ALEXANDER: So, okay.

MARC RESNICK: The first thing I'd like to do --

BRENDAN SULLIVAN: Give your name and address.

MARC RESNICK: Oh, I'm sorry. My name is Marc Resnick, R-e-s-n-i-c-k. My address is 183 Harvard Ave, Allston, Massachusetts.

So I recently purchased this building less than 30 days ago and I intend to convert the upper floors to residential. It had previously been all commercial. There is a way to use an existing staircase inside the building, in a building 30 or 40 or 50 foot long hallway to connect the right-hand side to -- because the exit can only go out of this side door. And so even the units on this side would have to pass all along the back of the building until they can get out of that little

door.

What I propose -- this is just a rendering versus an actual is that which is just a staircase. There's no living space going into that has to be enclosed. So I can't put stairs. I have to put like a little -- and there's also issues about its remoteness from the front door that comes out of the front. So that's why it's sort of long and thin. You have to go far away so that you can get out and still meet the building requirements. So if I can't have the Variance for that, then I would be able to have windows in the rear of the units. Because if I have the hallway along the back all the way along the back, all the windows are in the hallway of a common hall and then the whole back side of all the units will be dark. So, that's that part of it.

CONSTANTINE ALEXANDER: Let's talk about the roof deck.

MARC RESNICK: The roof deck.

CONSTANTINE ALEXANDER: And I see the roof deck, it looks to me like a common roof deck for four units.

MARC RESNICK: Correct.

CONSTANTINE ALEXANDER: And it's going to be something like almost 27 feet by 75 feet?

MARC RESNICK: Well, it's drawn relatively large and so I've gotten feedback from some people.

CONSTANTINE ALEXANDER: I would think you would.

MARC RESNICK: So the reason -- the architect drew that because that's the roof we're looking at. It's a huge -- it's a 5,000 square foot flat open roof. And also for residential you're supposed to have open space, but we have none. The lot is completely covered. So we propose the big deck. We can -- we've proposed the deck is

more than ten feet back on all sides. So that you can't look down on any of our neighbors. But I was at the -- here, I brought some other pictures. You can see --

CONSTANTINE ALEXANDER: All we have before us are your plans. The plans show a very large roof deck. You can't come in and show us photos or renderings --

MARC RESNICK: Oh, no, these are the neighbors, that's all. These are what we would be looking at.

CONSTANTINE ALEXANDER: I was there, the neighbors are very close to your very large roof deck.

MARC RESNICK: We set it back ten feet so we're not anywhere looking over.

CONSTANTINE ALEXANDER: Why is that going to improve the privacy and inhabitability of these very close structures? What's ten feet going to do?

MARC RESNICK: If you can from our

deck we would not be able to see the ground.

CONSTANTINE ALEXANDER: What about noise? Four people, four units so they have big block parties on this deck.

MARC RESNICK: Okay. So I -- my idea was then after speaking with the neighbors, that they were concerned about me being able to -- people going to look directly in the windows like on the second and third floors. So I would be amendable to either shrinking the roof deck or building the fence, the rail, as like a solid fence. You know, it's over six feet so that would mitigate the sound, that nothing could get through and also you wouldn't be able to see any other (inaudible).

CONSTANTINE ALEXANDER: Sir, we have -- I applaud your desire to satisfy I think very obvious neighborhood concerns. But you've got to come before us with exhibits -- you should be talking to your

neighbors, come up with a plan that the neighbors can support, plans which shows us exact size of the roof deck or they don't support. Come back with something specific. We can't talk in generalities here, we're going to do this or that. I'll give you a chance, Ma'am.

MARC RESNICK: So if the neighbors are way against the roof deck, I would just like to forget it. I'm not looking to create any conflict with any of my neighbors at all.

TAD HEUER: Do you need the open space in order to build the units?

MARC RESNICK: No. No.

TAD HEUER: Gold Star is right up the street.

MARC RESNICK: We're doing it as a deck, as a builder, the roof calls out for a nice roof deck because it's there. But if the neighbors don't want to have it --

CONSTANTINE ALEXANDER: He just

said he's going to withdraw the roof deck. Do you want to speak any further? It's opposing, it's gone.

MARGUERITE MANCINI: Okay, so that's gone. But I did have a question about the stairs.

CONSTANTINE ALEXANDER: We'll get to that.

MARC RESNICK: If there's any conflict, we would just like to forget it.

CONSTANTINE ALEXANDER: We'll take that as a representation you're withdrawing the request for the roof deck. We're just dealing with one issue now, the stairs.

MARC RESNICK: Just the stairs so I can get people out nicely.

CONSTANTINE ALEXANDER: Before you you have a chance to speak, anyone have questions regarding the stairs?

MAHMOOD FIROUZBAKHT: Was there ever consideration made in terms of

requesting a Building Code Variance from the Building Code to not necessarily have such a wide long stairway in the back structure added in the back?

MARC RESNICK: As far as I know, due to -- my architect explained to me that for egress issues you cannot get a safe -- it would be improper against safe codes, and so that has to be that long. It's thin and long and we purposely kept it under the roof line of the existing roof line so that they couldn't be seen from the street. It's lower than -- so you just couldn't see it unless you were around the back. And since it's not -- no one will ever be in there. It would just be to get to the ground basically. It's just lighting. There's no where to sit. It's just a passage to get out of the building. It actually passes back then into the first floor and then out of the building that way. So the deck is only the roof

part -- the addition is only two stories, and the first floor is actually still inside my existing structure.

TAD HEUER: And that's the primary means of egress?

MARC RESNICK: No, the back stairs. Secondary. There is a front stair that comes right up the front of the building in the front. It's a nice center on the one unit on the right and one on the left.

BRENDAN SULLIVAN: My experience with the State Building Code Commission and seeking Variances from them, they do it very rarely and they would only do it if it was absolutely no other alternative. What he has presented here is an alternative to them granting relief. And means of egress, the shortest route, the quickest route is what they look for. And this plan is an alternative to that, so it would be extremely difficult for him to get an exemption from

them where this is an alternative.

TAD HEUER: What's the relief?

CONSTANTINE ALEXANDER: It's not clear exactly what the problem with the rear staircase in terms of non-compliance with the Zoning Code. I had the same question.

MARC RESNICK: If I can maybe explain it.

CONSTANTINE ALEXANDER: Go ahead.

MARC RESNICK: The current space or the previously 30 days ago, the entire building was commercial building and it was converted by Special Permit to residential in the upper two floors. And part of the Special Permit is that you do not go outside the existing structure. So now to go outside the existing structure, I need relief to be able to go outside the existing structure. The Special Permit I received was specifically related to that.

TAD HEUER: Was that a Planning

Board permit?

MARC RESNICK: Planning Board, yes.

TAD HEUER: It wasn't us?

MARC RESNICK: No. Because it's by right according to codes. You can go to the Planning Board. And it was approved approximately 15 or 20 days ago -- 22 days ago. That's why now I'm looking at to plan the actual -- to build the building and I'd like to have the stairs so that I can design the units in a way that people would like to live.

TAD HEUER: So you have a Planning Board permit to convert?

MARC RESNICK: Correct.

TAD HEUER: And the Planning Board permit is out I presume (inaudible), but you're then to vary from the Planning Board's permit?

MARC RESNICK: Correct. And I've been to the Planning Board as well.

TAD HEUER: Is there a reason -- if you knew you were going to convert and you knew that putting the staircase along the back wall would create this kind of hallway of windows for the rear of the unit, is there a reason you didn't ask -- tell the Planning Board at the time I don't want to create a hallway of windows, can I build out the back?

MARC RESNICK: I think I misunderstood the procedure when I did it. I applied for both permits basically at the same time. So I applied for a Special Permit and a Variance separately at the same time. I didn't understand exactly how that procedure worked. And so I did go back to the Planning Board again and present what I'm presenting again tonight. And so that they did get the full picture. And that's when they explained to me that I should have thought of a slightly different procedure than two separate applications. They were

supposed to be more in conjunction with each other.

CONSTANTINE ALEXANDER: There is a memo in the file from the Planning Board that I'll read into the public record.

"545 Cambridge Street was granted a Planning Board Special Permit for conversion of the non-residential space, four dwelling units, but did not cover the Variance request in this case before us. The Planning Board has no objections to this application, but will review plans that include any Variance granted for this address."

I guess the point being you have been upfront with the Planning Board.

MARC RESNICK: Right. There was a form on the Planning Board application that said that if there are any Variance permits, it's supposed to be -- there was a page we're supposed to fill out, but I guess we missed that basically and filled out our application

leaving that piece out. As soon as we discovered that, we rescheduled to go back before the Planning Board again. And I was there like a week ago and presented all this. And that's when they added on the part about they had no objection.

CONSTANTINE ALEXANDER: In a more perfect world you would have gone back to the Planning Board, gotten their comments. And so we would know exactly what the Planning Board wants and doesn't want in deciding your case. If we grant your relief tonight, you still have to go back to the Planning Board. And I guess the risk is the Planning Board says you've got to make some changes before what we approved tonight, you're going to be back before us. You understand that?

MARC RESNICK: That's what they said they're fine with this.

CONSTANTINE ALEXANDER: That they have no objections to this application but

will review plans that include any Variance for this address. They're going to review that.

BRENDAN SULLIVAN: They just want to make sure there's no alterations from what he has submitted to us which is exactly what he submitted to them.

CONSTANTINE ALEXANDER: Hopefully that's what it is.

Anyway, you understand?

MARC RESNICK: Correct.

CONSTANTINE ALEXANDER: You said you had a question about the stairs.

MARGUERITE MANCINI: I did. He said he talked to neighbors, but I haven't seen them.

CONSTANTINE ALEXANDER: I have plans.

MARGUERITE MANCINI: We're right behind the -- so where are the stairs?

MARC RESNICK: This is the whole

building. That's Cambridge Street.

MARGUERITE MANCINI: Okay. So, that's Cambridge Street.

MARC RESNICK: And the back of my building.

MARGUERITE MANCINI: Okay.

MARC RESNICK: And the stairs is just in there. So it's lower than the existing. It has no windows overlooking anyone's properties and has some stairs that go down along and back.

MARGUERITE MANCINI: Okay. And this is where you wanted to put --

MARC RESNICK: That's where we proposed the roof deck.

MARGUERITE MANCINI: So that area there. Oh, okay. Can I just explain this to my dad?

(Speaking Italian.)

ANTONIO MANCINI: Five feet from my yard. Where you got you say you build

something to get out.

(Speaking Italian.)

ANTONIO MANCINI: I live behind.

CONSTANTINE ALEXANDER: You support the deck, right?

ANTONIO MANCINI: I don't want the deck.

MARGUERITE MANCINI: I don't have a problem with those stairs because it looks like it's -- I mean....

CONSTANTINE ALEXANDER: The record will note that the abutters have looked at the plans regarding the stairs and have no objection.

MARGUERITE MANCINI: Okay, I have no problem with that.

THE STENOGRAPHER: Can we identify the parties, please?

MARGUERITE MANCINI: I'm sorry, Marguerite Mancini, 11 Sixth Street. Antonio Mancini.

CONSTANTINE ALEXANDER: Ready for a motion? Is there anybody else wishing to be heard on this matter?

MARGUERITE MANCINI: Can he come back in six months and make another proposal for another deck?

CONSTANTINE ALEXANDER:  
Absolutely. But you would be noticed. Well, I'm not sure. He's going to withdraw that part of the application. It depends on the nature of the deck. He may or may not be able to come back before us. If he comes back with a radically different deck, then perhaps he could come before us. You would have the opportunity to come down and object.

DOUGLAS MYERS: Someone has her hand up.

HEATHER HOFFMAN: Hi. Heather, 213 Hurley Street. And you might be wondering why the East Cambridge Planning Team is not here great numbers tonight, it's because it's

a Big East End Fundraiser Cooking for a Cause tonight, and that's where all the civic minded members of the East Cambridge Planning Team are.

