

CASNER EDWARDS

October 1, 2018

By Electronic Mail to Charles Sullivan (csullivan@cambridgema.gov) and Sarah Burks (sburks@cambridgema.gov)

Cambridge Historical Commission
Lombardi Building
831 Massachusetts Ave, Second Floor
Cambridge, MA 02139

Re: St. James Project; Certificate of Appropriateness

Dear Chair and Members of the Cambridge Historical Commission:

We represent Oaktree 2013 Mass Ave LLC (“Oaktree”). With St. James Episcopal Church, Oaktree is converting the former car wash property at 2013 Massachusetts Avenue and part of the Church property at 1991 Massachusetts Avenue into a mixed use building with housing, a new parish hall space for the Church and a small amount of commercial space (the “Project”). The Cambridge Historical Commission (the “CHC”) issued a Certificate of Appropriateness for the Project dated May 19, 2011 (the “COA”). This letter requests that, at your meeting on October 4, 2018, you confirm that the COA remains valid, as construction of the Project has not commenced “for cause” under the COA and the CHC Policy Limiting Validity of Permits, which together say in substance that the work authorized by the COA shall commence within six (6) months of the date of the COA unless extended for one or more 6-month periods by the CHC “for cause”.

The COA was dated May 19, 2011, so its 6-month effective period was automatically extended by four (4) years under by the State Permit Extension Act, or until November 19, 2015. However, beginning on or about the date of issuance of the COA in 2011, the Project was delayed by a series of lawsuits, including a challenge to the COA, an appeal of the Project special permit and challenges to the Massachusetts Historical Commission review of the Project. Oaktree has submitted a Project Chronology summarizing the timelines of those cases, which continued over a period of roughly six (6) years. By August of 2017, the last of those lawsuits were resolved in favor of the Project, and on September 25, 2017, Oaktree applied for its building permit so it could finally begin construction. For reasons beyond Oaktree’s control, the City did not issue the building permit until August 13, 2018.

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The legal and factual bases for the finding that work did not commence “for cause” are quite straightforward. The first factor is the six (6) years of Project litigation. Massachusetts courts have consistently found that appeals of project approvals other than a given permit justify relief from the time periods for the commencement of the work stipulated under that permit.¹ As with the cited cases, the multiple appeals and lawsuits in our case challenged the validity of various Project approvals. Those lawsuits, baseless as they were, posed real impediments to the start of construction.

And, while that litigation alone is sufficient cause for delaying the start of work, other “legal impediments” to the commencement of construction may also constitute such cause. The facts here are that Oaktree applied for the building permit in September 2017, promptly after the resolution of the litigation; the City’s review of Project zoning appears to have commenced in February 2018; and ISD first made substantive inquiries about the validity of the Project special permit around March 27, 2018, about six (6) months after the building permit application was filed. Almost five (5) more months then passed, while we have actively and promptly responded to ISD’s requests for more analysis, until the issuance of the building permit.

Oaktree has on multiple occasions updated the CHC staff during these delays and understood that the COA remained effective at all times. While the Project is now underway, the City Legal Department recommends that Oaktree ask the CHC to make the requested finding.

Thank you very much for your consideration.

¹ See *Neilson v. Planning Bd. of Walpole*, 9 LCR 57 (2001), where a special permit was issued but the start of construction delayed while denials of subdivision approval were appealed, the Court noted that “(i) under G. L. c. 40A, s. 9, no affirmative extension is required to preserve rights under a special permit beyond two years, if good cause exists for the permit grantee’s failure to commence a substantial use under the permit within the two-year period, and (ii) such good cause exists in the instant case, as [the developer] was unable to proceed with the development pending resolution of its appeal of the related subdivision denial and its defense of the related wetlands appeal.” See also *Smith v. City of Waltham*, 2004 WL 1485140 (2004), noting:

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

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Very truly yours,

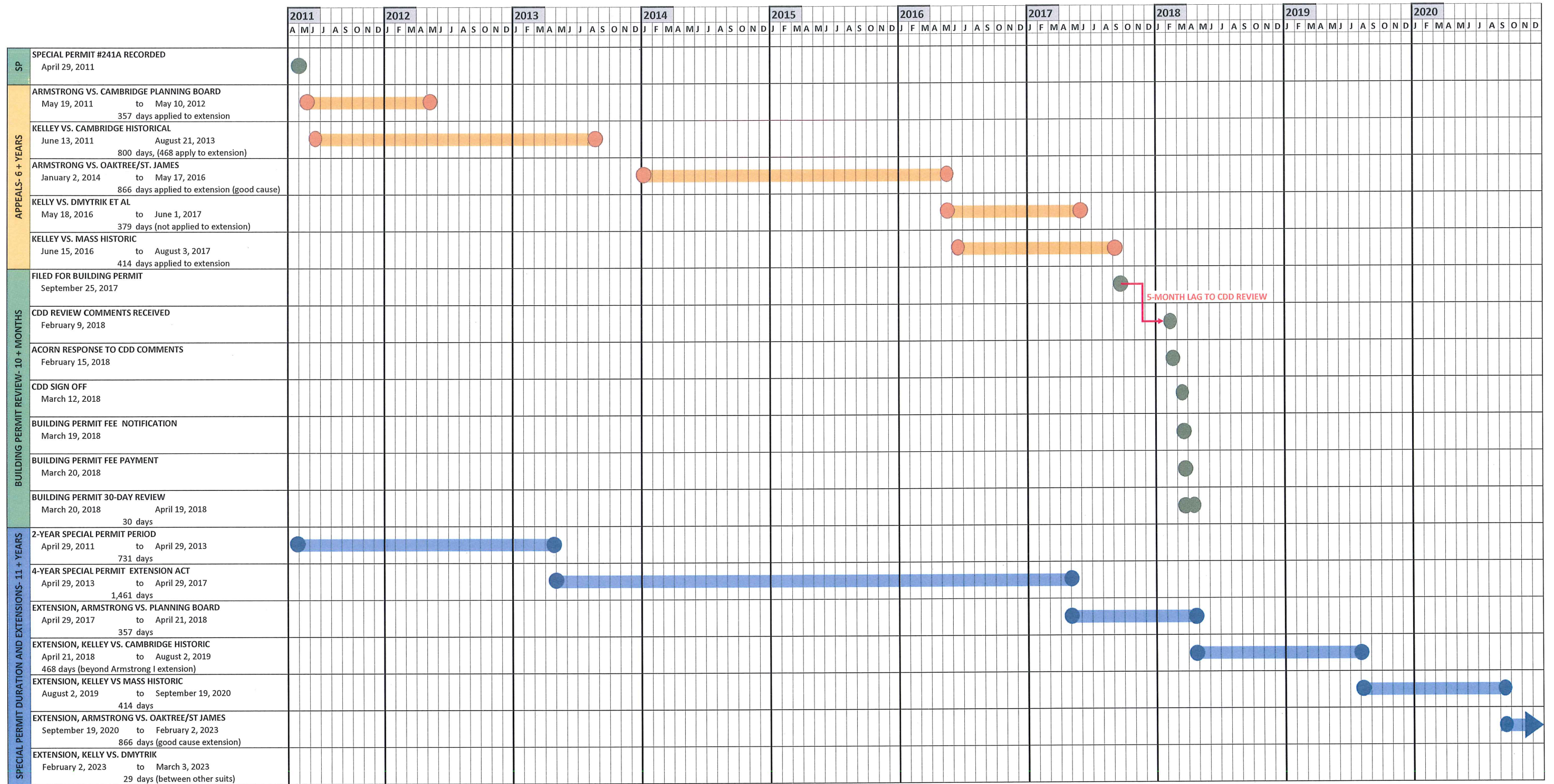
A handwritten signature in black ink, appearing to read 'Peter A. Caro', with a long horizontal flourish extending to the right.

