

BOARD OF ZONING APPEAL FOR THE
CITY OF CAMBRIDGE GENERAL HEARING
JANUARY 27, 2011 7:30 P.M.

in Senior Center
806 Massachusetts Avenue
Cambridge, Massachusetts 02139

Constantine Alexander, Chair

Tad Heuer, Member

Thomas Scott, Member

Slater Anderson, Member

Douglas Myers, Member

Sean O'Grady, Zoning Specialist

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P R O C E E D I N G S

(7:30 p.m.)

(Sitting Members: Constantine Alexander, Tad Heuer, Thomas Scott, Slater Anderson, Douglas Myers.)

CONSTANTINE ALEXANDER: The Chair will call the meeting to order. As is our custom, we're going to start with continued cases. And the first case I'm going to call is 148 Larch Road. Is there anyone here wishing to be heard on the matter?

(No Response.)

CONSTANTINE ALEXANDER: No one wishes to be heard.

SEAN O'GRADY: You have actually this gentleman.

UNIDENTIFIED MALE: I understand that this is a continuance and I just want to make sure that I can be available for that date.

CONSTANTINE ALEXANDER: Okay.

We're going to pick a date in a second and we'll run it by you before we pick it.

Anyway, we are in receipt of a request to continue the case I believe with a letter dated January 25th addressed to the Board. "We are hoping that you might have a space for us at the Thursday, March 3, 2011 meeting." I don't think we will.

SEAN O'GRADY: No.

CONSTANTINE ALEXANDER: So the next meeting I think -- what's the one after that, March 17th?

SEAN O'GRADY: 17th, yes.

CONSTANTINE ALEXANDER: Does that work for you?

UNIDENTIFIED MALE: Yes.

CONSTANTINE ALEXANDER: This is a case not heard.

The Chair moves that this case be continued until seven p.m. on March 17th. A waiver of time for a decision having been

signed. The continuance will be on the condition that the Petitioner modify the sign and continue to post the sign on the premises and modify that sign to reflect the new date and time.

All those in favor in continuing the case on this basis say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. Case continued.

(Alexander, Heuer, Scott, Myers, Anderson.)

(7:30 p.m.)

(Sitting Members: Constantine Alexander,

Tad Heuer, Thomas Scott, Douglas Myers,
Slater Anderson.)

CONSTANTINE ALEXANDER: The Chair
will call case No. 10012, 15 Raymond Street.
Is there anyone here wishing to be heard on
this matter?

(No Response.)

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

We have been advised that the
Petitioner wishes to withdraw this Petition.
The Chair will make a motion to accept the
request for withdrawal of this matter.

All those in favor say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in
favor. Case withdrawn.

(Alexander, Heuer, Scott, Myers,
Anderson).

(7:30 p.m.)

(Sitting Members: Constantine Alexander,

Tad Heuer, Thomas Scott, Douglas Myers, Slater Anderson.)

CONSTANTINE ALEXANDER: Now turning to our regular agenda. And the Chair will call case No. 10048, 104 Lakeview Avenue. Is there anyone here wishing to be heard on this matter?

ATTORNEY SANDER RIKLEEN: Yes.

CONSTANTINE ALEXANDER: We have a stenographer. Please give your name and address to the stenographer.

ATTORNEY SANDER RIKLEEN: My name is Sander Rikleen. I'm the attorney for the Appellant. My business address is Edwards, Angell, Palmer and Dodge, 111 Huntington Ave, Boston.

CONSTANTINE ALEXANDER: Do you have a business card to give to the stenographer?

KIRA MONTAGU: My name is Kira (phonetic) Montagu and my husband Jean Montagu and I own 104 Lakeview Avenue.

CONSTANTINE ALEXANDER: The floor is yours, Mr. Rikleen.

RICARDO DUMONT: Okay. This is an appeal from cease and desist order -- letter that was issued by ISD. The cease and desist letter said that the carriage house -- and this deals only with the carriage house upon the property -- said that the carriage house was inappropriately being used as a dwelling in violation of 4.2.1.J.

CONSTANTINE ALEXANDER: Right.

ATTORNEY SANDER RIKLEEN: We disagreed with that, and I tried to correspond with him in advance, and you've seen that I believe attached to the appeal. And he restated his view was unchanged so we've taken the appeal. I will explain to you in short summary because I had more detailed, precise language attached to the appeal, why we don't believe that this is violation and we believe this is a permitted

accessory use under 4.21.B. But that's just lawyer argument. The important thing is I have Mrs. Montagu here. I don't know if any of you are familiar with the property. She will explain the property and this particular building to you. And then I'll come back and explain what I think is the appropriate legal analysis.

KIRA MONTAGU: Well, let me say that I'm very upset about this because we bought a little two-story mansard house. It's the smallest house on Lakeview Avenue, but it came with this carriage house behind that the previous owner had used as a studio and as an apartment sometimes for her son. So, we went through -- we were very -- we did a lot of renovation on the house and we tried very hard to comply with all of the rules and regulations of the Zoning Board, and we submitted all our plans and they were all approved by the Building Department. It was

inspected upside down and sideways. And we didn't have the barn inspected because we did nothing to it, although there's been subsequent inspections at the end of the process. Okay? So we did -- we made no changes beyond a coat of paint and we removed a toilet that was downstairs that seemed to be inappropriately lodged there. And we changed -- we fixed the roof. But that's all we did.

So, I had always assumed, and we had always assumed that we could use this space when our children came to visit and for other uses, like an office or whatever. But since we're a little bit more ancient than we used to be, and that was part of our plan for moving into this house, we decided that with the weather in Cambridge and one thing and another, we would use the other room upstairs as our office, and there are only two rooms upstairs, and we'd use the barn when children

come because that's very seldom. It's once or twice a year. And other guests have come two or three times, but that's all. It's a very occasional use of that space. And we never imagined there was a problem with it.

So, I just want to say that having -- assumed we were complying with all the rules and regulations of Cambridge and the neighborhood and the Zoning Board and the Building Department to find that our children can't stay with us, is just an appalling discovery. And I think we had -- we put in an elevator, because we imagined that we would need it ultimately. And we assumed that if we had to have somebody looking after us, they could be in the barn. We haven't done that. There's not a stove. It's not a dwelling in the sense. But we assumed it was okay to use it. So, to find that this has distressed our neighbor and he's made a complaint is extremely upsetting. We didn't

want to upset anybody to begin with. And, you know, it's just a very difficult situation to know what to do about it.

CONSTANTINE ALEXANDER: I trust the thrust of your remarks is that you didn't intentionally go about to violate our Zoning Ordinance.

KIRA MONTAGU: Of course not. Of course not. And because it had been this way for eight years before we bought it. I didn't know -- I thought forever before we bought it. But certainly --

CONSTANTINE ALEXANDER: I'm willing certainly to accept that. But that's not the issue before us. The question is are you violating the Zoning Ordinance? And if you are, there are ways of seeking relief which you may or may not get. But your issue tonight is whether you're violating the Ordinance at all.

KIRA MONTAGU: Right, right. And

you know --

CONSTANTINE ALEXANDER: I don't want to get on the table good faith, it's not, if you will, relevant to us.

KIRA MONTAGU: It's not relevant to you, but it's very relevant to our sense of investment in this property.

CONSTANTINE ALEXANDER: I understand.

KIRA MONTAGU: And the degree to which we had.

The other thing that I want to say is that we also felt that we were doing nothing to disturb anybody in the neighborhood, so it was very upsetting to find out that we did. And we've tried to see if it was something we could talk about and it hasn't been.

CONSTANTINE ALEXANDER: You're aware in our files we have letters from at least two neighbors who oppose the use you're making of your carriage house.

KIRA MONTAGU: I didn't know that. But I have letters from at least 12 who approve.

CONSTANTINE ALEXANDER: Well, it's not a popularity contest. I just wanted to point out it's just not one neighbor who is apparently unhappy.

KIRA MONTAGU: Okay. I didn't know.

ATTORNEY SANDER RIKLEEN: Let me provide the Zoning analysis the way we see it.

There is no kitchen. There's no cooking facilities. It doesn't qualify as a dwelling unit.

CONSTANTINE ALEXANDER: That's not the statute. The statute says dwelling. It does not say dwelling unit.

ATTORNEY SANDER RIKLEEN: I understand that. But your by-law -- your Ordinance has what appears be to be an inconsistency. Under 4.21.B there are a

permitted accessory use for non-transient residential use. Transient isn't defined. But if you look at the Table of Uses, there's a listing of transient accommodations. There are three kinds listed, none of which this is.

CONSTANTINE ALEXANDER: But, sir, nothing in there says that that list of three is exclusive. It's intended to be the only -- that's what the statute means. Those are illustrations of what non-transient use. They're not -- unless you can point me to something in the Ordinance that says that.

ATTORNEY SANDER RIKLEEN: The landowner can only deal with what the city puts in writing. If you look through the Ordinance to find out what is a transient or a non-transient use, the only source of help is the table of permitted uses which lists different kinds of transient accommodations.

It lists three kinds, and clearly this isn't one. Tourist house, hotel or motel or lodging house. We're not one of those.

TAD HEUER: Doesn't that suggest that it's not permitted because it's not in the Table of Uses?

ATTORNEY SANDER RIKLEEN: The problem is a permitted -- you have as a permitted accessory use, non-transient lodging within a residential structure. So the question is what does that mean?

TAD HEUER: Right. Don't we go to a standard and kind of common usage in plain language, and non-transient would mean not occasionally, every once in a while, you know, few days. That's the definition of transient, isn't it?