I just wanted to let you know that the -- I believe you have a letter on this, but in addition so that you will hear it in the public record. At the discussion last night at the East Cambridge Planning Team, everything you said about decks was said. And I would add for my own self that every open fire escape I have seen has immediately been turned into a deck. And so I am happy to see that the stairs are enclosed.

CONSTANTINE ALEXANDER: By the way, there's no letter in the file.

HEATHER HOFFMAN: There isn't? Well, then let this be a report to you of a letter that was supposed to be sent to you and put in the file.

CONSTANTINE ALEXANDER: We got the

message from you, thank you very much.

Any one else wishing to be heard?

(No response.)

CONSTANTINE ALEXANDER:

Discussion? Ready for a vote?

The Chair moves that a Variance be granted to the petitioner with regard to only to the request to construct an exterior staircase off the rear of the building on the basis of the following findings:

That a literal enforcement of the provisions of the Ordinance would involve a substantial hardship to the petitioner financial or otherwise to the petitioner. The hardship being is that the petitioner is seeking to convert a commercial structure into a residential structure which would upgrade -- it would add to the housing stock of the city and upgrade generally the condition of the building. And that to do so the second means of egress is required,

necessary as a matter of law.

That the hardship is owing to basically the structure. The structure occupies virtually the entire lot and there is no other place for the staircase.

And the 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 staircase will improve the safety and inhabitability of the structure. The incentive provide further impetus to having the building convert to the residential uses.

The Board would further note that the Planning Board is in support of this and has granted a permit for the conversion, and that there appears to be at this point no neighborhood opposition to what is proposed.

The Variance will be granted on the condition that the work proceed in accordance with plans submitted by the petitioner

prepared by O'Sullivan Architects, Inc.; 1, 2, 3, 4, 5, pages in length. The first page of which has been initialed by the Chair. Again, the Chair would reiterate that this is only with respect to the exterior staircase and in now way allows you to build a deck that you were originally proposing to build.

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

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. Variance granted. Good luck.

(Alexander, Sullivan, Heuer, Myers, Firouzbakht.

CONSTANTINE ALEXANDER: With regard to this case the Chair would further move to accept the petitioner's offer of withdrawal with regard to the roof deck as set forth in the plans that I've cited in the earlier motion.

All those in favor say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor.

(Alexander, Sullivan, Heuer, Firouzbakht, Myers.)

(10:10 p.m.)

(Sitting Members: Constantine Alexander, Brendan Sullivan, Tad Heuer, Douglas Myers, Mahmood Firouzbakht.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9910, 58 Shepard Street. Is there anyone here wishing to be heard on that matter?

For the record, name and dress.

MARK BOYES-WATSON: Mark Boyes-Watson, 30 Bows Street in Somerville.

ROLAND GRAY: Rob Gray 40-A Mount

Vernon Street, Cambridge.

GERALYN GRAY: And I'm GERALYN Gray, 40-A Mount Vernon Street.

CONSTANTINE ALEXANDER: Okay. You want a Variance to do various things.

MARK BOYES-WATSON: Right. Should I just quickly review?

CONSTANTINE ALEXANDER: Please.

MARK BOYES-WATSON: So the 58 Shepard is attached to the house next-door. So it's automatically non-conforming by virtue of the zero lot line. And so there are a pair of sister houses that share a facade. All of the work in requiring relief is at the back of the property. And consists of three elements really.

One is this is a 59 square foot extension that goes out five foot, ten and a half. Ten foot, one fills in the back. Which actually if you look at the Assessor's map exactly reflects what's going on on the

other side of it. It also involves the relocation of a canopy that gave access here just to do with the interior planning of this area. And then up on the -- that's on the first floor. And up on the third floor it involves -- actually, there's already a door out through an existing dormer here. But we're removing that dormer and changing the -- changing the access out to here to a small roof deck. This roof deck's been a lot of discussion with the neighbors that the owners have been going through. And it's actually now it's very similar to the -- there's another roof deck on the house next door, exactly opposite and they've been talking a lot about how that works. They'll end up with the same configuration both sides. There's no add to the floor area here. It's just taking away. It's just reconfiguration of these dormers with the back.

CONSTANTINE ALEXANDER: You are adding floor area to the whole project?

MARK BOYES-WATSON: As the 59, the total dealt out to 59 square feet.

So, actually -- so that's -- basically those are the three elements.

CONSTANTINE ALEXANDER: The roof deck, it sits in the setback; am I right?

MARK BOYES-WATSON: That's automatically. Because of the zero lot line, it automatically -- it does not sit into the rear or the side yard setback but does, because it touches the next-door building.

CONSTANTINE ALEXANDER: So the setback is the next-door building, that's the setback it sits in.

MARK BOYES-WATSON: Well, it's regarded -- actually in a two -- so the other building is literally like this. It has a roof deck right here. I should have a Google earth thing. But that's automatically

unfortunately in the Zoning Code still there's no provision for this. Wo when it's an attached house, that left side yard is automatically non-conforming. So anything you do -- so actually if that roof deck sets in that needing a side yard variance.

CONSTANTINE ALEXANDER: Let me ask you something. You've been before us an awful lot. You have a tendency when you have attached structures like this, just to show us the half you want to see and not the other half. And I don't really appreciate that.

MARK BOYES-WATSON: It's just a documentation thing. And I actually brought -- it was bothering me, too, and I thought --

CONSTANTINE ALEXANDER: Oh, I'm sure it does.

MARK BOYES-WATSON: This is Google earth actually.

CONSTANTINE ALEXANDER: That

doesn't do it. I like to see the --

MARK BOYES-WATSON: The -- and the one you're referring to was on Shepard Street. You have a very good memory. That was the one we were talking about, the Beardsleys (phonetic).

But anyway, we're not making any front changes. In fact, what will happen as you can see from in Google earth picture, you can see -- you see where the red dot is the subject property?

CONSTANTINE ALEXANDER: Yes.

MARK BOYES-WATSON: And unfortunately I can't print out from Google earth what this is. You see the roof deck next-door? That's where we are, up there. And even the dormer configuration is very similar to what's proposed here. Yes, we're not making any front yard changes here.

CONSTANTINE ALEXANDER: I'm going to tell you next time you come --

MARK BOYES-WATSON: I'm going to bring both.

CONSTANTINE ALEXANDER: I'm not going to let you present the case.

MARK BOYES-WATSON: I hear you. I hear you. I mean, but, yes, it really is very similar to the -- and there's no front facade changes.

BRENDAN SULLIVAN: My take on this it's basically cleaning up some details. You're adding the space but you're doing it respectfully I think with the architecture of the building. And you're sort of tying the one side to the other side in a sense, is that basically it?

MARK BOYES-WATSON: That's exactly right.

BRENDAN SULLIVAN: And some of the details are lacking to bring the house back to more aesthetically pleasing.

CONSTANTINE ALEXANDER: And the

plans, these plans, that's the same board --

MARK BOYES-WATSON: Same set.

TAD HEUER: Just out of the curiosity on the side elevation, I guess, right where your finger is, what is that?

MARK BOYES-WATSON: Maybe the two of you want to explain the process you went with the neighbors.

GERALYN GRAY: We took the plans to all the abutters and sat down with them and went through it with them. We did want to put a bigger deck. And we got a lot of feedback that it was too big. So we said, okay, we hear you. We went back to the designer and worked with trying to make it more pleasing to the eye. I wish I had the pictures. The back of the house today does not look very pleasing to the eye. They messed up the mansard roof. It doesn't tie in nice. And we thought that by putting that little edge around the top, it gives them more privacy so

that they felt like they weren't looking right at the deck. They all liked it. They thought it looked better. So we said okay. It cost us more money, but it looks nicer.

MARK BOYES-WATSON: So it's in the tradition of those decorative rails and actually mediates the deck that's actually several feet behind it in terms of visual.

GERALYN GRAY: And we're wrapping it around the sister house. So we're gonna bring -- tie in both properties a little better than just these awkward decks that are kind of out there.

BRENDAN SULLIVAN: It gives it a little bit more elegance.

CONSTANTINE ALEXANDER: Oh, yes.

BRENDAN SULLIVAN: I don't know how architecturally historically pure it is, but it's lacking something and it -- yes.

ROLAND GRAY: When we looked out from the neighbor's point of view which we

would not have done, it really looks ugly and we don't like it. We don't like it and we said fix that. For the life of me I do not understand why somebody built a door that goes nowhere. That's really odd.

CONSTANTINE ALEXANDER:

(Inaudible.)

ROLAND GRAY: But that was governmental money.

We figured we might as well fix this up anyway. And where that door is now is going to be restored one of the original type windows that fit in at the mansard. And so it seems to, it seems to have pleased the folks. We did get verbal and written okay's from everybody except one, the rear yard folk who are travel and we couldn't catch up with them.

CONSTANTINE ALEXANDER: We have some -- we have two letters in the file.

GERALYN GRAY: You do have some.

CONSTANTINE ALEXANDER: I'm going to read them. If you have additional letters.

GERALYN GRAY: These are the two backyard abutters.

ROLAND GRAY: One is probably the same.

GERALYN GRAY: The Pools.

CONSTANTINE ALEXANDER: No, they're four different letters.

ROLAND GRAY: Good.

CONSTANTINE ALEXANDER: Let me quickly.

GERALYN GRAY: Sure.

CONSTANTINE ALEXANDER: I'm sorry. I don't want to be rude. Go ahead.

GERALYN GRAY: I just wanted to see if you have the Pools and Walsh.

CONSTANTINE ALEXANDER: We have letters from Roland Gray, Beth Gamse and Judith Singer. From Kenneth Nakayama and

Kate Anderson and from the Pools.

GERALYN GRAY: The pools. And then do you have anything from the Walsh? No. We actually -- the sister, the people in the house we abut are --

ROLAND GRAY: The one we left off the plans.

GERALYN GRAY: They came to the hearing but they left.

ROLAND GRAY: They gave up. We can certainly get letters from them.

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

(No response.)

CONSTANTINE ALEXANDER: The Chair notes no one wishes to be heard. Let me read the letters into the record first. We have a letter from --

ROLAND GRAY: That's not one that you want to count. That's my letter.

GERALYN GRAY: I gave you that by

accident.

CONSTANTINE ALEXANDER: We have a letter from Ken Nakayama, N-a-k-a-y-a-m-a and Kate Anderson, s-o-n. Addressed to the Department of the Community Development. Anyway. "Geraldyn and Rob Gray have spent sometime visiting with us at our home at 20 Walker Street. They reviewed the plans for the renovation of their property which includes some modest relief requested from the existing by-law regarding a rear bump out and a couple other related matters to the renovations. We have no objections as an abutter for the request for relief that Rob and Geraldyn Gray seek from the Zoning Board."

A letter from Jeremy and Gail Pool, P-o-o-l who reside at 60 Shepard Street. By the way, the Nakayamas reside at 20 Walker Street.

"Dear members of the Board: We are writing in support of the petition presented

by GERALYN BURKE GRAY and ROLAND GRAY in regard to the property 58 Shepard Street. We live at 60 Shepard Street directly adjacent to 58 Shepard Street. And the northeastern side of our house faces the side of the Gray's house which is a primary area of the proposed addition and the proposed relocation of the rear canopy. We have viewed the architect's plans for the proposed construction, and there is nothing there that we find objectionable. The proposed changes seem very minor from the perspective of the visual effect of our neighbor's property, and they seem consistent with the architectural style of the existing house and other houses in our neighborhood. We encourage the Board to grant the petition for a Variance."

And we do have this letter from a Beth Gamse, G-a-m-s-e and Judith Lee Singer.

GERALYN GRAY: Yes.

CONSTANTINE ALEXANDER: They reside

at 14 Walker Street. "Geraldyn and Rob Gray have spent sometime visiting with us in our home at 14 Walker Street. They reviewed the plans for the renovation of their property which includes some modest relief from the existing by-laws regarding a rear bump out and a couple of other related matters to the renovations. We have no objections as abutters to request the relief that Rob and Geraldyn Gray seek from the Zoning Board."