Peter A. Caro

cc: Phil Terzis

6599.22/#736261

SAINT JAMES PLACE: PROJECT CHRONOLOGY





CAMBRIDGE HISTORICAL COMMISSION

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William G. Barry, Jr., Robert G. Crocker, Joseph V. Ferrara, Chandra Harrington, Jo M. Solet, *Members*
Gavin W. Kleespies, Paula A. Paris, Kyle Sheffield, *Alternates*

October 1, 2018

To: Members and Alternates of the Cambridge Historical Commission

From: Charles Sullivan, Executive Director

Re: Case 2445 - St. James Place permitting approval

Oaktree LLC, the developer with St. James's Episcopal Church of the St. James Place project on Massachusetts Avenue at the corner of Beech Street, has requested the Commission to confirm that the Amended Certificate of Appropriateness granted on May 19, 2011 remains valid. We have been advised by the City Solicitor that the validity of the Certificate can best be confirmed by a vote of the Commission that there was "good cause" for the delay in the request for a building permit, as the Planning Board found at their August 7 hearing with regard to the project's Special Permit. This matter will be considered at the Commission's October 4 meeting.

Context

The Historical Commission granted a Certificate of Appropriateness for the proposed project on November 4, 2010, and after a further hearing approved an Amended Certificate of Appropriateness on May 19, 2011. The Amended Certificate was appealed on June 13, 2011 and resolved in the city's favor on September 20, 2013. Three subsequent lawsuits related to the St. James Place project were not finally resolved until August 3, 2017, at which time the developer and the church again pursued demolition and building permits for the project.

Sarah Burks, CHC Preservation Planner, signed off on the permit requests for the Historical Commission on October 18, 2017. On January 16, 2018 and February 1, 2018 the Inspectional Services Department (ISD) issued demolition permits for the St. James Parish House at 7 Beech Street and the vacant car wash at 1997 Massachusetts Avenue. Additionally, a building permit for construction of a new Parish House and residences was issued by ISD on August 13, 2018. Before issuing the building permit, the ISD Commissioner checked with Ms. Burks to determine if the Historical Commission had any concerns or needed to renew its approvals. Ms. Burks provided assurance that the project had been approved by the Historical Commission and subsequent design developments had been approved by CHC staff in conformance with the Certificate of Appropriateness and Amended Certificate of Appropriateness. Due to the passage of time, the validity of the certificates has been brought into question and the staff sought the advice of the Law Department in answer to this question.

Certificates of Appropriateness issued by the Cambridge Historical Commission are valid for six months from the date of issuance. If work has not commenced at the end of six months, the certificate expires unless the clock has stopped due to litigation or ISD review. In addition, during the recession of 2008 the Massachusetts Permit Extension Act automatically extended any permit in existence between August 15, 2008 and August 15, 2012 for four years beyond the date it would otherwise expire.

The Commission's Policy on the Validity of Permits allows for the chair, for cause, to grant one or more extensions of time for periods not exceeding six months each. This has not been required in the present case because the clock has been paused by litigation and ISD review.

I have been advised by the City Solicitor that the cleanest resolution to the question of whether the certificate remains valid is to have the Commission vote on whether there was "good cause" for the delay in the request for the permits. The Planning Board was previously asked to consider this question with regard to its Special Permit, and on August 7, 2018 concluded that construction of the project had not yet commenced for "good cause."

Recommendation

I recommend that the Commission likewise find that there is "good cause" for the delay in issuance of permits due to the four lawsuits and six years of court proceedings regarding this project and subsequent permitting procedures by the city. The permit plans submitted are in conformance with the Amended Certificate of Appropriateness issued on May 19, 2011.

cc: Nancy Glowa, City Solicitor
Ranjit Singanayagam, Inspectional Services Commissioner
Philip Terzis, Acorn Holdings LLC