ATTORNEY SANDER RIKLEEN: I would think that the definition of transient the way you use it in your by-law based on your list, when you're talking about transients,

you're talking about guest house, tourists, people who come to a hotel or a motel. A place that is letting out rooms for rent, because that's the only description of transient uses in your by-law. Clearly something, B must mean something. There's got to be something that's allowed there, because you've permitted it as an accessory use.

CONSTANTINE ALEXANDER: What's permitted is not -- non-transient. And the question is the common sense definition of non-transient. And what strikes me, your client's use of the building is exactly non-transient. It's not a permanent apartment. Yet from time to time the carriage house is used for dwelling purposes. Therefore, 4.21.J is quite on point as Mr. O'Grady cited in his letter.

ATTORNEY SANDER RIKLEEN: The problem you have is that J says you can't have

an accessory building used as a dwelling.

CONSTANTINE ALEXANDER: Dwelling.

ATTORNEY SANDER RIKLEEN: So if that's not permitted, what is permitted under B? Something has to be permitted under B. Non-transient lodging is permitted under B, but it can't be a dwelling. We know that under J. So something has to be permitted under B. And what we suggest is the use that we are making is a use that is permitted under B. Something has to be permitted.

CONSTANTINE ALEXANDER: But it can't be under B because what your use is, it's -- B deals with non-transient lodging. And what you're using is transient lodging. So B does not apply. There may be inconsistencies between B and J perhaps, but not in this case.

ATTORNEY SANDER RIKLEEN: I guess I have two answers. I guess I have two answers there. My first answer is you've heard my

view on transient by -- my interpretation of transient is based on the description of transient that used in the Ordinance. That's the first answer.

The second answer is that under the interpretation you're proposing, longer term dwelling in that building is what falls under B. But, then you run into a conflict with J which says that can't be used as a dwelling. So B must mean something different than long-term dwelling because long-term dwelling is prohibited under J. There has to be something that it means, otherwise you wouldn't have it as a permitted use.

TAD HEUER: Even granting that maybe there's -- so arguendo, granting your argument, why is what you're asking for one of those things?

ATTORNEY SANDER RIKLEEN: The -- my first explanation is that the -- our use is non-transient because we don't have a

definition of transient, so we looked at the uses listed and we're not one of those. So, my explanation is we're non-transient lodging. Now, if, if you accept to that, I don't think we have a problem with the other requirements of B. I don't think that's what we're really debating. I think what we're really debating is what does it mean to be transient or non-transient and is this an example?

TAD HEUER: So do you have a common -- so beyond the fact that it's not X, so it's not these three items that are listed as transient lodging, I mean, usually we would say that something not listed in the Ordinance is by definition prohibited. If you're arguing against that in that transient means something, what's your definition of transient that we should be reading into our Ordinance? It's kind of your dictionary definition of transient and why you meet it

or don't meet it.

ATTORNEY SANDER RIKLEEN: Well, my definition of transient is simple. You have a list. In your Table of Uses you've listed three kinds of things as being transient accommodations.

TAD HEUER: Right, and if you're not one of them, then you're not allowed period, right?

ATTORNEY SANDER RIKLEEN: No. My answer is if you're not one of those, you are by definition non-transient. Now, whether a non-transient use is permitted or not, we have to look elsewhere. We're not in the -- not listed, therefore, not permitted because B must mean something.

TAD HEUER: That's my question. What's your -- why is the occasional lodger not the paradigmatic example of transient?

ATTORNEY SANDER RIKLEEN: Because you have defined it in your by-law what is a

transient.

TAD HEUER: No, we haven't. We defined several things as transient lodging and we have said everything not otherwise expressly listed here is not permitted. That's just the way the Ordinance works, right?

ATTORNEY SANDER RIKLEEN: Let me say this I guess differently. I have a position and you guys have to make a decision. And if I'm dissatisfied with that, I have my appeal rights. I can't provide you with words more than what I've told you.

CONSTANTINE ALEXANDER: That's fair enough.

ATTORNEY SANDER RIKLEEN: I think an equally common sense way to look at this is that if citizens of Cambridge wants to know what Cambridge treats as transient accommodations, if you look through the entire Ordinance, the only place you will see

anything which gives you any information on that topic -- it's not in the definition section. But the only place you can find any information on the topic is by looking where I've directed you in the table. There is no other place to look. So, I mean, there's nothing else I can call your attention to because that's all I've got. If, if, if you agree with me that what the use we are making is non-transient, I think it's clearly prohibited -- excuse me, permitted, a permitted accessory unit under 4.21.B. and if I can't get you past that definition, it's part of the requirement. It's an element I have to establish, that's all I've got to establish it by. The -- I would make a, perhaps an argument as to the unintended consequences or maybe the intended consequences of the decision if it goes the way you're describing it.

There are a number of carriage houses.

In fact, there are a number of carriage houses many of which some people are staying in at least part of the time. The -- my understanding from Mr. O'Grady is that by his definition, this couldn't even be used for office space or play space. In the exchange of letters with me, as he was describing what he viewed as residential uses which did not involve a dwelling unit. You know, residential use but not a dwelling unit.

The kinds of uses that are described for what this owner is making and what the prior owner apparently made since at least the 2004 Building Code, are uses that by Mr. O'Grady's definition are residential, but not permitted. And so I think the natural consequence of the determination that you guys are weighing is that everybody up and down that street with carriage houses and elsewhere -- I'm only familiar to the carriage houses on that street because that's

what I paid attention to. There are a number of homeowners in Cambridge who are going to find themselves in a similar situation if they are not a long-term pre-existing use which is protected in another way.

CONSTANTINE ALEXANDER: The only case we have before us is your case tonight.

ATTORNEY SANDER RIKLEEN: But you have to consider -- in adopting the interpretation you have to consider how the Ordinance applies to everyone not just to us.

CONSTANTINE ALEXANDER: Well, of course. No one has suggested -- in Mr. Heuer's questioning and my questioning, we're not directing our attack or questions on your client. Whatever decision we reach will have application throughout the City of Cambridge.

ATTORNEY SANDER RIKLEEN: Which is why I'm making -- I'm asking you to consider that, because it will affect not just this

owner, it will affect a number of other people.

CONSTANTINE ALEXANDER: Whichever way we decide this case is going to affect residents of Cambridge throughout.

ATTORNEY SANDER RIKLEEN: That is true. What I'm suggesting -- I suggest to you that if you determine that this is not a permitted use, there are a number of people who are making uses of their carriage houses in ways that they will find unexpectedly find are not permitted under this interpretation.

The other arguments that we made are -- they're apparent in the document, but one of the things Mr. O'Grady was not aware of before we brought it to his attention, therefore, I flag it for you, is we attached to the appeal --

CONSTANTINE ALEXANDER: Right.

ATTORNEY SANDER RIKLEEN: -- the Building Permit from a prior owner, from 2004

which described that they were proposing an additional residential unit in the boxes for residential use, units existing one and proposed unit one. And they were proposing Home Office and --

CONSTANTINE ALEXANDER: Garage.

ATTORNEY SANDER RIKLEEN: -- and basically occupation of this building. Building Permit was issued, the work was done, and this isn't somebody who has come in to do something new. We're entitled to the protection of the use that was authorized by the Building Permit because six years has passed.

CONSTANTINE ALEXANDER: I don't know. I have a lot of problem with that one, too, I have to tell you. I think the use that was -- the Building Permit covered was -- was it a garage and Home Office? What are the specifics?

ATTORNEY SANDER RIKLEEN: Yes. It

says proposed use garage/Home Office.

CONSTANTINE ALEXANDER: Home Office. That's what it was all about. That a box is checked that references residential unit with one before, one after, to me could be -- I don't know who checked the box. It could mean that on these premises there is one residential unit, the main house, and there would be one afterwards, the main house. And that this garage, which the permit is specifically addressing is going to be a Home Office and a garage.

KIRA MONTAGU: Could we still call it that and use it then?

CONSTANTINE ALEXANDER: Of course you can.

KIRA MONTAGU: Okay.

CONSTANTINE ALEXANDER: You can't use it for dwelling purposes. That's the whole issue before us tonight. That's the issue. There's no question at all, in my

judgment, Mr. O'Grady may disagree with me, there's no reason you can't continue as a garage and a Home Office. That's not before us.

ATTORNEY SANDER RIKLEEN: I guess two final points which maybe we already understood from the discussion. We're not trying to use this as a separate dwelling unit. There's no intention to do that. The only question is whether episodically people could sleep there. We were quite concerned by some of the language in Mr. O'Grady's letters because the logic of the by-law provisions he was referencing suggested we wouldn't even be able to continue to use it as a Home Office. And whether that was intended or not, you know, that's not really the problem.

CONSTANTINE ALEXANDER: Right.

ATTORNEY SANDER RIKLEEN: The homeowner needs to know, and I would ask you

whatever you decide, to please make it clear. If you did want to disagree with us on the episodic allowing of guests to sleep there, please make it clear what they can continue to use it for. They spent a lot of money on the home and uncertainties.

CONSTANTINE ALEXANDER: I understand.

ATTORNEY SANDER RIKLEEN: Her husband is sitting in the back as he preferred not to have to speak publicly. So it's a matter of importance to them.

CONSTANTINE ALEXANDER: Before we go any further and since Mr. O'Grady's name has been taken in vain, do you want to speak?

KIRA MONTAGU: Fair enough.

SEAN O'GRADY: Is counsel finished?

ATTORNEY SANDER RIKLEEN: Yes. The only other thing I was going to say and then you can take the floor and go wherever you like, is we had submitted electronically

copies of letters from neighbors.

TAD HEUER: Those are here.

ATTORNEY SANDER RIKLEEN: If you have them, that's great. I have an additional one, but it's from a spouse of somebody you already have.