For the record by the way, the relief is necessary because you are increasing the FAR from 0.59 to 0,6 in I district that has a cap of 0.5. So you have a non-conforming structure and you are slightly increasing the non-conformance, that's why you're here before us.

MAHMOOD FIROUZBAKHT: As well as a setback.

MARK BOYES-WATSON: For the setback on the deck technically, and also the rear

yard if you look just because of the slope in the back rear lot line slightly encroaches.

CONSTANTINE ALEXANDER: Okay. So we know those are the basis for the relief, for the reasons relief is being sought.

TAD HEUER: Is there a topographical reason?

MARK BOYES-WATSON: There's a slope. I think those are the --

CONSTANTINE ALEXANDER: Questions or comments from members of the Board?

DOUGLAS MYERS: What was the size of the deck when you originally proposed it?

ROLAND GRAY: Actually I have no idea. We thought it would drop back about four feet and follow the perimeter of the roof upon which it was. Probably 20 by 15, something like that.

DOUGLAS MYERS: Its present size?

ROLAND GRAY: Nine by seven.

GERALYN GRAY: No. Is it ten by

seven? What is it?

MARK BOYES-WATSON: Seven by nine.

DOUGLAS MYERS: Is it visible from the houses that front on the opposite side of the street?

MARK BOYES-WATSON: No.

ROLAND GRAY: No.

MARK BOYES-WATSON: Just from the properties on Walker Street.

CONSTANTINE ALEXANDER: The other side is Radcliff Yard.

DOUGLAS MYERS: Dormitories there. Bertram Hall.

GERALYN GRAY: Yeah, you can't see anything.

MARK BOYES-WATSON: Right.

DOUGLAS MYERS: And what about that -- from how many of your nearby houses is the deck visible?

GERALYN GRAY: Five. And we have four people in support of it.

ROLAND GRAY: Yeah, I'd say five people, five neighbors.

GERALYN GRAY: And the one said they didn't see any problems with the plan, but they were going out of the country but they thought it looked okay.

MARK BOYES-WATSON: And you can see on the Assessor's map here, you see this sort of relationship to the property. The deck is actually right in the middle of the plan, right next to this demising wall. So it's, so it does it all anywhere on Shepard, because it's hiding behind the mansard roof. So the properties that look, you know, across at it, are like this. And in general, that rear lot line to our lot line is 25 feet plus the rear setback of the other. So most of the structures are, you know, I don't want to characterize it, it's sort of in the 40 foot or so away at least from where that is.

DOUGLAS MYERS: How close is it to

the deck on the mirror, on the analogous side?

MARK BOYES-WATSON: Immediately adjacent.

DOUGLAS MYERS: Immediately adjacent. It's separated?

MARK BOYES-WATSON: Yes. There's a little screen.

DOUGLAS MYERS: I see.

MARK BOYES-WATSON: They have almost identical -- is it not identical or almost identical?

GERALYN GRAY: No, it's going to be a little bit different. Theirs goes through the whole length of the back. It's a different configuration.

MARK BOYES-WATSON: And if you look on the elevation, there's a little screen between the two.

CONSTANTINE ALEXANDER: Other questions or comments from members of the Board or are we ready for a vote? Ready for

a vote.

The Chair moves that we make the following findings:

That a literal enforcement of the provisions of the Ordinance would involve a substantial hardship to the petitioner. Such hardship that they can't not -- given the fact that they have a non-conforming structure, the outset cannot make desirable modifications to the structure. That, the hardship is owing to circumstances related to the nature of the structure, it being a non-conforming structure and, therefore, any external modifications require Zoning relief.

And relief may be granted without substantial detriment to the public good or nullifying or substantially derogating from the intent or purpose of this Ordinance.

The Chair would find that the relief being sought will improve the architectural

character of the structure. That the relief is modest in terms of being sought. That all abutters who are affected by the proposed construction have either expressly, have for the most part given their written endorsement of the project, and that other person is said to be not opposed at least to what is being proposed.

The Variance will be granted on the condition that the Board proceed in accordance with the plans submitted by the petitioner, prepared by Boyes-Watson Architects dated March 19, 2010 and initialed by the Chair.

All those in favor of granting the Variance on the bay says so moved, say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. Good luck.

(Alexander, Sullivan, Heuer, Myers, Firouzbakht.)

(10:25 p.m.)

(Sitting Members: Constantine Alexander, Brendan Sullivan, Tad Heuer, Douglas Myers, Mahmood Firouzbakht.)

CONSTANTINE ALEXANDER: The Chair will call case 9911, Ten Fawcett Street. Is there anyone here wishing to be heard in that matter?

ATTORNEY BRIAN GROSSMAN: Good evening. Just for the record, Brian

Grossman, Prince, Lobel representing Clear Wireless. With me is Anne Malone also from Prince, Lobel. I know for and on behalf of Clearwire, Adam Braille is typically representing Clear wireless. There's been a bit of a reshuffling in this area in terms of areas of responsibilities, so going forward most likely Anne or myself will be --

CONSTANTINE ALEXANDER: Did Mr. Braillard tell you that our concerns -- my concern about the quality of the photo simulations that you've been getting at Clearwire?

ATTORNEY BRIAN GROSSMAN: He did. And I was involved in some of the those suggestions with vendors as well after the fact, but I did hear about them.

CONSTANTINE ALEXANDER: Have you brought better photo sims than we have in my our file. Mr. Braillard did the last time.

ATTORNEY BRIAN GROSSMAN: I'm not

sure which photo sims you have in your file. I know there were discussions on how we can improve them going forward. Making sure that we had the higher quality pictures to start with. Maybe this is a better copy than what you have.

CONSTANTINE ALEXANDER: Keep going anyway. These appear to be the same.

TAD HEUER: Tell Bay State Design to do what Newbury does.

CONSTANTINE ALEXANDER: Exactly.

TAD HEUER: Tell your client to switch to a new vendor. Because --

CONSTANTINE ALEXANDER: Yes. Your competitors have vendors that do a better job of photo simulations, and again, speaking for myself, that's the most important part of these applications. That's what we're talking about. We're not going to -- I don't think we have the right to deny relief just because we don't like antennas, but we do have

a right to deal with the aesthetics. The photo simulations help us deal with the aesthetics.

ATTORNEY BRIAN GROSSMAN:

Understood. I know Adam, and he and I talked about it a little bit, and have been working with Bay State to get them to produce a better quality photo. I know having seen some of the prior work, certainly much better higher qualities photos than they have been turning out.

CONSTANTINE ALEXANDER: We can help you that. We'll turn you down. We'll throw you out.

TAD HEUER: We'll tell you to come back.

CONSTANTINE ALEXANDER: You need to get the message to them that we're not going to continue with these blurry photo simulations and we're just not going to hear the case. With that being said, let's move

on. You've been duly warned.

ATTORNEY BRIAN GROSSMAN: I know Adam's been here before. We've been here before. So, we'll skip the explanation of how Clear Wireless is and what the backhaul antennas do.

With regard to this particular site, the existing infrastructure for the site is set up for Clear Wireless. So in terms of this proposal, it's fairly simple and straight forward compared to some others that might be slightly more additional equipment, changing of panel antennas, things of that nature. So all Clear Wireless is proposed as part of this installation is the installation of the three of the backhaul antennas or the communications dishes that provide the backhaul for the site for the wireless broadband facility. There is one that are parallel to Foster Street that goes back and forward. And then one opposite Fawcett

Street on the opposite side of that existing penthouse.

One issue that I know from Adam has been important to the Board, the size of the mounting bracket with regard to the size of the dish itself. Adam and I discussed that and he's discussed that with the Board, this is the minimum necessary in terms of allowing the communications dish to be mounted and also to withstand the wind loads in weight.

TAD HEUER: Do you have to pipe mount? And I'm asking a kind of strange question because we're going to get to the Planning Board that says these things look terrible on this building. Again, I think I made this comment before and perhaps to other telecommunications, is there a more is less solution here? Because the pipe mount is very clearly the minimum you need to get that thing up on the building. But it looks awful. It's absolutely terrible. Is there

any way to mount it on perhaps a larger backing that would be less obtrusive because it is, you know, it looks more like a dental office, the building then simply something that is clipped to the building? I don't know, but it seems that in an effort to get these things up there as fast as possible I'm sure is cheap, but it looks terrible.

ATTORNEY BRIAN GROSSMAN: It also is functional in terms (inaudible) to be obtained. It is necessary because there is a depth to some of the equipment that goes right behind the dish.

BRENDAN SULLIVAN: You mentioned there is a function to it, but does the form that we have, does it require that the dishes be repositioned from time to time? In other words, the form that we have, and again, I think that Mr. Heuer's position is well taken, is that it really seems quite --

TAD HEUER: Utilitarian?

BRENDAN SULLIVAN: Soft. It seems they could do something better. But does that require that form because the dishes have to be repositioned and that gives it some flexibility? I don't know. It's not a leading question.

ATTORNEY BRIAN GROSSMAN: There is a requirement that we be able to adjust the dish in some way so that you make the link to the site that you're trying to connect. With regard to Mr. Heuer's suggestion in terms of is there almost a different way -- this is -- you're asking your suggestion is one that I haven't heard before in terms of almost kind of maybe creating a box for that mount.

CONSTANTINE ALEXANDER: Usually when you come or Mr. Braillard or other telecommunications companies come before us, they bring some technical people with them that can answer the questions that are being posed. You've seen the Planning Board memo?

ATTORNEY BRIAN GROSSMAN: I have.

CONSTANTINE ALEXANDER: There are legitimate questions as to whether you can do a better job -- not you, your client -- of doing a better job of designing and installing these antenna. And maybe we need to send you back to the drawing board. And at least if you can't do that, come back with AN authoritative response rather than, you know, you're in a difficult position. I'm not criticizing you, but, you know, we have concerns. The Planning Board has concerns. You heard concerns among members of our Board.

ATTORNEY BRIAN GROSSMAN: I did forget. We do have the radio frequency engineer if you have any questions for him. And as I've said, I've done a lot with Clearwire and a lot in some other jurisdictions that have specific design review. The suggestion that Mr. Heuer has

come up with is not something that anyone has come up with so far. It is certainly an interesting one.

CONSTANTINE ALEXANDER: Therefore you think maybe we should continue the case?

ATTORNEY BRIAN GROSSMAN: The few hundred sites I've been dealing with is not something that has come up.

BRENDAN SULLIVAN: Is that the best we can do? In plain English is that the best we can do?

ATTORNEY BRIAN GROSSMAN: That's a fair question. I think one of the things that doesn't come through from the Planning Board, and she can speak to this. She was at the Planning Board hearing. The issue with regard to the current appearance, I did not understand with discussing it with them to be the specific installation of how these particular antennas are being configured. It was a concern about generally the

proliferation as well as there are some elements that are unrelated to our installation that are existing. The roof line and couple light dish mounts.

TAD HEUER: The point being I understand you're here for your client. We're looking at this building because we're representing the City of Cambridge and we represent the people of the City of Cambridge. By accretion there can be a Clear Wireless backhaul, it could be a print long wave, it could be an AT&T six foot. We don't really care who has what up there. It's the fact that all of this stuff is up there. And everyone says it's only two up there, it's not our fault. That may be true individually, but we're looking at the entire building and say it can't continue to go that way because it looks terrible.

One of the cases that Mr. Braillard brought last two weeks ago, last hearing, was

one up at Lesley University at Mass. Ave. In that situation they have a tower there, you may be familiar with it. It's the tallest site in that location which is why it's attractive for telecom. It has kind of a particular tic-tac-toe type structure on it. It looks like this (drawing). And right now they're -- I think I'm slightly exaggerating -- the antennas are arranged like that. That looks terrible. And our question to them was is it possible to put up dummy antennas so you're not drawing attraction to those that exist? And as people need antennas, they get swapped for the dummies but at least you're looking at something clean and coherent and visually not obtrusive in a way that a random array exists. I would be hard-pressed to come up with more random array antennas on this roof line on this building than are there now. And I've seen a lot of these.