CONSTANTINE ALEXANDER: If you want to give it to us, we'll put it in the file and make it part of the record.

ATTORNEY SANDER RIKLEEN: You already have from the spouse at that address.

CONSTANTINE ALEXANDER: You'll have a chance to give a final closing comment. Our procedure as well in this case is we'll have Mr. O'Grady speak if he wishes, and then if other members of the Board have questions and then we'll open it up to public testimony. People pro or con can speak and then you will have a chance to conclude.

So, Sean, do you have anything you want to say?

SEAN O'GRADY: Yes. First I regret having to send those letters. I meet Kira. She's very nice. I believe what she says, there was no intent here. I personally am not troubled with the occasional use of that building, but as counsel has said, this really is an issue precedence. We have carriage houses and garages all over the city. This is not a case of first impression. We clearly understand the difference between accessory and primary use buildings. Carriage houses and garages have always been treated as accessory buildings uniformly. This Board has seen multiple cases, Variance cases requests to convert these out buildings to primary residential uses, and that is the rightful way that this issue should be brought in front of the Board as I see it.

Precedence again, other than, of course, the fact that we have requests for

enforcement, precedence really is the concern of the department. We simply cannot have just people occupying these buildings. While this building seems to be a very solid building and doesn't raise any concerns for me, that's certainly not the case with quite a few of our out buildings.

I'm sorry if I gave anybody the impression that that building cannot be used for a Home Office. A Home Office is recognized and enumerated use in our section of accessory uses and is totally appropriate and uniformly allowed in accessory buildings like this carriage house.

So, we proceed a little unhappily but frankly have to. Counsel is also correct of 4.21.B must mean something, and it does mean something. It's a well-recognized section of the Ordinance that allows roommates and boarders. It simply says, yes, you're allowed to have -- you're allowed to bring

people into your house, people outside of your family, to a maximum of two, and rent or otherwise provide them housing. It could be foreign students. It could be the classic boarder situation. And B just sort of says, yes, let's just sort of tell you what this is about.

The first thing that B said -- well, other than the non-transient, and I frankly just can't follow counsel's argument there. It is saying non-transient there because what it's saying is you're not to be a bed and breakfast, which is one of the enumerated transient occupations -- uses. It's saying your boarder is not to be there for the weekend. They are to be there, you know, non-transient, month-to-month at least. The second thing it says is a residential structure. And what this section of the Ordinance is saying is, yes, you can have lodgers, but they have to be in your house.

You can't put them in the garage. This is not how we house people.

And then it goes on to say that you also have to live on the premises. You're not to buy a condo and then just start moving people in and out of there other than a rental situation. It limits it to two. It's saying yes, these boarders can have rooms but they can't have suites with kitchens. And so that's what 4.21.B is all about.

The second issue of dwelling, dwelling unit, counsel didn't delve too deeply into that, and I think that's well represented arguments on both sides in the letter and probably need not flood that.

The Building Permit, clearly the Building Permit states it's for Home Office. The tick of the box is simply that. It's to say this is a one-family house. It's a uniform form. That box is there so that we understand that they're in fact not adding

another dwelling unit. It's just one of many little checks on the form so that we can follow the changes of uses and the changes of dimensions. The checking of the box would mean nothing more than oh, yes, they're not changing the number of residential units there. But clearly the language, the plain recitation of Home Office is not accidental. It's stated because that is probably the premiere accessory use other than parking that -- and perhaps workshops that go into that box. I guess that's probably it.

CONSTANTINE ALEXANDER: Thank you.

Questions from members of the Board at this point or should we go to public testimony?

TAD HEUER: I do. I don't want to flog this, and I hope I don't sound that I'm being critical. I'm trying to work my way around this issue. Seeing as your position, Counsel, is that we can't define transient

except as in reference to how we referenced it in our Table of Uses, can I try and put it a slightly different way ask if you have a definition of non-transient or am I going to get the same response?

ATTORNEY SANDER RIKLEEN: You're not going to be happy with my response. It is things which are not falling within the definition of transient. So -- well, you could have different definitions where you have a continuum.

TAD HEUER: Right.

ATTORNEY SANDER RIKLEEN: Or you have either A or B. In my view of this, it's either transient or it's not transient. It's not a stretched out continuum. And I think that's the simplest answer.

TAD HEUER: Does the word have a substantive meaning besides its relation to other words in the Ordinance? It means something physically, right? What does it

mean physically?

ATTORNEY SANDER RIKLEEN: I guess the problem is it really doesn't matter what it means in the abstract. In Cambridge you have language which you use in your Ordinance, and land owners are obligated to use your definitions not their own.

TAD HEUER: My question is: Do you want me to make up a definition? Because if I do that, I'm not sure you're going to be happy with me making it up.

ATTORNEY SANDER RIKLEEN: I don't think you're allowed to.

TAD HEUER: Right. So if I'm not allowed to, what do I look to to define it?

ATTORNEY SANDER RIKLEEN: Well, you're not going to like my answer. What you look to -- if you look to the language you have used in your own Ordinance. And in your own Ordinance although you don't do it in the definitional section, you do have -- in your

Table of Uses, you have extensive examples of various things.

CONSTANTINE ALEXANDER: That's the key, examples. You're trying to say that's an exclusive definition, and it is examples. The word you're using are exactly the point I've been trying to make. I don't think you get there by your reference to that Table of Uses section.

ATTORNEY SANDER RIKLEEN: Except that it doesn't say it's examples.

CONSTANTINE ALEXANDER: I know that. It doesn't also say this is an exclusive definition either. We've exhausted it to interpret it.

ATTORNEY SANDER RIKLEEN: I guess stuck with first principles. You have to interpret your by-law. And we don't -- we don't have the freedom to put in words that were left out by the city.

TAD HEUER: But nor can we do so

arbitrarily and capriciously. We need to tie it to some reasonable standard. And if that's not intrinsic, we can look at extrinsic evidence. I'm asking for what extrinsic evidence do we use if it's not evident intrinsically from the Ordinance? Or if we believe, you know, arguendo we believe it is not intrinsic, what extrinsic evidence should we be looking at, in your opinion, to determine what constitutes transient or non-transient? And I don't want to be arbitrary and capricious in making that statement, that's why I'm asking for your input.

ATTORNEY SANDER RIKLEEN: My answer is if you do anything other than look to the sign posts in your own Ordinance, you will be acting arbitrarily and capriciously --

TAD HEUER: That can't be true, Counselor. That -- whoa, whoa, whoa that can't be true.

ATTORNEY SANDER RIKLEEN: Where you have --

TAD HEUER: No court -- no court --

ATTORNEY SANDER RIKLEEN: -- where you have examples listed in an Ordinance, you're tied to the examples. If you have no examples at all, then I think you're given more freedom as to how to give words there -- the word where the case, we'll talk about usual and customary meaning and then people look at dictionaries and the like. When -- let's be practical about this, if you look at your section of definitions, maybe you've defined a hundred terms. And in your Ordinance you probably have thousands. So not every word means a definition. What I'm suggesting is that where you have a particular category, and you've identified things that fall within the category, the standard interpretation is the express mentioning pride exception. Things that are

not listed are left out, you know.

TAD HEUER: Transcursorius
(phonetic).

ATTORNEY SANDER RIKLEEN: Whether it's good Latin, you're a lawyer. The -- if you had language that said it's tourist house, hotel, lodging house or similar things, that's the standard example of transcursorius, principle that expressed mention applied exception.

TAD HEUER: Right.

ATTORNEY SANDER RIKLEEN: And the Court would say it has to be something like that. What I'm suggesting, too, is you can't make it broader by leaving out the words or similar things. And so, I'm suggesting that if you wanted to look for what this undefined term means, you look to how it is used in your by-law. The only way it is used is in those three particulars and we're not that -- and I'm suggesting to you that by definition

you're either in one bucket or you're in the other bucket. And if we're not in the transient bucket, we must be in the non-transient bucket because there's no other bucket to be. And if that doesn't persuade you, that's what I've got.

DOUGLAS MYERS: Unless we clearly agree with you we're clearly wrong? That's your position.

ATTORNEY SANDER RIKLEEN: You've never had an advocate who came up in front of you who didn't say that, agree with me or you're wrong. I'm trying to persuade you that that's the logical way to work through it and then that's what the by-law means but I'm the advocate and you're the decider.

TAD HEUER: And I guess the last point I want to make -- it's not a here nor there, I suppose, but I'm still struggling. If this were not about the word transient but about the word presuming we have in our

Ordinance, butcher shop. And we had a question of are you or are you not a butcher shop? And you said we have to define it as to whether you are or you aren't. And I say, what does it mean? Does that mean I sell flowers? And you say, no, it's arbitrary. And I say why? You say because if you're butcher shop, either you are or you aren't. That doesn't get me to a what it isn't or isn't. It's a string of faux names that aren't defined just in their relation to not being them. They mean something. If I were to define butcher shop, and it was in the Ordinance, I would think a reasonable person would say it's a place where meat is sold, perhaps cut. You could have discussions about where your gradation is there, but it's still has some substantive English language meaning other than not X.

ATTORNEY SANDER RIKLEEN: Well, I think that would be a great argument if you

hadn't listed examples of what a butcher shop was. And if you had particular examples of what a butcher shop was, then we might have a different discussion. The problem here is, in my view, the problem is caused because we have a term which is not defined in the definition section, but examples of which are listed in the Table of Uses. And I'm suggesting that Cambridge has, therefore, identified what it means when it says transient because it lists them. And if it hadn't listed them, then you and I would be looking at dictionaries and trying to figure out is there a commonly accepted use of what's a transient and what isn't a transient. I don't know. I didn't go do the exercise because I found that Cambridge had in itself given examples.

TAD HEUER: If I said transient means staying put, would you say that was wrong?

ATTORNEY SANDER RIKLEEN: I guess the question is for what period of time?

TAD HEUER: Oh, so now we're getting into what does the word transient means. Now you've given me for what period of time. That has something to do with time, right? So can I go that far? Because it sounds like what you're suggesting transient, if I decided means jumping up and down, is okay because if it's transient lodging, it means jumping up and down lodging. It sounds arbitrary, but to you arbitrary is neither here nor there, right?

ATTORNEY SANDER RIKLEEN: I don't think that in this instance you can have that discussion because your own Ordinance contains a list. If we were dealing with a term that didn't have a list, then we'd be pulling out definitions and comparing definitions. But we have a list. I'm not -- I'm suggesting you don't go to a

dictionary definition.

CONSTANTINE ALEXANDER: Should we move on?

TAD HEUER: Sure.

CONSTANTINE ALEXANDER: Sean, did you have something to say?

SEAN O'GRADY: I have a question for counsel. Carriage house, residential structure or accessory?

ATTORNEY SANDER RIKLEEN: We claim this is an accessory building and this is a proposed accessory use. The main, the main -- I don't think you disagree with that.

SEAN O'GRADY: Okay, yes. No, if that's indeed true, then how could B apply? How could you use B at all? You have to be in a residential structure to use B.

ATTORNEY SANDER RIKLEEN: The structure is a residential structure for your purposes I believe, because if you look at the Building Permit, the Building Permit

was --

SEAN O'GRADY: No, I'm just asking you for your purposes, if indeed it's an accessory structure -- and we consider it an accessory structure, and then how do you use B?

ATTORNEY SANDER RIKLEEN: Well, because I think it's an accessory residential structure.

SEAN O'GRADY: If you want to talk about our Ordinance, there is no such thing.

CONSTANTINE ALEXANDER: There's no such thing. There's no such thing under our Zoning Board --

SEAN O'GRADY: There is not such thing. There's a residential structure, there's an accessory structure, they are different structures.

ATTORNEY SANDER RIKLEEN: You asked me my interpretation of it.

SEAN O'GRADY: Your argument of is

it in the Ordinance?

ATTORNEY SANDER RIKLEEN: And that's my interpretation. This is -- we're arguing. This isn't the principal use. This is an accessory use, and....

SEAN O'GRADY: Well, our accessory uses, as you say, would be listed in the Ordinance, and if they're not, then they're not. Our accessory uses are indeed listed in our Ordinance and none of them are primary residential uses.

ATTORNEY SANDER RIKLEEN: I'm not claiming this is a primary residential use. That goes on in the main house. I'm suggesting it's a residential structure. Things happen in it which are more than parking a car. Things happen in it that could happen in the main house. They don't happen to happen in the main house, but they could. You wouldn't have any problem with an office in the main house --

SEAN O'GRADY: No.

ATTORNEY SANDER RIKLEEN: -- being part of a residential use. And I'm suggesting to you that under B the non-parking uses that where -- where people are in there making some use, the kind of use you can make in the main house.

SEAN O'GRADY: Yes I can.

ATTORNEY SANDER RIKLEEN: Makes that a residential structure for the purpose of B and then we look at the conditions to see if that satisfies them. And then --

SEAN O'GRADY: Well, no they have to --

CONSTANTINE ALEXANDER: We can go on and on with this. I want to move on. I don't mean to cut you off, but you made your point.

ATTORNEY SANDER RIKLEEN: I don't feel cut off.

CONSTANTINE ALEXANDER: We're just going over and over covering the same ground,

and I do want to give other people a chance to speak as well as members of the Board. I'm going to hold Board comments for now.

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

PETER SIGOURNEY: Peter Sigourney S-i-g-o-u-r-n-e-y. I live at 102 Lakeview Ave. right next-door.

The Board I think has received a letter from myself.

CONSTANTINE ALEXANDER: It's in the file, yes, it is. It will be part of our record. And all the letters that we received -- I'm not going to read them tonight. We have read them, and they are part of the file. So they're part of the record, okay.

PETER SIGOURNEY: I wanted to make sure -- I think you have this, a letter from Doris Hagan (phonetic). She's also an abutter on Lexington Ave.

CONSTANTINE ALEXANDER: Mr. Heuer is checking right now. Keep going as he's doing that.

PETER SIGOURNEY: As I said in my letter, my family has lived at this address for four generations. It really is a special place for us. And part of the charm of our house to be honest is our backyard. I included photographs with my letter. The carriage house is 36 inches from our fence, so it literally sits right on top of us. And I feel it's really going to be a large -- you know, it will detract largely from our privacy having even part time residential use. Having heard the arguments thus far, I even hate to get into the minutia of what is how long short term use is. And I'm just -- I have concerns that over time like many structures in Cambridge, this will eventually morph into some sort of an apartment. I know there is precedence on

Lakeview Ave. for people that have been denied this sort of use for a carriage house, just I think three or four door downs, just several years ago, our neighbors applied for this type of use and were denied. So I think the precedence is there that it's not permissible. Having lived through the two years of construction as our neighbors renovated their property, I honestly find it hard to believe that there's only a toilet removed. I saw extensive work done with piping going into the structure. It was dug up several times. I am clearly not an expert in such thing, but it looked more extensive than pulling a toilet out. That's something my brother and I could probably do in a half hour.

I would just like to express my view that, you know, I'm opposed to this. My brother and I own the property together, and I'll certainly let him speak for himself.

You have letters from other neighbors, including Doris Hagan who wished to be here tonight. She's elderly, she's not feeling well tonight. I want to make sure I brought a copy of her letter along.

TAD HEUER: How close is your house to the property line? You say the carriage house is on the property line, but how close are you to that carriage house roughly?

PETER SIGOURNEY: 30 feet. It's an interesting property. I believe that our property was a subdivide from 1 of 4 Lakeview back in 1915. I think it was actually built for a family member. So, it's a bit of a peculiar property. It's quite narrow and we've got about -- literally about 36 inches on either side of our house for our property. So, it's, you know, it's a tight space there's no doubt about it. You know, and I would also like to add that, you know, 1 of 4 Lakeview is assessed as a nearly 3,000 square foot

four-bedroom home. I know that the Montagus reconfigured the home when they purchased it. Again, I just don't think that justifies moving your living quarters out to the, you know, another part of the house and would suggest that perhaps, you know, you have a pull out couch or something might accommodate the occasional guest.

CONSTANTINE ALEXANDER: Thank you.
Sir?

JEAN MONTAGU: Could I explain --

CONSTANTINE ALEXANDER: Just state your name and spell it for the stenographer, please.

JEAN MONTAGU: J-e-a-n and then Montagu. I would like to explain the work that Peter feels is extensive. There is a problem with basement and water, excessive water. So the town suggested that we clear and put in what you call a French drain. And in order to satisfy the need of the neighbors,

which had the wet basement, we cleared (inaudible) a pit in order to accumulate the water from outside and the neighbor's side. And so this is the substantial work that you so --

CONSTANTINE ALEXANDER: That's the work that you're talking about that went into it?

JEAN MONTAGU: Yes.

CONSTANTINE ALEXANDER: Thank you.

JEAN MONTAGU: The other part is to remove the toilet. You know, we're able to bury the sewerage line lower which was not possible when the previous owner was there. So this is what we're doing.

CONSTANTINE ALEXANDER: Thank you. Is there anyone else wishing to be heard on this? I know what you're going to say so we'll go over here next.

JOYCE KLINE: Hi. I'm Joyce Kline. I'm here to speak for myself. I live with my

husband and we're at 112 Lakeview Avenue, on the other side of Peter and Kira.

To start off they've been wonderful neighbors. They did do massive construction. They were considerate the whole time. I'm very pleased with our neighbors. And I guess I, you know, I'm as close to Kira as Peter is. In terms of -- and apparently Kira told us how many guests she's had since she's lived there. I never new anybody was living there. So there's been absolutely no disturbance from anybody that has been staying there. I'm very curious about the use business.

CONSTANTINE ALEXANDER: What kind of business?

JOYCE KLINE: The kind of use you can have in a carriage house and transient and non-transient. So, you're saying that it's okay to have two boarders living there at any time without using a kitchen? Is that what

you're saying?

SEAN O'GRADY: In the main house.

JOYCE KLINE: In the main house.

Okay. What is allowed in terms of for usage in terms of someone staying over? Is there a transient or non-transient?

CONSTANTINE ALEXANDER: In the main house or in the carriage?

JOYCE KLINE: In the carriage.

CONSTANTINE ALEXANDER: That's the issue before us tonight.

JOYCE KLINE: Because my question is we're talking mostly here of the guests so far, and I guess I would oppose this for anybody in any way on the street. If you cannot have your adult children come back to stay with you, to visit, and be in a comfortable place, are they transient or non-transient?

SEAN O'GRADY: Well, let me say this: We've gotten into sort of a strange

discussion because of I think the misunderstanding of 4.21.B as being something other than an allowance to have boarders or roomers. And there's other sections of the Ordinance that talk about degrees of relation. You can pack your house with as many -- under the Zoning Ordinance, not under the Building Code -- family members as you want. So that's never a problem. You can only have --

JOYCE KLINE: What about the extent of them sleeping in your office?

SEAN O'GRADY: If it's in the residential structure, then yes, they can sleep there and there's nothing to stop them. The only place that they couldn't sleep would be in a basement that didn't have sufficient headroom. There's a couple other permutations. But no, the family can come any time. Two unrelated people can come at any time. They can be, the boarders -- what

B is saying is we don't want you taking in -- turn your house into a B&B. And we have a lot of that. So it's saying no B&B. But if you have long-term boarders or roommates, that's okay. And that's what B is all about.