Then we've got a backhall on the left. We've got two antennas that are spaced for no apparent reason. And we go around the other side of the building and we've got pretty much, I don't know, a circus worth of antennas. All different shapes, sizes -- a menagerie of antennas. If I want to see a museum of antennas, I would go to this building and see what my options are up there.

So, I guess my question still goes to back what is brought up by other members, is this really the best we could do? I'm almost certain it's not. I'm almost certain. And I think the Planning Board is -- in this case it may be the array, but we've also received letters from the Planning Board and they give us similar letters on 1518 Mass. Ave. at Lesley two weeks ago. I don't think the Planning Board or us are inclined to let this go any more. I think quite frankly seeking for me, and maybe the rest of the Board, we

think that this is -- we let it run a bit too long already.

CONSTANTINE ALEXANDER: So, I think it would be behoove you to agree to a continuance and come back with more definitive answers to the questions you've heard tonight.

ATTORNEY BRIAN GROSSMAN: You've read my mind, Mr. Chairman.

TAD HEUER: And if you can't -- I don't mean to yell at you in particular. If you can't do it, this is the way it has to be because Mr. Sullivan said the dish has to rotate to pick up signals from two different locations. Or because unless you put it there, it doesn't connect to the other backhaul half a mile away and it doesn't work. That's fine. I mean, if this is really the best that can be done, then we're within the restrictions of the Ordinance, we have to approve telecom.

CONSTANTINE ALEXANDER: You can demonstrate this is the best that could be done. And whatever approval you want to submit to --

BRENDAN SULLIVAN: You have to get the technical people and the design people together and say we've got to do something better. Because as I said, we're really starting to get our back up on these things. You know, the initial antenna, they were sort of necessary evils and now we're staring at these dishes which are just shouting from the high heavens to us. And, you know, I ride around the city and oh, God, I approved that one and I approved that one. And all the stealth paint in the world isn't going to make them go away. So unfortunately we're beating up on you, you're the guy in front of us.

ATTORNEY BRIAN GROSSMAN: Not the first time before this Board or others.

BRENDAN SULLIVAN: No, and we're not just picking on you. There have been other cases that continued, too, other telecoms, and we're saying we ain't gonna take it.

MAHMOOD FIROUZBAKHT: And because you may not have answers to all the technical questions that come up, I mean, it might not be a bad idea to bring some of the engineers or design folks to kind of answer some of those questions.

BRENDAN SULLIVAN: We know the need and the location fills that need otherwise you wouldn't be here. But we're looking for something more than just something that's quick and that satisfies the need.

CONSTANTINE ALEXANDER: When's the next time we can hear this case? It would be a case heard so we have to have all of us here on June 10th. Everybody available June 10th?

BRENDAN SULLIVAN: Are we really that jammed between now and then?

SEAN O'GRADY: We are. Well, I mean unless you wanted to -- I suppose you could try May 27th.

CONSTANTINE ALEXANDER: I can't be here May 27th.

DOUGLAS MYERS: I can't be here either.

CONSTANTINE ALEXANDER: What about the one before May 27th?

DOUGLAS MYERS: May 13th.

SEAN O'GRADY: You've already got three cases there.

CONSTANTINE ALEXANDER: Are they controversial?

SEAN O'GRADY: I don't know.

TAD HEUER: Are they telecom cases? We can do it more than once.

SEAN O'GRADY: Maybe we should have a telecom night.

CONSTANTINE ALEXANDER: If we say May 13th, is that enough time for you?

ATTORNEY ANNE MALONE: Yes.

ATTORNEY BRIAN GROSSMAN: Yes.

CONSTANTINE ALEXANDER: I'm sure you want to move forward with this.

ATTORNEY BRIAN GROSSMAN: We do. I think your questions are good, but I think they're answers we can get fairly quickly.

CONSTANTINE ALEXANDER: I'm going to suggest we put it on the agenda for May 13th.

The Chair moves that this case be continued to seven p.m. on May 13th on the conditions that the petitioner sign a waiver of the time for rendering a decision.

On the further condition that the sign on the premises be modified to reflect the new hearing date.

BRENDAN SULLIVAN: And any new submissions being submitted.

CONSTANTINE ALEXANDER: Thank you. Just to reiterate our rules, which you

may or may not be aware of, any new submissions including more improved photo simulations have to be in the public file by no later than five p.m. on the Monday before the hearing date.

DOUGLAS MYERS: It would be the 10th.

CONSTANTINE ALEXANDER: So five p.m. on the 10th, any new plans, any new photo sims have to be in the file. If not, we'll continue the case further.

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

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. Case continued as a case heard.

(Alexander, Sullivan, Heuer, Myers, Firouzbakht.)

(10:45 p.m.)

(Sitting Members: Constantine Alexander, Brendan Sullivan, Tad Heuer, Douglas Myers, Mahmood Firouzbakht.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9912, 334-336 Concord Avenue. Is there anyone here wishing to be heard on that matter?

Please come forward. For the record, name and address.

IDES MILLER: Ides Miller.

TED SCHWARTZ: Ted Schwartz from American Dural, 143 Huron Avenue, Cambridge, Massachusetts, 02138.

CONSTANTINE ALEXANDER: You're here before us seeking a Variance to construct two new dormers on the third floor. What about the -- it also says on the advertisement alter front porch roof within the front setback. It wasn't clear to me on that.

TED SCHWARTZ: Yes. When we submitted the drawings and met with Sean, we determined that we would need to request a Zoning Variance for the front porch.

CONSTANTINE ALEXANDER: So that's before us as well?

TED SCHWARTZ: Yes.

CONSTANTINE ALEXANDER: The dormers and the front porch. Why should we grant you a Variance?

TED SCHWARTZ: Okay. Well, the

clients are seeking a Variance due to hardship for lack of better terms, lack of space. It's currently a two-family. The owners of the building, my clients Ides and her husband John reside on the second floor with their two children and consist of two bedrooms, and one bathroom, and they're looking to expand up into the third floor to add another bedroom and bathroom. Current third floor is somewhat, it's habitable but it's very tight. So they're looking to add the dormers to, you know, increase the living area and make it more comfortable.

CONSTANTINE ALEXANDER: And the FAR right now is 0.94 and you would go to 0.98. So relatively slight increase, you're in a 0.5 district, so you're substantially over what's permitted anyway. The dormers, I want you to confirm, comply with the dormer guidelines?

TED SCHWARTZ: Correct.

CONSTANTINE ALEXANDER: And also the other issue is with regard to the front porch, is that your setback will be 13 feet, seven inches and you're supposed to have 15 feet front yard setback.

TED SCHWARTZ: So, it's an existing front porch. What we're looking to do is somewhat unsightly on the second floor there is a walkout flat roof. It's just rubber right now, and the battle straight that goes around it. We're looking to remove that and replace it with a low pitch hip roof. So just looking to dress up the front facade.

CONSTANTINE ALEXANDER: Approve the appearance of the front facade. That's shown on these plans?

TED SCHWARTZ: Correct. Z2.

CONSTANTINE ALEXANDER: Why does it say here no request and it scratches out the front porch?

TED SCHWARTZ: That's the rear

balcony.

CONSTANTINE ALEXANDER: That's how smart I am. Thank you.

Okay, to grant the Variance we have to make various findings as you probably know. You probably heard them until you're sick of hearing them. You have to demonstrate to us a substantial hardship if we don't grant you the relief. And the hardship is you need additional living space?

IDES MILLER: Yes, we have two teenagers and it's impossible.

CONSTANTINE ALEXANDER: I'm sorry, it's a two-family house and you rent the other half?

IDES MILLER: Yes, the first floor is one bedroom and one bath.

TAD HEUER: So, why can't you expand down to the first floor?

IDES MILLER: I need the income. It's simple as that, you know. It's a

two-family home and we, you know, live off the income of the first one.

TAD HEUER: But you could expand down into the first floor and get a significant amount of living space. You'd get another 1,000 square feet, right?

IDES MILLER: If I go into the basement?

TAD HEUER: No. If you go into the first floor. I mean, no tenants but you get the living space you want.

IDES MILLER: Well, I'm sorry, with taxes and everything, we do need to have income from the tenants so that's....

TAD HEUER: You could move, though, right? I guess at a certain point granting space and roofs when you're well over FAR, I mean, we're not in the business of granting new houses. We're in the business of granting relief from hardships. And you've got a lot of house underneath you, don't you?

I mean, usually we have a situation where people come in where they say well, you know, I've got a small house, I can't do anything except put a dormer on the roof. You don't have a small house. You're twice the size of what this district allows, and you're saying I've got enough house there, I just want more house so I cannot have to make the choice of whether or not to cut my income by taking the house that's already available. So I understand that there's a hardship financially possibly to you, but I'm having a bit of difficulty understanding where the hardship is in terms of the City that we're making a bigger house when there's enough house there to fill your needs or someone's needs, right?

TED SCHWARTZ: Yeah, I mean you argued it well, and we argue it that way. But I think, you know, starting off with a design of this project, you know, we'd want to add

as much space as possible. Obviously we can't, we're over the FAR. And we're looking at the surrounding context, there's a number of buildings that -- neighboring buildings abutting buildings have put up dormers of this size. We used that as a guideline to, you know, judge how much space we would be able to capture hopefully.

TAD HEUER: For the record I would vote against that, too.

CONSTANTINE ALEXANDER: I would observe, and I don't necessarily disagree with you. That you take your position to extreme, every two-family house would have trouble getting a Variance for two-family house because you can always say you can convert the two-family to the one-family and you don't need the additional dormer or additional space you want. We've not historically done that. But every case we had last time where we didn't grant -- with

a two-family house and they needed additional space in the attic, and we granted relief. We didn't say well, give up the two-family house. So, but the point is well taken. You're absolutely right. As a matter of logic, you do have alternatives. But the hardship is you're going to lose a piece of income and your ability to afford the house and not have more space.

IDES MILLER: And I also got the attic there right now it's, you know, the space, lower ceilings and there's no windows or whatsoever over there, too. So I think even for fire hazard and stuff like that, it's something that we have to consider also. So that's what we're trying to improve, the space. Not just, you know, of course we could have it be more useful, but I think it's also more of a hazard there right now, too.

BRENDAN SULLIVAN: Have you considered one dormer? And will that

satisfy the needs? I have two concerns.

No. 1, I really don't like dormer dormer. It almost looks like it's another story. It adds an awful lot of bulk and mass. So I guess my question is will one dormer on one side or the other satisfy your requirements? But the real problem I have with this one is enclosing the front porches because it --

TED SCHWARTZ: We're not enclosing the front porch. It's just changing the roof, and then what we show in the elevation is we show some screening, some trellis which shows -- but we're not planning on enclosing it.

IDES MILLER: The porch that we have there right now, it has to be redone anyway because it's not structural properly.

BRENDAN SULLIVAN: It wasn't clear to me looking at the --

CONSTANTINE ALEXANDER: There's the

existing and the proposed. We're all commenting that it suggests that it's going to be enclosed.

TED SCWHARTZ: Well, it's definitely not. It's showing that just fine lattice work. It's not glass or anything.

BRENDAN SULLIVAN: There's got to be a front view.

TED SCHWARTZ: The front view?

BRENDAN SULLIVAN: I read that as a glass block or something else.

CONSTANTINE ALEXANDER: Lattice is not going to be glass. It's just going to be wooden lattice.

TED SCHWARTZ: Yes.

BRENDAN SULLIVAN: What sheet is that?

TED SCHWARTZ: Sheet 2.

BRENDAN SULLIVAN: And this along the front, this will be the stairs going up is just a solid --

TED SCHWARTZ: Yes, it's just a solid wall.

CONSTANTINE ALEXANDER: I think then I anticipated what Mr. Sullivan would say, and basically you're increasing the massing, crossing it into the street and increasing the overall bulk, the appearance of bulk on the structure.

TED SCHWARTZ: Well, what we're doing is where the existing handrail is, that's just what we're making solid.

CONSTANTINE ALEXANDER: I know. That's the point. You're making it solid. It brings the whole structure forward into the street and goes against our goal of a front yard setback which is a setback. And it's not even a matter of the space anymore, it's also a matter of bulk.