Transient or non-transient, it doesn't matter, nobody can be in the accessory building for sleeping purposes especially. Only very limited, enumerated accessory uses that are laid out clearly in 4.21 like Home Offices can be -- or garage use can be done in the accessory building.

TAD HEUER: By right.

SEAN O'GRADY: By right.

JOYCE KLINE: So what does it mean (inaudible) that there are many carriage houses that have people sleeping there, I'm positive of it.

SEAN O'GRADY: Well, I'm not going to stand here and --

JOYCE KLINE: And No. 2, there are

particular instances about Kira's house.

No. 1, up the street I think most of them have a third floor. There's only one that has two floors. Of all the streets on the house -- I don't know if anybody has made the house handicap accessible. Part of this renovation that they did is they took away a bedroom to have an elevator and to have handicap access to the whole building. Because I think it's amazing. They have a friend that's needed wheelchair accessibility. They're obviously getting older and are preparing for themselves. I don't know what we can do as citizens of the street, and it's a very lovely neighborhood with Christmas parties, and we really care about each other as people. That you have adult children that want to come visit or if you need someone to take care of you in your old age, and you have a part of your property that's totally safe, how can we make that

accessible so that we can be a family neighborhood that allows your adult children to come home and be comfortable and caretakers to be taking care of your elderly people?

TAD HEUER: One of two things --

CONSTANTINE ALEXANDER: Can I -- one of us can address it. Let me try it and Tad can improve on what I say.

Sean has explained to you what you can do in your primary residence structure. You can have as many family members as you want. You can have two non-family members, two boarders if you want for a better term. And that's permissible subject to maybe Building Code issue if you're really overcrowding or putting people in space that's really not habitable. That's in your primary residential structure.

On accessory structures; garages, the second building, if you will, on the property

4.21.B -- J, I'm sorry -- says you cannot use that building as a dwelling.

So you can use it for a garage. You can use it for a Home Office. You can't use it as a dwelling. Okay?

Now, two points to that. One is if you want to use it as a dwelling, there are mechanisms to have it. You have to come before the Board and seek a Variance which is not the issue before us tonight. You can seek a Variance, we may grant it, we may not. But you have a recourse to try to persuade us or whoever is sitting here why you should be able to put -- to use your accessory building as a dwelling.

The other point I would make is we're not as dumb as we look up here. There are accessory buildings throughout Cambridge. We have -- I have no doubt that many of them from time to time are used for dwelling purposes. The City of Cambridge has

done -- doesn't have dwelling police out there checking every house. Sean has better things to do with his life than to go out and looking for these kind of uses. So generally it's live and let live. But when neighbors complain or any citizens of the city complain to the Building Department, they have an obligation to pursue it and to enforce the Zoning Ordinance as it's written. One of the arguments tonight is what does it mean as it's written. We're going to decide that before the night's over. But it's not a matter of which this case is so monumentally presidential that every carriage house is being used every once in a while for living purposes is going to be shut down. I don't believe that to be the case. Assuming we uphold Mr. O'Grady's decision and not accept the arguments that the Petitioner is making. I hope that answers your questions.

JOYCE KLINE: It does. I just want

to support whatever way I can, support them as our neighbors to have the kind of living situation I would want for everybody on the street even Peter. When his son comes home to take care of him, I hope he can make him as comfortable.

TAD HEUER: The only other thing I would say is that we have limited powers. We sit here to enforce what's in this yellow book. We don't write what's in the yellow book. The people that write what's in the yellow book meet across street every week or so, and plenty of people can go in and say, we think this part of the Ordinance shouldn't read the way it reads. Or, it seems to be capturing something that it wasn't intended to capture, and it captures a lot of someones that it's not intended to capture. And every year the city will make changes to the Ordinance, and then we come back here, and you can either do it by right and say it's not even

an issue for us or they change the definition so it means we interpret time differently. So, just because we say something here tonight based on our interpretation of the Ordinance doesn't mean that if the city cares enough about this issue and sees it as a concern, in that it was drafted to address something that's no longer relevant or is capturing people inadvertently that shouldn't be, there's a recourse out there called the City Council, it's just not us.

CONSTANTINE ALEXANDER: Sir, you want to be heard?

HENRY SIGOURNEY: Yes, I'm Henry Sigourney. I'm Peter's brother and co-owner of the Lakeview property. And as he said, we're the third and four generations that have been hanging out there. Our grandmother was there. Unlike counsel, I support and subscribe to the interpretation that has been made of the rules so far, and

I support your decisions. And at some point I may be living in the downstairs of that place, and any amount of additional residential foot traffic is going to go right by my bedroom window. And, you know, from a strictly personal point of view, I'd rather not hear that. I'd rather not deal with it whether it's people walking by or whether it's cars driving in at different hours and, you know, it's strictly a personal thing for me, but I support my brother and I support the interpretation that you people have --

CONSTANTINE ALEXANDER: We haven't made the interpretation yet.

HENRY SIGOURNEY: Ascribe to the rules at least as I've heard you discuss them. So I would ask you to uphold your existing policies at least as they stand right now and to hold your ground on this one.

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

Sir.

JEAN MONTAGU: Again, I would like to point out it is not possible for a car to drive passed any bedroom, any house in view of -- it's not possible. So the objection seems to be moot.

One other thing that puzzles me is that the upstairs of the carriage house has been used as a bedroom for the son of the previous owner who is a friend of the son of Peter. So that they wear --

CONSTANTINE ALEXANDER: I don't want to go there. This is not -- I don't want to get neighbor against neighbor. The issue is a more abstract one than that.

JEAN MONTAGU: Yes.

CONSTANTINE ALEXANDER: Thank you.

I see no one else wishing to be heard. I'm going to close public testimony before I give members of the Board a chance to comment.

Counsellor, anything else you want to

add at this point? It's up to you.

ATTORNEY SANDER RIKLEEN: You understand my arguments. Anything more I say is just going to take up time.

CONSTANTINE ALEXANDER: Thank you. Comments from members of the Board or do you want to go to thrash it out or go to a motion? I'll leave it up to you.

DOUGLAS MYERS: How do you propose to frame the motion?

CONSTANTINE ALEXANDER: I think our usual practice in an appeal is to frame the motion to uphold the decision of, in this case, Mr. O'Grady. I'll frame it that way and you can vote it up or down and you can vote it down. But we've got to frame it one way or another. I would propose to do it on the basis of upholding the decision of Mr. O'Grady.

DOUGLAS MYERS: Thank you.

CONSTANTINE ALEXANDER: Tad, you

had something else?

TAD HEUER: Yes, I'm going to vote to uphold the decision of Inspectional Services. That being said, we're here to enforce the laws that's written in the book. As the Chairman has said, and generally this is a situation in which is nearly impossible to police. It presumably occurs throughout the city and it's occurring even as we sit here right now without much detriment to anyone. Given the sense of the transients, and I don't want to interpret the word transient to mean overnight guests. People there for perhaps less than a week, perhaps less than a few times per year, it seems like not an unreasonable definition of transients for me to use in the absence of one being provided anywhere else and having to make a decision as to what it means. That those types of situations are not necessarily uncommon. We live in a very dense city. A

city where people have made choices to live here knowing full well what the circumstances are in their surroundings, in the neighborhoods. I'm not very pleased to be voting to uphold the Ordinance though I will. I would just encourage everyone after they leave here that, you know, we probably never will see you again. You're living less than three feet from each other. Please regardless of our decision, make sure that you engage with each other in a positive basis and don't let this become a virtual dividing line between your houses.

CONSTANTINE ALEXANDER: Well said. Very well said.

SLATER ANDERSON: I totally agree with that. The decision we need to make unfortunately -- I sympathize with your situation. But we have to look at it in the context of you may be gone, someone else may live there and there's use creep here that we

need to be working to prevent occurring throughout the city because it's the policy, it's the bylaw, it's Inspectional Services' practice to enforce the by-law. And there are means by which to potentially come for a Variance for residential use in the structure. You need to meet a hardship standard which under the facts that I've heard today I don't necessarily see. But yes, this is a decision about the use of the property, not about the people involved in this case. And my inclination is to support, uphold the letter, the decision by Inspectional Services.

CONSTANTINE ALEXANDER: I should have said before and let me just say it, our file contains a number of letters I would say mostly in support of the Petition, some opposed. And they're all part of our record. As I said before, I'm not going to read them into the record. We've spent enough time on

this case already. And I think the views that are in those letters have been expressed orally tonight one way or another.

I'm going to make a motion, please --

SEAN O'GRADY: I'm sorry, Gus.

CONSTANTINE ALEXANDER: Yes.

SEAN O'GRADY: I would request that you make the motion to grant the appeal because four in favor, if you go the other way, it's -- there is the inequities of how you frame the vote and generally we have gone the other way.

ATTORNEY SANDER RIKLEEN: The statute requires --

CONSTANTINE ALEXANDER: No, I understand that. I'm just thinking how I want to explain this to the audience. They may not have understood Mr. O'Grady's very fine point. The point simply is this: When we render our decisions on a case like this, it's a super majority. We need four out of

the five of us to vote in favor to whatever the motion is. So if I were to make the motion to uphold Mr. O'Grady's decision and only three people want to uphold the decision, then the motion to uphold would be defeated and the appeal would be granted. So Mr. O'Grady is suggesting that the motion be made in terms of denying -- of reversing his decision, upholding your position, and I think that's probably a better way to go.

TAD HEUER: I think it's also correct because we are sitting in an appeal that is being brought by the Petitioner.