BRENDAN SULLIVAN: Concord Ave. is such a prominent and somewhat narrow street. And some people have done some horrendous,

atrocious things on that street. It's just -- I don't know. I have a problem with again, bringing that house further. I'm -- and again not that my likes should be yours, but I like front porches on two-family houses. It's open and airy. It doesn't -- you can't bring that massing towards the street line.

TED SCHWARTZ: This is a picture of the existing house.

BRENDAN SULLIVAN: No, no, I go right by there. And, again, it's just -- to me it's open, it's airy.

TED SCHWARTZ: That's not something that we're against. We proposed the solid ballast if you will, in an attempt to almost, you know, streamline the view, clean it up a little bit, and a little less cluttered in the floor of the deck. But I mean it's definitely something that we would be willing to adjust.

MAHMOOD FIROUZBAKHT: So are you removing that door, the existing door between that deck? The window, are you going to replace that door on the second story?

TED SCHWARTZ: Yes.

CONSTANTINE ALEXANDER: You're right.

MAHMOOD FIROUZBAKHT: So this a usable for much space?

IDES MILLER: We never use that porch.

TED SCHWARTZ: You can walk out there and it's not used that way.

CONSTANTINE ALEXANDER: And the new plan would make it not usable anymore.

IDES MILLER: We never use it. I've been there over ten years and we never use it.

MAHMOOD FIROUZBAKHT: What's the function of doing this in the front? What's the purpose?

IDES MILLER: We would have to

replace the porch. As I said, it's structural and it has a problem right now. We would need to work on that anyways. So we figure like the names across the street has the same roof line that we're doing, that would be told with what's going on in the neighborhood already.

MAHMOOD FIROUZBAKHT: So make it more symmetrical with the neighboring house?

IDES MILLER: Instead of building it on the same deck, we don't use it. I thought it would be more --

MAHMOOD FIROUZBAKHT: I agree with Mr. Sullivan. What's here looks nice. I guess the idea of rebuilding if it's a structural issue --

IDES MILLER: It would have to be redone.

MAHMOOD FIROUZBAKHT: You're redoing it anyway.

IDES MILLER: Yes, we have to work on

that.

CONSTANTINE ALEXANDER: I think what you're hearing from the Board, you're really asking for two different kinds of relief; the Variances, and we haven't really come -- we touched only the dormer, but we've moved on to the front porch. That you may not be able to get relief for the front porch. Which means you would have to rebuild or refurbish what you have now. I don't know. I suspect when we take a vote, we should break it into two separate votes so we can -- a vote on the dormers and a vote on the front porch. Back to the dormers.

BRENDAN SULLIVAN: Yes, I guess my question is do you really require both the dormers? I mean, obviously you've drawn them in there as a wish list. But I mean is it really --

TED SCHWARTZ: For the layout to work for -- the plan was to create the master

bedroom up there with a bedroom and a bathroom. If one of the dormers is removed, it becomes awfully tight to fit a bathroom up there so it becomes a bedroom. So a three-bedroom and one bath.

CONSTANTINE ALEXANDER: And what would be on the third floor, just one bedroom?

TED SCHWARTZ: Just one bedroom.

BRENDAN SULLIVAN: Can I see the floor plan again?

CONSTANTINE ALEXANDER: Sure.

MAHMOOD FIROUZBAKHT: And the second floor unit only has one bathroom.

CONSTANTINE ALEXANDER: So you would have a living unit with one bathroom?

DOUGLAS MYERS: How many children did you say you have?

IDES MILLER: We have two teenagers.

DOUGLAS MYERS: Both living at home?

IDES MILLER: Yes. One is 13 and one is 15.

BRENDAN SULLIVAN: The third floor becomes the master suite?

IDES MILLER: Storage and closet space. I don't have none of this right now.

BRENDAN SULLIVAN: I mean, I'm okay.

CONSTANTINE ALEXANDER: Further comments from members of the Board? I forget whether I asked for public comments.

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

(No response.)

CONSTANTINE ALEXANDER: No one wishes to be heard. There are no letters in the file. Have you talked with neighbors?

IDES MILLER: Yes, we have. And they're okay with that. They have just done the same thing next-door so they're all okay.

CONSTANTINE ALEXANDER: Further comments? Questions? Or do we, in a sense of the Board that we should vote on these in two parts or do we want one vote?

BRENDAN SULLIVAN: Yes, I would allow for the dormers, it's the front porch that really considers that setback somewhat sacred.

CONSTANTINE ALEXANDER: I agree with you. It didn't occur to me until you pointed it out. I don't see what the need is for the front porch. Maybe it's desirable in your mind from an aesthetic point of view. You have to show a substantial hardship. The hardship is if we don't allow you the relief for the front porch. The dormers, see in the Board buys it, but I do share with Mr. Sullivan that I think the front porch is something I can't support just because you don't meet the requirements. It's not a matter of my judgment or aesthetic judgment is yours. You don't meet the legal requirements and we have to apply the law as it is.

Other comments? Ready for a vote?

I'll take -- the Chair moves to grant the petitioner a Variance to construct two new dormers on the third floor on the basis of the following findings:

That a literal enforcement of the provision of the Ordinance will involve a substantial hardship to the petitioner. Such hardship being that the petitioner needs additional living space. That the only other way of getting additional living space and the relief being sought would be to eliminate the first floor renter unit which in turn would make it uneconomical to the petitioner or unaffordable I should say.

That the hardship is owing to circumstances relating to the shape of the structure and to the non-conforming structure already. So any attempt to add additional living space, in fact, requires Zoning relief.

And relief may be granted without

substantial detriment to the public good or nullifying or substantially derogating from the intent or purpose of the Ordinance. The Chair would note that there are dormers, including dormers on both sides of the roof are not uncommon in the neighborhood, that there have been no letters of objection to the petitioner. And it's represented to us that the neighbors are in support. And that dormers that increase the size of the FAR of the structures in the city are not uncommon or shouldn't be allowed automatically, I think under all the circumstances that are identified before; the hardship, the nature of the structure. And in this case it would be a substantial detriment to the public good or nullifying or substantially derogating from the intent or purpose of the Ordinance should we grant you relief regarding the dormers.

All those in favor of making

these -- and on the basis of the foregoing, the Variance would be granted, and on the further condition that the work proceed with regard to the dormers in accordance with these plans submitted by the petitioner. They are prepared by American Dural, D-u-r-a-l. They are numbered Z1, Z2, Z3, Z4, four pages. First page of which has been initialed by the Chair.

Before we take a vote I just want to point out as I point out to everyone else, these are the plans. If you want to modify them, assuming we grant you the relief, and you want to modify them, you're going to have to come back before us. This is not a concept, this is it.

TED SCHWARTZ: Correct.

MAHMOOD FIROUZBAKHT: Only with respect to the dormers.

CONSTANTINE ALEXANDER: Yes. This is all with respect to the dormers.

DOUGLAS MYERS: Mr. Chairman, is it too late for one question of fact?

CONSTANTINE ALEXANDER: Go ahead.

DOUGLAS MYERS: It's belated.

Is there any increase in the elevation of the ridge line?

TED SCHWARTZ: No.

DOUGLAS MYERS: None?

TED SCHWARTZ: No.

CONSTANTINE ALEXANDER: All those in favor of granting the Variance for the dormers on the basis so moved, say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Four in favor.

(Alexander, Sullivan, Myers, Firouzbakht.)

CONSTANTINE ALEXANDER: Opposed?

(Show of hand.)

CONSTANTINE ALEXANDER: One opposed.

(Heuer.)

CONSTANTINE ALEXANDER: That Variance is granted.

The Chair now moves that we make the following findings with regard to the alteration of a front porch roof within the front yard setback. The Board will make the following findings --

MAHMOOD FIROUZBAKHT: I'm sorry, Mr. Chair, and again I'm just throwing this out there here. In case the front porch is very significant to the petitioner, I mean, if you're turned down here, then you really, you're foreclosed on doing anything that's similar to what you're proposing --

CONSTANTINE ALEXANDER: For two years.

MAHMOOD FIROUZBAKHT: -- for two years. If this is important enough to you, would you want the opportunity to go back and speak with your design specialist and figure

out an alternative design that, you know, would sort of address your needs and address some of the comments from the Board that you've heard? If you do want that opportunity, you can ask for a continuance, you know, in terms of that element of your petition here and then you can come back again.

IDES MILLER: Just for the porch?

CONSTANTINE ALEXANDER: Just for the porch.

MAHMOOD FIROUZBAKHT: If you think you don't want to do that and you want your answer tonight and move on.

TED SCHWARTZ: Can we go ahead under the assumption that maybe we will come back, but if you know a week or two into the design the clients decide, you know, what we want to stick with what we have, we don't want to do anything, can we just put a call in and cancel that?

CONSTANTINE ALEXANDER: Before I answer that, Sean.

SEAN O'GRADY: Procedurally I have no idea how to split a case.

CONSTANTINE ALEXANDER: Basically one petitioner is seeking two Variances, front roof and the dormers. I don't know why we can't consider each and decide the case in part and continue the case in part.

SEAN O'GRADY: Because I only have one case number. It only tracks as one. If the people want two cases, they actually file two cases. How would the appeal work?

BRENDAN SULLIVAN: It's either all or nothing.

SEAN O'GRADY: I don't know how that procedurally it would work.

MAHMOOD FIROUZBAKHT: Unless we vote on the dormers, that's the second time around as well. We essentially continue the whole case.

CONSTANTINE ALEXANDER: That's how you would --

SEAN O'GRADY: You could continue the whole case.

MAHMOOD FIROUZBAKHT: Then you run the risk of somebody in the meantime --

CONSTANTINE ALEXANDER: Plus your project is delayed.

IDES MILLER: Absolutely I guess we rather not do that.

CONSTANTINE ALEXANDER: So you withdraw that part of the application?

IDES MILLER: If I can continue, yes. If I can't, no.

CONSTANTINE ALEXANDER: We can't do what?

IDES MILLER: I appreciate your explanation. I thank you very much for that.

CONSTANTINE ALEXANDER: So, we granted a Variance with regard to the dormers. You may have heard with that

gentleman Mr. Resnick before, are you withdrawing your application with regard to the front porch?

IDES MILLER: Yes, I will.

CONSTANTINE ALEXANDER: Then the motion before the Board would be to accept the offer of withdrawal with regard to the alterations of the front porch.

BRENDAN SULLIVAN: As per the plans.

CONSTANTINE ALEXANDER: As per the plans. The plans I cited before, the five by American Dural.

All those in favor of accepting the withdrawal say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: So the porch is gone unfortunately, but good luck with the dormers.

IDES MILLER: Thank you.

TED SCHWARTZ: Thank you.

(11:05 P.M.)

(Sitting Members: Constantine Alexander, Brendan Sullivan, Tad Heuer, Douglas Myers, Mahmood Firouzbakht.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9913, 45-47 Fenno Street. Is there anyone here wishing to be heard in that matter?

For the record, give your name and address.

MEGAN DEMOTT-QUIGLEY: Megan Demott-Quigley, 45 Fenno Street.

DAVID QUIGLEY: David Quigley, 45 Fenno Street.

JULIAN BONDER: Julian Bonder, 45 Sheridan Street.

CONSTANTINE ALEXANDER: You're seeking a Variance for various things. But one of the things that puzzle me at the outset looking at your revised dimensional information with regard to FAR you said you said you're now a 0.73 and you're going to 0.82 or is 1.0 with a basement. What are you here before us -- is the basement in or out?

DAVID QUIGLEY: The basement is one of the requests in the Variance, we're requesting to go down to seven foot, six.

CONSTANTINE ALEXANDER: The FAR issue is you're going to go basically compliant because the district requires or has a max of 0.75, you're at 0.73. You're going to go from there to 1.0. So that's a substantial -- I have to point out to you at

the outset, that's a substantial increase in FAR and departure for what our Zoning By-Law permits. It doesn't mean you can't do it or we're not going to approve it, but that's the consequence of what you're doing.

DAVID QUIGLEY: I'll just begin. We moved in two years ago. We're on the top two floors of a two-story house. We're converting from a two-story to -- a two-family to a one-family. It's a very compressed.

TAD HEUER: It can be done?

DAVID QUIGLEY: It can be done. It's a very compressed space.

MEGAN DEMOTT-QUIGLEY: It's small though. It's small.

DAVID QUIGLEY: As we began the project, we've realized just how small it is. We've got three growing children. We face the likelihood of at least one if not several elderly parents moving in over the next few

years. We're pushing for a front porch enclosure to allow us to have a room on the first floor with bath. As we move forward, we realize that the 1969 conversion of a 1890's home was somewhat delapidated, shotty construction. Stairs that are not code compliant. Second and third floor, first and second floor. The parking spot, we have a curb cut it is not in compliance with the --

CONSTANTINE ALEXANDER: I assume you weren't around in 1969. Do you know if the people who did all this property at that time got Variances or other Zoning relief?

DAVID QUIGLEY: The only record I could find in the basement across the street was one of those index cards. When we were buying the house, I tried to track things down. It was an architect John Ellis and the owners of the house. The owner of the architect and they remained there for 40 years. We purchased it knowing that we were

going to want to do substantial work, and we hope that these changes will get the support of our neighbors, will go through to allow us to make it a home, improve the housing stock of the community and allow our growing family to be able to stay on the block that we love. One of our favorite places.

I'll turn it over to the designer now and happy to answer any questions.

JULIAN BONDER: So when my friends asked me to look at this project, I said well, let's look at what is there first. And I said let's look at Fenno, which is a very interesting street, you know, in Cambridge. And I am -- part of my work has to do with historical memory and how to think about buildings and I teach as well. How to figure out projects in relation to specific areas. So we try to -- I have some boards here. I think it's okay I can show them to you.

CONSTANTINE ALEXANDER: Of course

it's okay.

JULIAN BONDER: The first thing that we tried to do in addition to looking at what was the specifics of the unit to the house which, you know, they intend to, which is this yellow house which has been converted to, you know, a traditional, you know, more or less 45 degree angle to a symmetric roof in 1969. We said well, there's something interesting about it. What can we do with this? What can we think about?

CONSTANTINE ALEXANDER: Where is it in relation to your house?

JULIAN BONDER: That's the house. That's the yellow house.

CONSTANTINE ALEXANDER: Sorry.

JULIAN BONDER: And we looked at a number of things. And first of all we looked at the street itself. And the red lines that you see on the diagram, you know, on the lower end, basically are the setbacks. And I would

say 85 percent of all the houses are infringing on the setbacks which is part of the conversation you just had a moment ago. But they're doing it in a couple of ways.

On the one hand, the front setback is important part of the principles of the code. But there's something that happens in Fenno which is very strange because it's tighter as a street, as kind of a more sense of city, more urban condition because there are a number -- I don't know if you can see this. There are a number of houses, at least various of them have used this second floor porch. The first floor porch. Two levels front porch just across the street from them. And, you know, you see these kinds of interesting design issues that happen all around. But basically what happened in the 1969 house is that they constructed this deck, this balcony which is not in very good shape. Like, lots of the houses around. So part of our thought

was how can we work with this? That was architectural question, you know.

Second thing that was complicated in 1969 when they opened this as an apartment, they put a staircase to come into this apartment which is actually infringing into the parking situation. The curb cut is there, but there's not enough space. So you either park right exactly on the edge or you don't park there. That was another issue for us to think about, how do we make the conditions of the house better? But also how to resolve these things, you know, not to seek relief from the parking, because I would be -- I think it would be a big problem today. But that's something you have to determine not on ourselves. So one of the arguments that we're making is that our project, you know, and this is kind of the form of the project that I show you in more detail images, basically keeps in the spirit of the

neighborhood, keeps the ridge exactly at the same precision, and creates a kind of a continuity between the interior and exterior. And I'll show you in a moment how we tried to do that. And the realities that we have because of the multiple complexities and complications of the lot we have a number of very small what I call piece meal that actually construct the totality of two kinds of requests in terms of relief.

In terms of numbers, the FAR we understand goes to one if we get the basement.

CONSTANTINE ALEXANDER: You're saying you're seeking that?

JULIAN BONDER: We're seeking that. But the main concern is about 200 square feet of relief which is what we do with a massing of the house.

The basement is in very bad shape, and the foundations need to be restructured and repointed. And they're going to be

repointed to the six-eleven level that we not count for FAR. That's 540 square feet of the total relief that Megan and David are seeking. But given that we have to do this work, we are trying to see if there's any way that can become more habitable space, you know, for the kids to play ping-pong and the kids, three teenagers, you can imagine. So that's -- let's just quickly run through the principles of the project so that you understand what's going on. So this is the existing conditions. Can you see from there?

BRENDAN SULLIVAN: Yes.

JULIAN BONDER: The existing conditions, this is just -- we brought this to show the staircase in non-conforming.

CONSTANTINE ALEXANDER: This is the one in the parking?

JULIAN BONDER: This is the one that goes in this volume, you know. So the main

principle, these are the elevations, you know. They have a double layer of shingles on top of the cladding. So it's just, you know, how things are. So we want to get this house to really code compliant and be energy efficient and have good insulation. And so the porch is in absolutely disrepair.

So the principles of this plan -- let me try to point out here. The orange line that you see here is basically the principal of the enclosure that we're seeking. That does not go beyond the setback. That maintains the seven foot, six side yard because of the 5.21.1, because it's 36 feet wide, it's less than 50. So we are basically seeking that. And then you see the orange line, and I'll show you a bit more detail plan. We're designing the staircase, you see to do this, so that the parking can now fit. So we have heights. We calculated the 7.6 on the level of the parking. The main

principal is try to make one designed move, you want to call it that way, that kind of sweeps and constructs the design of the project. So that's kind of the principal of what we're doing. And I'll show you very quickly how this works in the plan. And then I'll show you quickly the elevations, and I hope that I not take too much of your time.

So the principle here is the following: The basement, what we are trying or what they are trying to do is to keep the portion of the basement that will be mechanical on a higher level, and if at all possible, get this area that is already sunken, that is not visible to the usable space. For that we are actually constructing the kind of a semi sunken courtyard in this area that will bring beautiful light to this area. There's a lot of double height spaces and I think they like it or I hope -- but basically this is the principal of this project. And this is, you

know, part of the considerations.

The existing front house is here. The existing front porch is here. It's about five feet from the street. As I said before, there are probably six or seven houses at the same line, you know, at the street. So the idea is to create here the very small room or a small room, but okay room for the parents that may come here that would not be able to go to a second level. So we need to have a shower, we need to have a bathroom, you know, in this level.

Then they have the extension of the living room to this area which is basically setback is totally conforming. There's no problem in terms of setbacks. And then the staircase that runs diagonal and arrives to this point, and then they have the studio. David's a professor of history and Megan writes as well. So they have the time to work in the house. And then the staircase that

takes us to the third level where the kids are. In principle we are, there's a dormer here, but the dormer is only a foot and a half beyond the five foot line because we were very much heard what the neighbors requested. That there's a big distance and there is no use, so we actually faced the bathroom with high windows there so there is no infringement on the privacy which are very good friends of Megan and David. And this would be office space for kids to work and play. And so that's basically the bulk of the house. There's a double -- we're eliminating about 60 square feet here of space. And just to show you a couple of images, you'll see that the principal of this project is to maintain the spirit of the house pretty much, but make some modifications, you know, that will make it still one piece.

One of the things that we see all over the city is that many houses start piling on

dormers. You start to see the dormers are even bigger than the houses. And you start see that you have a sense that there are three houses in the same structure. So for us the notion of a single structure was quite important. And that's why one of the ideas was to maintain the concept of the a symmetry of the roof, maintaining the exact of the ridge and maintaining this so it encloses the staircase area so that we don't have a sense of another dormer. So as you see the form, is one roof. And the only dormer is a ten foot dormer for the bathroom area which actually requires I think 10 or 15 square feet of relief. I mean, we could push it in, you know. I mean, if it's complicated -- but the other part that is important is because of the design. You see a staircase runs this way. We connected the staircase with a porch so that they have an overhang that protects them from sunlight. And this overhang basically

takes around 40, 45 square feet of the FAR because it's over a walkway. So in essence interior space, we're adding about 150 square feet. We're managing to work with that, plus this kind of overhang and the basic question then becomes as we mentioned, in addition to all the questions that you may have becomes the issue of the basement, you know, as a number in terms of FAR calculations go.

So, these are the innovations that you see. We wanted to construct a mass that really continues, that creates the sense of a one unit. And there's kind of a small adjustment on the position of windows on this facade making them smaller so the neighbors, I think, mentioned that were very happy with this idea. And basically the house maintains kind of the spirit of the 70's but also the original house. In principle it's going to be clad in shingles as well. It's a material.

TAD HEUER: Yellow?

JULIAN BONDER: No. I think we'd like to give it a kind of weathering, you know, shingles.

DAVID QUIGLEY: White cedar that will phase into grey.

JULIAN BONDER: But we have some details that will give a little touches of color, you know, around the facade.

And I think, you know, also we have a computer model that we would be more than happy to show you to see how this works as a building in totality.

TAD HEUER: What comes off that is that a flag pole that comes off the back?

DAVID QUIGLEY: That's the fireplace in the living room. You can see it on the other side.

JULIAN BONDER: This way.

CONSTANTINE ALEXANDER: Does that dormer go to the rim line? It appears not.

JULIAN BONDER: No, it doesn't.

CONSTANTINE ALEXANDER: Does it comply with the dormer guidelines?

JULIAN BONDER: Yeah, I think it does. We checked that, and to be honest when we designed it, less based on the guidelines but more on the notion that the ridge line should be kept as the ridge line.

CONSTANTINE ALEXANDER: I have to ask you another question. It's not clear on these plans. Are the dormers compliant with our dormer guidelines?

MEGAN DEMOTT-QUIGLEY: Yes.

CONSTANTINE ALEXANDER: It is single. It's not longer than the 14 feet.

JULIAN BONDER: It's 10 feet.

CONSTANTINE ALEXANDER: And a foot below the ridge line?

JULIAN BONDER: Below that, yeah.

CONSTANTINE ALEXANDER: Okay.

DOUGLAS MYERS: Is there a distance

that separates it from the ridge line?

JULIAN BONDER: Yeah, I mean to be honest.

CONSTANTINE ALEXANDER: It looks like that elevation there.

DOUGLAS MYERS: You can scale that.

CONSTANTINE ALEXANDER: I can't tell from the scale.

JULIAN BONDER: This is probably two feet from the ridge line.

TAD HEUER: So can you just go over the -- where the FAR is coming from? I have 150 square feet from the interior.

DAVID QUIGLEY: On that porch outside of the living room on the back overhang.

TAD HEUER: That's 45.

DAVID QUIGLEY: And the remainder. That's 200, that's interior. Save what we have in the basement.

TAD HEUER: And additional space for

the dormer I presume. Did you say 10, 15?

JULIAN BONDER: No, that's including. We have basically. Let's say the original house has 260 square feet allotted FAR as of right because the site is 2,880. So that gives us 1610. The existing house according to the measurements is 2113.

TAD HEUER: Right.

JULIAN BONDER: So what we are -- the calculations that we have and the plans that we have gets us to 2,362 square feet.

CONSTANTINE ALEXANDER: You're adding 250 square feet of FAR and we're trying to break down where that is.

JULIAN BONDER: We'll show you the third one. So because the house is so complex, there are a number of things that were originally in the calculations that we made were counted. For example, the front porch we counted for FAR.

CONSTANTINE ALEXANDER: It's not

counted for FAR purposes under the Zoning By-Law. You're just enclosing the porch as I understand it. You need a Special Permit for that.

JULIAN BONDER: Yeah, we're asking for a Special Permit. But according to our understanding, and maybe we're wrong, but according to our understanding anything that is under a porch counts for FAR.