SLATER ANDERSON: We're voting on the appeal.

TAD HEUER: We're voting on the appeal.

CONSTANTINE ALEXANDER: I agree with all of that. I think that's exactly right. All right, let me try to make a motion.

The Chair moves that this Board grant Petitioner's appeal that Mr. O'Grady's determination that Petitioner's use of a carriage house located on the premises at 104 Lakeview Avenue to house occasional guests violates Zoning Ordinance.

On the grounds that Section 4.21.B is controlling with respect to its interpretation in conjunction with 4.21.J and also on the basis that a Table of Uses which defines -- which deals with non-transient lodging, does not deal with the occasional use of an accessory structure.

In short, that we would accept the Petitioner's counsel's arguments. That the use of this accessory building be permitted under our Zoning Ordinance.

All those in favor of approving the motion to reverse Mr. O'Grady's decision say "Aye."

(No Response.)

CONSTANTINE ALEXANDER: None in favor. So the motion has been denied. Therefore, Mr. O'Grady's decision has been upheld.

I think we should go on to make further finding as to why we're upholding Mr. O'Grady's decision. And I would propose that we do this in on the basis that 4.21.J of the Ordinance prohibits the use of an accessory building as a dwelling.

That housing guests in an accessory building constitutes the use of the building as a dwelling.

That section 4.21.B of the Ordinance does not apply because it deals with providing non-transient lodging and occasional guest room use constitutes transient lodging.

That a prior Building Permit granted to renovate the carriage house for use as a garage or Home Office did not intend to permit

and did not permit use of the carriage house for residential purposes, and therefore, that Section 7 of Chapter 40 cited by the Petitioner is inapplicable.

All those in favor of in making those findings and any other findings people wish to make --

TAD HEUER: I would propose adding the fact that in subsection B residential structure is not an accessory structure and that Section B could not apply to the accessory use.

CONSTANTINE ALEXANDER: I accept that amendment to the motion.

All those in favor of making these findings say Aye.

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. Those findings have been made. Your appeal's been denied.

Thank you.

(Alexander, Heuer, Thomas Scott,
Slater Anderson, Douglas Myers.)

KIRA MONTAGU: Thank you for hearing
us.

(8:35 p.m.)

(Sitting Members: Constantine Alexander,

Tad Heuer, Thomas Scott, Douglas Myers, Slater Anderson.)

CONSTANTINE ALEXANDER: The Chair will call case No. 10049, One Broadway. Is there anyone here wishing to be heard in this matter?

ATTORNEY JAMES RAFFERTY: For the record, Mr. Chairman, members of the Board, James Rafferty on behalf of the Applicant Venture Cafe, LLC. And to my immediate left I'm going to have each person give the spelling of their names.

CARRIE STALDER: My name is Carrie Stalder, C-a-r-r-i-e S-t-a-l-d-e-r.

TIM ROWE: And I brought a name tag. It's Tim Rowe, T-i-m R-o-w-e.

ATTORNEY JAMES RAFFERTY: This is a building location no doubt familiar to the Board. It's a large office building located at the corner of Third and Broadway. It's called One Broadway, built and known as the

Badger Building in its early years. It's in an Office Three Zoning District and it is also in a PUD District. For reasons that have long escaped me, the Table of Uses for the office districts do not permit retail uses. So this is a small corner of what's known as larger Kendall Square. Its office.

The Board might recall they had a very similar case next-door a few months ago.

CONSTANTINE ALEXANDER: I was going to ask you. These are next-door premises.

ATTORNEY JAMES RAFFERTY: This is next-door. This premises, your predecessor saw fit to grant the Variance many years ago for Dominos Pizza. So, there's a Domino's Pizza in this location today. It's operating. Venture Cafe would like to replace the Domino's Pizza, and there will be espresso, fresh croissants, savory pastries, French omelets, farm fresh poached and charred eggs and crepes. A little bit

different than the fare offered by Dominos.

But nonetheless it's a location. And the Planning Board I think offered a somewhat of a planning rationale in the last case, and I included that in this case with the filing. I don't know if the Board had an opportunity to see it.

SLATER ANDERSON: A supporting statement?

ATTORNEY JAMES RAFFERTY: No, it's the --

CONSTANTINE ALEXANDER: It wasn't in there a couple days ago.

ATTORNEY JAMES RAFFERTY: I thought we put it in, but you might, you might take a look at the --

CONSTANTINE ALEXANDER: You can keep your own copy. No, we don't have anything from the Planning Board. You have the old Planning Board.

ATTORNEY JAMES RAFFERTY: It didn't

get stamped in there?

CONSTANTINE ALEXANDER: No.

ATTORNEY JAMES RAFFERTY: It expresses two important views, I would suggest. The first is the city's planning goals for this particular stretch of Broadway or for this section of Kendall Square.

Secondly, it attempts to offer some historical understanding as to why in the office districts there is such a limitation on retail uses. Because if you go through the table, you can sell used cars in this district and you can have a funeral home, but you can't have a convenience store. You can't have a dry cleaner. You can't have things that are in current thinking encourages in the ground floors of these buildings. So in some ways this case has its hardship set identically to the adjacent space that the Board granted a Variance on a few months ago. And that is that the

building itself is designed to accommodate an active ground floor use. It's currently, and in its current occupancy involves a Variance for fast food which I think is reflected least of the sense that those type of uses can work in this location. But the sidewalk itself, I'm sure the Board members know, it's a very prominent and wide sidewalk. It's a boulevard. MIT has built an expansion of the Sloan School across the street. There are 700 additional units of housing around the corner on Third Street in the past three or four years, the 303 Third Street building and the tall towers. So, there is a desire to have a use here.

All that is set against the backdrop of what is a very unique operation, and Ms. Stalder and Mr. Rowe will share just a bit about the Venture Cafe.

Venture Cafe has been a concept that's been nurtured now for several years by

Mr. Rowe. And it exists not merely in cyberspace but it exists how many days a week maybe?

CARRIE STALDER: One day a week right now.

ATTORNEY JAMES RAFFERTY: One day a week they run a satellite in a space in the Cambridge Innovation Center. And maybe, Carrie, you can just give us a little flavor so the Board can understand that this is, this has a -- while it's open to the public and will serve the greater community, it does have a particular focus of the emerging technology businesses and young start-ups in Kendall Square.

CARRIE STALDER: So just a little bit to that. I mean, Kendall Square is a very special place as you all know. I mean, my experience there at MIT as a graduate student, just finished up in the last year, but what we're trying to do with the Venture

Cafe is really create a community hub that functions for greater Kendall Square, but also for -- specifically for the startup entrepreneur, innovative community as a place to go to actually get away from their technology to take a little bit of a break for what they're doing to connect in person.

ATTORNEY JAMES RAFFERTY: So maybe you just tell a little bit about how this is functioning these days? What do you do with this?

CARRIE STALDER: So what we've been doing actually for about the last eleven months, since the end of February, is prototyping the cafe is what we call it. So, we're running an alpha prototype where we're open five hours a week, and providing a space for venture capitalists to come in and give free advice to entrepreneurs and to act as basically a public service for them. We actually -- I left there to come here tonight

and it's a gathering space that we've had over 2,000 people visit within the last eleven months, and that some people come back week after week.

CONSTANTINE ALEXANDER: Where is this being operated?

CARRIE STALDER: So right now we're operating out of the fourth floor of the Cambridge Innovation Center.

ATTORNEY JAMES RAFFERTY: The building upstairs from where this is.

CARRIE STALDER: And so actually a lot of those people now know that we're looking at moving downstairs and they're excited.

CONSTANTINE ALEXANDER: And this cafe is quite a bit different. The restaurant that you've persuaded us to grant a Variance for next-door?

ATTORNEY JAMES RAFFERTY: Well, it is, and both Carrie could speak to that.

There is definitely a distinct difference both in terms of its set-up, its offering and the likely target market that will be served here. Maybe Mr. Rowe can --

TIM ROWE: Yes, just a quick word. First of all, thanks for having us.

CONSTANTINE ALEXANDER: We have no choice.

TIM ROWE: Thank you anyway. Actually, I think you did have a choice to serve on the Board and that's quite a bit of work.

CONSTANTINE ALEXANDER: That's true, too.

ATTORNEY JAMES RAFFERTY: He came up with this on his own. I did not -- he's naturally a nice person, too.

TIM ROWE: And just so you know, Carrie and I are both Cambridge residents. I grew up in Cambridge. I've been running the Cambridge innovation center now for eleven

years. Just for context, Cambridge Innovation Center we think is the largest number of startup businesses under one roof anywhere in the world. I've been saying that now for a few years, and nobody yet has contradicted me. So perhaps it's actually true.

We noticed that the gathering spots that exist around Cambridge, but particularly in Kendall Square are not necessarily set-up as places to meet and Mingle. If you think about the design of say Au Bon Pain, the people who know these things tell us that the chairs are designed so you don't stay there too long. And we have lost what some people refer to as cafe culture, where you come in and you really get a chance to meet people and connect. There's some great places in Harvard Square like this. There really are at this point. Nearly so many in Kendall Square.

We've designed this concept actually not as a money maker. We're going to ask probably 50 or 60 prominent individuals in the innovation community to invest in this business. The current concept is that they will get no return. If it works out, they'll get their money back and that's it. Because we don't want to have the economic pressure here to get the table turns and try to make this be there for the money if you will. What we've said is they'll get interest on their money in the form of credits that they can use in the cafe. So they can themselves come in and eat and mingle and mix.

CONSTANTINE ALEXANDER: The way the cafe's setup, do you have sufficient privacy to do your business deals?