CONSTANTINE ALEXANDER: I think it does now. I don't know what you're planning to do increasing the FAR.

JULIAN BONDER: No, no. We don't increase the FAR. It's exactly the same footprint as the -- maybe more. I think we reduce it by one feet because of the diagonal.

CONSTANTINE ALEXANDER: No new FAR from that?

JULIAN BONDER: No.

CONSTANTINE ALEXANDER: Where is the new FAR going?

JULIAN BONDER: Mainly on this area here. This is the existing porch.

CONSTANTINE ALEXANDER: And how much roughly is that?

JULIAN BONDER: This is where we get about here we have it. Increases 170 square feet on this ground floor.

CONSTANTINE ALEXANDER: That's the whole going around the bend. So you have -- where there's the other 80 feet then? Some of it has to be in the dormer.

JULIAN BONDER: On the second level, because the staircase pushes out, we have this triangular space that pushes out is a Variance, and this which is additional FAR. There's nothing before because this adds to the volume the original volume. That's why we're trying to see one sweep so this has and this has. There is here is an existing condition which is the little bulk of the staircase that exists in the center of the

house. So that we didn't count as additional FAR. Then we're removing 60 square feet here as a double space, and then we comply with the dimensions of the interior courtyard.

CONSTANTINE ALEXANDER: The basement itself is adding another 600 square feet of FAR.

JULIAN BONDER: Sorry. And then the third floor, we have a staircase and then the little, little ledge of the bathroom. And then the basement is what brings the bulk of the number up.

TAD HEUER: So I guess my only question was you're netting out something because you're losing a double height space?

JULIAN BONDER: Yes, exactly.

TAD HEUER: I was just trying to make my numbers add up.

JULIAN BONDER: That's how we add up the numbers. In the basement, for example, we have about 485 feet, but because we have

to count the wall outside, we have about 60 square feet of wall.

TAD HEUER: Right.

JULIAN BONDER: So that's kind of a the principle of the project.

CONSTANTINE ALEXANDER: Anyone wishing to be heard on this matter? Please come forward. We have a letter of support in the file, it's not your letter by any chance?

MEGAN DEMOTT-QUIGLEY: No, that's Julie and Steve's, yes.

RUTH RYAN ALLEN: That's next door. But half of the people had to leave because of the kids. So, I'm supporting. My name is Ruth Ryan Allen. I live at 48 Fenno Street, Cambridge. We look at the old Ellis's house the new Quigley's house, and I have since 1964 since I was born there. My mother was born there. I'm fourth generation in that house. I also -- the other four people that are in support, and there's -- everybody is in

support basically, but the other four people are 41 Fenno Street, James and Kristen Eric; 43 Fenno Street, Susan and Tom Harris; 52 Fenno Street, Erica and TC Paris; 53 and 55 Fenno Street, Robin and Bob Kanick (phonetic). They're also second and third and fourth generation in the same houses that they were born in.

CONSTANTINE ALEXANDER: Did you identify 49 Fenno Street as well because we have a letter?

MEGAN DEMOTT-QUIGLEY: No, no. That's Julie and Steve. They're away --

RUTH RYAN ALLEN: I have 41, 43, 52, 53-55 and 48, mine.

And the Quigleys are awesome people. We have so many -- our street, you have to understand, we have a short street and it says dead end, but it's really not a dead end. Because half of us have lived there for so long, the people used to use it as a cut

through. We have so many kids and generational kids that it's just not feasible for people to come through Fenno Street at certain times. Anyway, it's a nice neighborhood. I own a business right down the street. A bar that's been in business since 1934.

CONSTANTINE ALEXANDER: Patty's.

RUTH RYAN ALLEN: Yeah. It's our neighborhood. And trust me, if something was not on board, we'd let you know. But, the Ellis's architectural style was 1960s, and he used to pick up the building guys off of the Cambridge Common to come work there. So that -- they had -- there was no Variances. There was people working day and night.

TAD HEUER: I noticed the card says contractor, self.

RUTH RYAN ALLEN: Yes, yes. John Ellis. And soon after that they got divorced so he never really finished it.

So, anyways, Mrs. Ellis had lived there for something, something years. It was a slant style house. It was horrible looking. It didn't conform with anything in the neighborhood. And we had pride in our houses and neighborhood on that street. You come out of our kitchen on to the stairs, you're on the sidewalk. So most of the time we spend it on the street. Everybody's standing around.

The plans that the Quigleys made went, they went over it, you know, in the middle of the street. We had all the things and we saw everything. And it's conceptually perfect. As far as we're concerned, I don't know as far as you guys, but as far as the neighborhood goes and as far as FAR, because I had done my house over not too long ago because I wanted to have my mom with us until she passed away. So I know that part of what they want to have done. And their children, three boys, very

active boys, that are great. They need to have that kind of space for them. And they need the space to get away from them when they need it. I'm there, I have two girls and we have the same sort of, you know -- so as far as you have total support of the neighborhood in other words. I thank you and I know it's late. But you should come to the block party because we have them every year. And Halloween. We're very active. Very active.

CONSTANTINE ALEXANDER: I'll read into the file -- thank you very much. Thank you very much. There is a letter of support in the file from Steve Gallant (phonetic) and Julia Todd who reside at 49 Fenno Street. "We write to support the Variance of Special Permit application for David Quigley and Megan Demott-Quigley, case 9913. David and Megan have showed us the plans a week ago including the dormer and walkway, and the

center of the roof on our side, and enclosing the front porch first floor. We support this application. Unfortunately we'll be out of town on March 25 and we cannot attend the hearing in person."

Anyone else wishing to be heard?

(No response).

CONSTANTINE ALEXANDER: Anything further you want to add at this point?

JULIAN BONDER: We're open to any decision.

CONSTANTINE ALEXANDER: I'll open it up to comments from the Board or are we ready for a motion?

BRENDAN SULLIVAN: Going back to the previous case, I really hate when people start to push, however, on Fenno Street it is the norm. Everybody's right out to the sidewalk. Other than the design, it should be unusual for the street, but the house that's there now is unusual for the street.

A number of John Ellis when he built it, well, that's a long story.

CONSTANTINE ALEXANDER: They renovated the front porch. Remember, this is a Special Permit. I'm still not quite understanding how the we get there. But it's a Special Permit for the front porch not a Variance.

BRENDAN SULLIVAN: Yes, it's, it is consistent with what is there now.

CONSTANTINE ALEXANDER: With regard to everything else?

BRENDAN SULLIVAN: No, I mean, the basement. I don't care what's going on down in the basement to be honest with you. It's about, again, a need to capture some space for the boys to, you know -- so....

CONSTANTINE ALEXANDER: Other members of the Board have comments?

MAHMOOD FIROUZBAKHT: You need ping-pong with the basement. I agree in

terms of adding additional FAR, the basement on my mind is -- I had a hard time grasping the design of the whole project. It's really late in the night to fully grasp it. But I think the additional FAR that's being proposed I don't think it's a problem.

CONSTANTINE ALEXANDER: Other members of the Board want to express any views?

TAD HEUER: I would suggest that you give us copies of what you have on the boards as plans for the files because I think they will be a lot more clear to Inspectional to figure out what's going on than the black and whites that we have here. I too had difficulty figuring out -- part of it is the fact that it's such a one-off design that it's difficult to figure out what's going on. So to have everything laid out on a much larger piece of paper, I understand this fits in the file perfectly. I think Inspectional would

be happy to have a board copy. I think they would appreciate it.

CONSTANTINE ALEXANDER: Let me endorse that. I've got to say sensory overload when I look at these plans. I couldn't put a coherent picture together. You did a good job with the boards. If they gave us a board, what do you do with them for filing purposes?

SEAN O'GRADY: That's funny because I encouraged Julian to go smaller for the file. So I'll take some of the heat there. But whatever the Board is happy with.

CONSTANTINE ALEXANDER: As Tad pointed out.

BRENDAN SULLIVAN: What was lacking in those were the visuals, that's all. I could read them. It's the visual. One picture is worth a thousand words or a thousand pages.

TAD HEUER: I think I agree with

Brendan. Generally I can't remember the last time I voted to enclose a front porch, but if we're looking at preserving neighborhood forms essentially rather than reaching an idea that doesn't exist and the Board hasn't for decades, this isn't a situation wherever one has a front porch and houses are now on the street quite frankly. They were on the street even before they added the front porch.

BRENDAN SULLIVAN: They're all front loaded.

TAD HEUER: There's no front setback on that street.

MAHMOOD FIROUZBAKHT: The neighborhood sort of likes it that way.

DAVID QUIGLEY: That's why we live there.

TAD HEUER: As for the basement, I understand practically the difference and we always go over this six foot, eleven, seven

foot issue. It gives me pause only because it's a very large number for a not very large house, and 25 percent increase of FAR. But even though it's hidden and no one will ever see it, it doesn't change the structure at all. I guess I just have -- it's not enough to sway me. But I don't see granting 25 percent increase. I would appreciate other people on the Board persuading me or distinguishes this case from other cases which we --

CONSTANTINE ALEXANDER: I think the case, you know, I'll accept your request. The other cases that we have substantial deviations from the required FAR result in either big dormers on the roof or addition on the back. I mean, it changes the visual impact of the structure. And so FAR I think is designed to minimize the density, the visual impact, the density of use of property. Going to Brendan's, but down in

the basement as opposed to adding another addition on. There's difference. I'm not as troubled by the number. I started out being troubled by the number as you are going from 0.7 to conforming to essentially non-conforming, but if it's basically in the basement, I can live with it as well.

TAD HEUER: Is there a distinction between that and when someone comes in with a 0.8 in a 0.5 and they say well, we want to put something on -- we want to put on a dormer, we're only going to put on 0.5 and our basement is ten FAR, is but we use it just for laundry, in that situation we could go numerically a much bigger number. We could go 0.9 but the basement non-conforming sticks to the 0.85 FAR with your basement. Is well over your number. I mean, is there a conceptual difference between that versus someone who is artificially winded and visible on their first, second third story

because of what's hidden in the basement?  
Here it's for the basement and we would say  
it's different.

CONSTANTINE ALEXANDER: Do you have  
a view on that?

BRENDAN SULLIVAN: To me it's  
visual. You know something that's  
subterranean there's nobody can notice.  
They could go down two stories and --

DOUGLAS MYERS: It lacks the visual  
impact.

BRENDAN SULLIVAN: It's bulkiness.

MAHMOOD FIROUZBAKHT: It's harder  
to play ping-pong.

TAD HEUER: It is.

BRENDAN SULLIVAN: It doesn't make  
the volume massive of the house visually.  
This is an exception. This is sort of not  
going in 15 different directions, but you're  
typical where somebody wants to add in the  
basement, I have no problem to that as opposed

to sticking the roof on and pushing it out the back. You just don't see it.

TAD HEUER: So the case we had near Mount Auburn where we granted relief from seven foot basement to allow a moderate addition off the back of a brick center colonial, the hardship was that the basement was being used. And there were some members of the Board that that would be the same both of them for the Variance -- granting Variances essentially for the same thing. One for a hardships that the basement isn't using other for the basement that can't be seen and wants to be used.

BRENDAN SULLIVAN: Yes. If you're looking for consistency, don't look here.

CONSTANTINE ALEXANDER: Doug, anything you want to add here?

DOUGLAS MYERS: The pursuit of consistency I was also troubled by, you know, it's a big increase in FAR, but on the whole

I think this house, this neighborhood it's okay.

CONSTANTINE ALEXANDER: I think we're ready for a vote.

TAD HEUER: Mr. Myers is okay with it.

CONSTANTINE ALEXANDER: We have two votes to take as I neglected to point out. The petitioner is seeking a Variance and a Special Permit.

BRENDAN SULLIVAN: On the windows we can grant you relief, I don't know, state building code may give you a problem with that.

DAVID QUIGLEY: And the double height thing?

BRENDAN SULLIVAN: Well, location. Distance between the house and the side yard setback. Is it three feet, Sean, the magic number?