TIM ROWE: Well, that's one of the reasons we've been prototyping this. We're now in our second space within the Cambridge Innovation Center. And our goals has been to

try to figure out not just the design of the space actually but the social interaction aspects. How to make it a place where people are comfortable meeting new people? This name tag by the way is from the Metro Cafe tonight. This was probably our 40th or so gathering, maybe more than that. I manned the door. That means when people came in, I greeted them and asked them, you know, what they do and introduced them to people. Tonight I introduced a gentleman who is an independent Analog systems designer. Probably this is Robert probably 50, to another gentleman who has invented a patent for putting out fires using ultrasonic technology. This is -- it doesn't exist in the world yet, but he thinks he can use ultrasonics to put out fires without chemicals. And the two started talking about how they might apply each other's technology to make this possible. That's

the image, that's the goal, and probably I shouldn't take up too much more of your time.

ATTORNEY JAMES RAFFERTY: No, but I it's responsive to the -- it is unique.

CONSTANTINE ALEXANDER: It is. You're going to add an amenity to the area that doesn't exist there now? That's the point I want to make.

ATTORNEY JAMES RAFFERTY: With all respect to Dominos the environment they described isn't quite, you know, the milliard that Domino's provides. So, I do I think it's relevant and I'm glad the Board identified it, because we recognize we are in Variance territory, but we think there's a practical element to that last provision of the Ordinance as to whether what we're doing is in any way contrary to the city. I would suggest that I caution my clients that the only vulnerability I thought they would have is someone who would take a big view here

might suggest well, isn't it long over due for the City Council to address this and not require people in your position to have to repeatedly address this? And there's a legitimacy to that and we're frankly working on that. I'm sure you're aware that the city has put out a new RFP for all of this area, and I would anticipate that as a result of that, there was just an Ordinance -- there was a committee meeting held by Councillor Cheung just the other night where they identified things that just aren't quite right could use fixing, and this was on that list. The notion of office districts, what's behind the thinking that's longstanding now for decades that retail is not compatible in offices. And you'll note the Planning Board attempted to address the historical basis for it, but I would suspect that whatever new Planning and Zoning emerges in this district, because this is exactly

what all the new buildings are being built in the area are being encouraged to do at the ground floor. So, I think we've probably said more than we need to.

CONSTANTINE ALEXANDER: One question for you, in your supporting statement you have a statement, "The use of the premises as a restaurant is permitted under Article 12.42.4 (5)."

I went to that section and saw nothing in there.

ATTORNEY JAMES RAFFERTY: Is that not the PUD section?

CONSTANTINE ALEXANDER: Yes, it has nothing to do about restaurants.

ATTORNEY JAMES RAFFERTY: In the PUD district if you get a PUD Special Permit, you can have a restaurant here.

CONSTANTINE ALEXANDER: Okay. I don't think that section -- there's no Section 5. I think you have an incorrect

reference.

ATTORNEY JAMES RAFFERTY: I apologize.

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

ATTORNEY JAMES RAFFERTY: It was a reference to the PUD, the fact that in the PUD Special Permit if they -- in the PUD -- if this building were built pursuant to a PUD Special Permit, this would be as of right use. And the Planning Board noted that as well in the prior case, that the lot just doesn't have to be big enough to accommodate a PUD, it would have to be combined with another lot. So, I was trying to emphasize the point that it's, it's not as though the use is that incompatible at the location. There's another mechanism that you could get a restaurant there.

CONSTANTINE ALEXANDER:
Understood.

Questions from members of the Board at this point?

Is there anyone here wishing to be heard on this matter? Sir, please come forward and give your name and address to the stenographer.

CHARLES MARQUARDT: Charlie Marquardt, Ten Rogers Street, probably the closest person here living to this new place, and I welcome the replacement of Dominos with anything but Dominos. Now that we have Czar right around the corner, it would be a great improvement. And I too was at that meeting that Esquire Rafferty mentioned the other evening and I think.

TIM ROWE: Not counselor Rafferty.

CHARLES MARQUARDT: Not counselor. That's the people across the street that hopefully make the changes. I think Tad mentioned it earlier, that there are things that need to be fixed and until then you have

to work within the Zoning. It would be a real shame that out of that decision we were left with the Dominos instead of something that would be remarkably different. And I hope that this gives this Board the chance to prove some members of the Planning Board wrong when they say that we can't have a cafe culture in the Kendall Square area. I think we can. And this is a good place to prove those members wrong.

CONSTANTINE ALEXANDER: Thank you.

Mr. Rafferty, you have one trick that you should have thanked the Board for allowing Dominos to move to Mass. Ave. We gave you permit for a fast food enterprise on Mass. Ave. and that's why they're moving out the space that your clients wants to occupy.

ATTORNEY JAMES RAFFERTY: That was one of the rare cases where I wasn't quite as enthusiastic with the Board's reaction

because it seemed to me that they appeared here without counsel. And we wouldn't want to encourage people to be doing that. But it should be noted that --

TIM ROWE: I think, Mark, did you raise your hand.

CONSTANTINE ALEXANDER: Anyone else?

MARK JAQUITH: Mark Jaquith, J-a-q-u-i-t-h, 213 Hurley Street. I live right up the street from this area. And the whole redevelopment of Kendall Square is something that will affect me and my neighbors. And I'll start out by saying that the one slight hesitation I have to full support is that so far in all the discussions I've heard of renovating Kendall Square and making it work so to speak, the only retail that anybody's ever mentioned practically has been food, food, food, food. And long term that is going to make it not work as well.

This particular case, I think, what Mr. Rowe is proposing is something which will work, which will be very good for Kendall Square, for development of new businesses, and for the city in general so I would support this one.

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

TAD HEUER: I have a question. Has East Cambridge Planning Team looked at the kind of issues that you've just talked about in terms of retail mix and restaurants?

MARK JAQUITH: We have, and in fact coming up in the next month we're planning a fairly big get-together to look at the whole Kendall Square concept.

TAD HEUER: Okay.

MARK JAQUITH: And if I might make one more point, I was also at the meeting that Mr. Rafferty referred to attended by four councillors I believe. And I would be

surprised by this time next year a Variance like this would be needed in that Zone. So, what he's saying is absolutely true, and I think that this might be just jumping the gun a little bit, but appropriate.

CONSTANTINE ALEXANDER: Thank you. Thank you. Your question answered?

Doug.

DOUGLAS MYERS: Question. I wanted to ask Mr. Rafferty or the applicants whether any aspect of the Variance approval particularly relates to the use of the outdoor patio?

ATTORNEY JAMES RAFFERTY: Well, because -- yes, it does. Because the restaurant use or any retail use, frankly, in this office district is not permitted and requires a Variance. So the use -- the Variance would extend to the area of the patio.

CONSTANTINE ALEXANDER: Don't you

have to get some approval from the City Council or some other -- Licensing Commission?

ATTORNEY JAMES RAFFERTY: Well, we need a license to operate. And this particular patio, this area is privately owned, so it doesn't have the City Council -- like some of the places on Central Square on Mass. Ave, those patios are on public property. This is actually owned by the landlord. But nonetheless, there is very much a -- from this -- if this were to proceed, we could then go to the License Commission, obtain the CV license and the alcohol licenses and all the operational issues with entertainment and the like get addressed.

DOUGLAS MYERS: Do you need a Variance for the use of the patio in connection with the restaurant?

ATTORNEY JAMES RAFFERTY: Well,

yes, it's covered by this Variance.

DOUGLAS MYERS: Yes.

ATTORNEY JAMES RAFFERTY: Yes, it's included in this. We do.

CONSTANTINE ALEXANDER: Anybody else wishing to be heard? Yes.

BARBARA BROUSSARD: Barbara Broussard. I have to comment as myself because they haven't come really down to the East Cambridge Planning Team yet. They are going to do that before they come before the Licensing Commission and explain it to the community. My only concern is with Mark Jaquith I think in the general Planning with the Board holding a very large informational meeting, and there are concerns if everyone puts a restaurant, we don't want it to fail. But I think this is very unique, and it would support not only the people in the innovation center, but other members of the community who have their little ideas and could go down

there and speak to someone that knows a little bit about being innovative.

Thank you.

CONSTANTINE ALEXANDER: Thank you very much.

Anyone else wishing to be heard.

(No Response.)

CONSTANTINE ALEXANDER: The Chair notes no one else wishes to be heard. The Chair would note that we have in our files and as part of our record a letter from City Councilor Timothy J. Toomey, Jr. supporting the relief being sought.

I will -- now unless you have further comments?

ATTORNEY JAMES RAFFERTY: No.

CONSTANTINE ALEXANDER: I will close public testimony.

Questions or comments from members of the Board or are we ready for a motion?

TAD HEUER: I just have one comment,

and this relates to the point that this is not allowed now, may eventually be allowed within the next year if the City Council does an update of a PUD. And I think the only analogy I make, and I plan on voting in favor of it, is that we had a similar situation come up in terms of wind turbines where there had been no real notion of what we should do with these types of things. There are some members of the Board suggested should we be waiting for City Council, which was at that time imminently about to pass the wind turbine Ordinance, you know, whether we should do it because we knew they were thinking of it or wait and see what they actually gave us. I think this situation is different even though it's in advance of potential pending change to the Ordinance, that would make this process not necessary that the standards for granting a Variance would be met here regardless. So I'm not as concerned as I was

in that situation that jumping the gun with City Council is necessarily at odds with what we should be doing.

CONSTANTINE ALEXANDER: Thank you. I'm ready for a motion.

The Chair moves that this Board make the following findings:

That a literal enforcement of the provisions of our Ordinance would involve a substantial hardship. Such hardship being would be the inability to have retail, in this case a restaurant use, in this building.