SEAN O'GRADY: Three feet is the

magic number.

BRENDAN SULLIVAN: That's what you are, exactly three feet?

JULIAN BONDER: Yes.

SEAN O'GRADY: I thought you were three, two. Okay. You're all set.

CONSTANTINE ALEXANDER: The Chair moves that we make the following findings with regard to the Variance being requested by the petitioners.

That a literal enforcement of the provisions of this Ordinance would involve a substantial hardship to the petitioner. In fact, the structure is in need of substantial repair and petitioner also needs additional living space. And there is no other way of granting that except through the relief being sought.

That the circumstances, the hardship is owing to circumstances relating to the nature of the structure. The structure itself is

the real hardship. And particularly because given the type circumstances, there is a need to increase the FAR, but that substantially the desirable 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, most of the additional FAR is in the basement. Which from a Zoning point of view does not impact the neighborhood.

That it's quite clear that this project has unanimous neighborhood support. And that the fact that the project as proposed would improve the appearance of the structure and improve the quality of the housing stock in the City of Cambridge.

Relief would be granted on the condition -- the Variance would be granted on the condition that the work proceed in accordance with the plethora of plans submitted by the petitioner. The first page

of which is marked revised and initialed by the Chair.

And with the further request that the petitioner submit to the Inspectional Services Department the visuals that they presented to the meeting in a form that we can maintain. But it would assist the Building Department in monitoring whether you're complying with the plans.

And, again, these are the plans. Modifying them you may have to come back to us. You don't want to do that.

All those in favor of granting the Variance so moved, say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor.

(Alexander, Sullivan, Heuer, Myers, Firouzbakht.)

CONSTANTINE ALEXANDER: The Board moves -- we've got to make a lot more

findings. The Board moves a Special Permit be granted to the petitioner to enclose a front porch and to relocate windows on front and right side facades.

Granting the Special Permit the Board must find that traffic generated or patterns of access or egress as proposed does not cause congestion, hazard or substantial change in established neighborhood character. In fact, demonstrated the neighborhood character would be consistent with what's being proposed, including moving the front of the house, if you will, for the enclosing of the front porch closer to the street.

That the continued operation of adjacent properties would not be affected by what you're proposing.

And that there would be no nuisance, hazard created to the detriment of the health, safety and welfare of the occupants. It's been demonstrated there is apparently no

concerns about privacy which is often a concern of ours when windows are relocated. We have unanimous neighborhood support for the fact that there are no concerns about privacy.

And that the proposed relocation of the enclosure of the front porch and location of windows would not impair the integrity of the district or adjoining districts or otherwise derogate from the intent and purpose of this Ordinance. Again, it would be consistent with the integrity of the district and the adjoining district in terms of the visual impact. And it does permit a more liveable and inhabitable structure that is there right now.

The Special Permit would also be granted on the condition that the work proceed in accordance with the plans previously identified. They are marked -- revised large size, first page

which has been initialed by the Chair.  
That's it.

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

(Aye.)

CONSTANTINE ALEXANDER: Five in  
favor.

(Alexander, Sullivan, Heuer, Myers,  
Firouzbakht.)

CONSTANTINE ALEXANDER: One more  
case.

(11:45 P.M.)

(Sitting Members: Constantine Alexander, Brendan Sullivan, Tad Heuer, Douglas Myers, Mahmood Firouzbakht.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9914, 545 Technology Square.

You know the drill.

JASON PARILLO: My name is Jason Parillo, P-a-r-i-l-l-o. I'm Back Bay Sign, 425 Riverside Ave, Medford, Mass. All right.

So this evening we have two proposals for two signs that are above the 20-foot height limit for Tolerx. Because of the

height of the building in Technology Square area, it's difficult to identify a tenant without the signs being on a higher --

CONSTANTINE ALEXANDER: Why two signs?

JASON PARILLO: One sign faces north and one faces south.

CONSTANTINE ALEXANDER: I know. One sign faces the main thoroughfare, and I can certainly see a need for the sign there. The other is a side street, why?

JASON PARILLO: Well, the Broadway is a main road. There's a lot of vehicular traffic there. So from the vehicular point of view, it would be beneficial to have a sign that faces that street. There's also a sign, Forester has two signs on their building techno and they have a sign at that vantage point as well. It's also for pedestrian traffic within the Technology Square area. It's a lot of pedestrian --

CONSTANTINE ALEXANDER: What is Tolerx, a biotech company?

JASON PARILLO: Yes.

CONSTANTINE ALEXANDER: Why do they need to know it's a biotech company?

JASON PARILLO: The same way you need representation to approach the building from that side. There's a lot of buildings in that area that can be confusing and complicated as to where they are located in the building. The signs are very tastefully scaled and designed. They're only 15 square feet. They're smaller than most of the --

CONSTANTINE ALEXANDER: You've complied with illumination and the lighting. It's just the fact that you have no -- and because of the nature of the architecture of the building, you can't put a sign that's lower than 20 feet in the front.

JASON PARILLO: Exactly.

TAD HEUER: How many other tenants

in this building?

JASON PARILLO: There's two tenants on the first floor and one tenant on the third floor. Excuse me, the second floor.

CONSTANTINE ALEXANDER: Are they going to want signs, too?

TAD HEUER: How do they deal with their needs to identify themselves?

JASON PARILLO: They're smaller tenants.

TAD HEUER: How much of the building does Tolerx expect to occupy?

JASON PARILLO: Presently we have two floors. I'm trying to work out a deal with Alexandria when the deal is up on the --

CONSTANTINE ALEXANDER: How many floors on the building?

JASON PARILLO: Eight floors.

CONSTANTINE ALEXANDER: Three out of the eight floors?

JASON PARILLO: Yes, first floor of

the building is open space and hopefully retail space.

TAD HEUER: So first floor is open space. You have two other tenants and you have a floor at the moment. So that's three floors. You want ideally to be occupying three.

JASON PARILLO: Taking one of those floors, right.

TAD HEUER: That leaves two floors.

JASON PARILLO: And Dyax (phonetic) is up on the upper floors. So 6, 7 and 8.

TAD HEUER: What's that?

JASON PARILLO: 6, 7 and 8.

TAD HEUER: Who is up there?

MR. LEFT: Dyax. And they have two signs on the building.

JASON PARILLO: They have the sign that faces the east.

CONSTANTINE ALEXANDER: Did they get approval for that? On this building or

across the street?

JASON PARILLO: Yes.

CONSTANTINE ALEXANDER: Did that show up on the photo simulations as a sign?

JASON PARILLO: Yes. And the photos I submitted.

TAD HEUER: Where is it?

JASON PARILLO: Look at the photos. We are in the front. That's the Dyax sign, I believe, and there's one on the other side of that.

CONSTANTINE ALEXANDER: And the front one where would the Tolernx sign be?

JASON PARILLO: Not on that same elevation. It would be on the front elevation which faces Main Street.

CONSTANTINE ALEXANDER: That's one sign. And what about the other?

JASON PARILLO: The elevation faces north.

CONSTANTINE ALEXANDER: So we'll

have signs on three sides of the building basically, or four sides. All four sides have signs?

JASON PARILLO: Yes.

DOUGLAS MYERS: Does the side that says faces north front a street?

JASON PARILLO: Yeah, it fronts Technology Square Drive.

DOUGLAS MYERS: It doesn't front Broadway?

JASON PARILLO: Yeah, it doesn't front Broad -- it's setback about 300 feet.

DOUGLAS MYERS: Technology Drive is an interior passthrough between various buildings in the Technology Square Complex.

JASON PARILLO: There is a sign on the Forester Building which is right next to this building that faces that same, faces north as well.

MAHMOOD FIROUZBAKHT: It would be visible from Broadway?

JASON PARILLO: Absolutely.  
That's definitely the objective here of the case.

CONSTANTINE ALEXANDER: The Chair would note there's no one in the audience, therefore, there's no one else here for public comments on this matter.

I don't believe there are any letters in the file. I didn't see any before in support or opposition.

TAD HEUER: Is the Forester sign or Dyax, are they illuminated?

JASON PARILLO: Yes.

CONSTANTINE ALEXANDER: Yours is illuminated, too?

JASON PARILLO: Yes.

DOUGLAS MYERS: What are the hours of illumination?

JASON PARILLO: Does the code stipulate hours of illumination?

SEAN O'GRADY: It doesn't.

CONSTANTINE ALEXANDER: But the illumination is code compliant?

JASON PARILLO: Absolutely. And also the way that the signs are designed, there's a green -- they have a green translucent material on them, so it's not like there's going to be this bright white sign. It's going to be very modestly lit.

DOUGLAS MYERS: How much of the surface area of the sign is in fact illuminated?

JASON PARILLO: There are individual letters and each letter is illuminated.

DOUGLAS MYERS: Is the background illuminated also?

JASON PARILLO: No. The light only goes out.

DOUGLAS MYERS: And the letters comprise what percentage of the surface area of the sign?

JASON PARILLO: All of it. Because the -- it's not a box sign. They are individual letters. There's a logo and a T and an O.

DOUGLAS MYERS: I see.

CONSTANTINE ALEXANDER: Further questions from members of the Board?

MAHMOOD FIROUZBAKHT: How many employees in total?

JASON PARILLO: Presently we have 74.

TAD HEUER: If you had anecdotally concerns from people trying to find you who haven't been able to find you or is this more a preemptive submission?

JASON PARILLO: Kind of a preempted. We're presently finishing second phase and that will be marketing and hopefully approval from the FDA.

MAHMOOD FIROUZBAKHT: (Inaudible.)

JASON PARILLO: Yes, it does.

DOUGLAS MYERS: Preemptive in the sense -- maybe I'm not familiar with the use of the word.

TAD HEUER: In terms of not having concerns, but people who would be more desirous --

DOUGLAS MYERS: Preempt for companies from access signage on the building?

TAD HEUER: No, just enough to preempt people from saying where are you? I'm in the middle of the street and I don't see your building.

But you say you're expecting to be in a more public phase relatively soon?

JASON PARILLO: That's right.

TAD HEUER: It's not an issue of new hires for an interview, it's more external?

JASON PARILLO: More people coming into the billing.

CONSTANTINE ALEXANDER: I tend to

think these signs, not yours, but all the others are corporate testosterone that you may need to need. You're not a retail operation. People can find Tolerox or your neighbors easily. It has become an accepted part of this community. We're looking to encourage biotechnology companies to the extent that you can identify where you are through the signs, and as long as you don't deviate dramatically from our sign variance, which you don't, I'm in support of this.

Other members of the Board, comments or are we ready for a vote?

The Chair moves that we make the following findings with respect to the Variance being sought:

That a literal enforcement of the provisions of the Ordinance would involve a substantial hardship to the petitioner. The hardship being that the petitioner not be able to put an appropriate sign on its

structure identifying its location which in turn has consequences in terms of people either -- people doing business with the company, having difficulty locating where you're located.

That the hardship is owing to the nature of the structure. Really the architecture of the structure is just simply impossible to locate a sign that's less than 20 feet from the ground as required by our Zoning Ordinance.

That desirable relief may be granted without substantial detriment to the public good or nullifying or substantially derogating of the intent and purpose of this Ordinance. In fact, signs of this nature being proposed or sought by the petitioner are prevalent in this area. It is an area of office use, not -- it's not a visual impact to residential properties. And that it is the intent of our Ordinance to encourage the

development and proliferation of  
biotechnology companies such as Tolerx.

The Variance would be granted on the condition that the work proceed in accordance with the plans numbered A2-01 initialed by the Chair. And a series of others -- that's really just an elevation -- and other plans 1, 2, 3, 4 pages of plans, the first page which has been initialed by the Chair.

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

(Aye.)

CONSTANTINE ALEXANDER: Five in favor.

(Alexander, Sullivan, Heuer, Myers, Firouzbakht.)

(Whereupon, at 12:00 Midnight, 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 5th day of April 2010.

---

Catherine L. Zelinski  
Notary Public  
Certified Shorthand Reporter  
License No. 147703

My Commission Expires:  
April 23, 2015

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