That the hardship is owing to the nature of the building. The building is such it's configured for residential use at the ground level.

CARRIE STALDER: Retail.

ATTORNEY JAMES RAFFERTY: Retail.

CONSTANTINE ALEXANDER: Retail, sorry. Retail use at the ground level, yet retail use is not permitted under our Zoning

By-Laws as currently drafted.

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

In fact, this cafe would further, in the opinion of this Board, further the development of the Kendall Square area which is desirable from the point of view of the city. It's an area of the city that's targeted in particular for further development. That there is unanimous -- appears to be unanimous support by neighbors, including and I think it's fair to say the East Cambridge Planning Team, although not formal support, but there's certainly no opposition.

And that this type of retail use is not unique to the premises. We've already granted two Variances on this building. One for a restaurant next-door and one for a Zygos

(phonetic) around the corner, take-out place, a food take-out place.

So on the basis of all of these findings, the Chair moves that a Variance be granted to the Petitioner to operate a cafe as proposed in this petition.

All those in favor say "Aye."

(Aye.)

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

(Alexander, Heuer, Scott, Myers, Anderson.)

(8:55 p.m.)

(Sitting Members: Constantine Alexander, Tad Heuer, Thomas Scott, Douglas Myers, Slater Anderson.)

CONSTANTINE ALEXANDER: The Chair will call case No. 10050, 15 Homer Avenue. Is there anyone here wishing to be heard on this matter? For the record, give your name and address, please.

KECIA LIFTON: Kecia Lifton, K-e-c-i-a L-i-f-t-o-n, 175 Maple Street.

CONSTANTINE ALEXANDER: I'm going to stop this case for one second. We have another case on the agenda we're going to continue and I believe there are people here who don't realize this if you don't mind waiting for a second. Let me call that case. You can stay where you are and we'll dispose of that case.

(Case Recessed.)

(8:55 p.m.)

(Sitting Members: Constantine Alexander, Tad Heuer, Thomas Scott, Slater Anderson, Douglas Myers.)

CONSTANTINE ALEXANDER: The Chair will call case No. 10051, 175 Huron Avenue. Is there anyone here wishing to be heard on this matter?

Are you the Petitioners?

UNIDENTIFIED FEMALE: No.

CONSTANTINE ALEXANDER: Do we have a letter in the file anyway, Sean?

SEAN O'GRADY: Yes, I believe we do.

CONSTANTINE ALEXANDER: The Chair is in possession of a letter from Mr. Rafferty on behalf of his clients saying: Please accept this correspondence at the request to continue the above-captioned case currently scheduled for Thursday, January 27, 2011."

And I think the Chair and this Board is favorably disposed to continuing the case.

Anything you wanted to add, Mr. Rafferty?

ATTORNEY JAMES RAFFERTY: Oh, I'm sorry.

CONSTANTINE ALEXANDER: We started to this case and then called your case to allow people to go home.

ATTORNEY JAMES RAFFERTY: Fine.

CONSTANTINE ALEXANDER: You have a motion to -- a request.

ATTORNEY JAMES RAFFERTY: We have a request to continue. There's been an exchange of information and correspondence from some abutters, so yes, we're requesting.

CONSTANTINE ALEXANDER: Let me point out that even if you didn't request a motion for a continuance, that we would continue the case anyway. And this is for the benefit of your clients, not for you. Our file contains inadequate elevations. If we're going to hear this case and the neighbors are going to want to know this, we

want in our files, as you know, but I'll just repeat it for the record, adequate elevations, detailed elevations showing the property as it is now and as it will be if the relief being sought is granted, including the relocation of the windows as well as whatever other external changes in the structure. So my motion to continue is going to -- I'm going to build that into it as well, that these elevations be in the file the usual five p.m. before.

ATTORNEY JAMES RAFFERTY: I think they're there.

CONSTANTINE ALEXANDER: They weren't there as of Wednesday.

ATTORNEY JAMES RAFFERTY: No. That was pointed out to me. So I think we brought them over this afternoon.

CONSTANTINE ALEXANDER: I'll still make it part of the motion.

ATTORNEY JAMES RAFFERTY:

Understood. And I would suspect frankly that as a result of conversations, those elevations are more than likely to change.

CONSTANTINE ALEXANDER: Okay. Do you have a time you want to request to hear it?

ATTORNEY JAMES RAFFERTY: No, whatever the Board's able to accommodate us.

SEAN O'GRADY: April 14th.

ATTORNEY JAMES RAFFERTY: April 14?

SEAN O'GRADY: Yes.

SLATER ANDERSON: You want to request another date?

ATTORNEY JAMES RAFFERTY: I could file five more cases between now and then and get dates in March I would think.

SEAN O'GRADY: We're given March 17th which is our only March date for new cases, but we've got three continued cases on that now.

CONSTANTINE ALEXANDER: You can

always re-file if you want to get the hearing earlier.

ATTORNEY JAMES RAFFERTY: Well, it means a month, so I think we'd consider that. But is there not a possibility to extend the continued -- this is a case not heard.

CONSTANTINE ALEXANDER: No, but this is a case, I suspect based on what I've seen so far, is going to draw some controversy. It's going to take sometime. So, we've got an otherwise crowded agenda on the only March hearing date. I don't think it's wise for us to take the case in March.

ATTORNEY JAMES RAFFERTY: But yet, if I chose to re-file it --

CONSTANTINE ALEXANDER: Well, we can't do anything.

ATTORNEY JAMES RAFFERTY: No, I'm just saying it does seem that the Board could take fewer new cases in light of having taken an additional continued case. I mean,

that's certainly within your purview to suggest as the agenda for March is being set, instead of taking the traditional eight cases, perhaps only six should be taken. There's a certain --

TAD HEUER: Your point is that you can get on that date anyway, why should you spend the additional fee and file a new number?

ATTORNEY JAMES RAFFERTY: Right and having two cases and two signs. And a month is a long time.

CONSTANTINE ALEXANDER: How full is the March agenda now, the regular agenda?

SEAN O'GRADY: It isn't. Well, we've got one case today. Just, not to be argumentative, but just to lay it out, we have the February 10th agenda which we've grossly overbooked. And then we have the March 17th, and then we have the April. We've been running a little lean, and so cases have been

dropped off. So just be cognizant of the fact that as you overburden a night, there's not necessarily another night to --

CONSTANTINE ALEXANDER: As of right now, I'm trying to figure out what the March agenda is going to be. We have one regular case.

SEAN O'GRADY: One.

CONSTANTINE ALEXANDER: Any continued cases?

SEAN O'GRADY: Three.

CONSTANTINE ALEXANDER: Three. Do you recall whether they'll be controversial that will take a bit of time off the top of your head?

SEAN O'GRADY: I don't. One of them is Larch which promises to be very controversial. The other two I just don't know.

CONSTANTINE ALEXANDER: Okay. Well, what's the --

ATTORNEY JAMES RAFFERTY:

Mr. Chairman, and I agree, but wouldn't it be possible for the Board to give some direction to the staff to suggest well, given the fact that we're on a one-month cycle as opposed to the two meeting cycle and everything else, I mean for the March meeting, we only take six cases. So the next six people in get it and then the seventh person goes to April.

CONSTANTINE ALEXANDER: We can make that direction. The question is do we want to.

SEAN O'GRADY: The statute rules.

CONSTANTINE ALEXANDER: I'm sorry?

SEAN O'GRADY: The statute rules.
We have the 65 days.

CONSTANTINE ALEXANDER: Right, I know that. We have the 65 days.

ATTORNEY JAMES RAFFERTY: True.

CONSTANTINE ALEXANDER: None of us have to be necessarily sitting here on April

14th or even March 17th. Do you want to say -- I'm looking for views from the board members, what they would prefer to do, hear the case on March 17th or April 14th? Anybody have any views?

DOUGLAS MYERS: Rescinding from the case in any personalities my inclination is to defer to the staff. I mean they have a better sense of how the cases are coming in.

CONSTANTINE ALEXANDER: My personal view, I didn't realize it was another month, is to defer to April, but I don't feel strongly.

SEAN O'GRADY: I don't want to give the impression that we are -- I'm just trying to be informational to the Board, and I'm glad to take direction in any direction.

CONSTANTINE ALEXANDER: Right. I'm going to suggest unless people feel otherwise that we continue the case until April 14th. Anybody feel otherwise?

ATTORNEY JAMES RAFFERTY:

Mr. Chair, can I just ask the question on the motion, if the Petitioner then because of time constraints, directed me to file the same case tomorrow and a new filing fee, I would just want anyone here from the public to understand that that would only be done, and that wouldn't in any way be an attempt to undermine the Board or the schedule.

CONSTANTINE ALEXANDER: That's correct.

ATTORNEY JAMES RAFFERTY: But it seems funny that clients I haven't yet met can come in on March 17th and get a hearing and this case cannot. So, if that were to happen, we would certainly notify everyone. But I think there's a real practical piece of this that's worthy of consideration by the Board in determining this continuance.

CONSTANTINE ALEXANDER: I can respond to that, but let's not debate it. I

think the argument's in response to -- but anyway, I still say you always have your right. And I want to point out to the people in the audience, if we do continue the case until April and Mr. Rafferty and his clients choose to re-advertise this case, this case will be heard in March. He has the ability to do that. You have to pay an extra filing fee, but that's his and his client's decision.

Are we going to move to April unless people think I'm crazy.

TAD HEUER: Actually, I would have to say I'm not thrilled by it. I'll vote for it because I'm not hearing for it tonight.

SLATER ANDERSON: Philosophically I'm always against to push things out and out and out because they get piled up down the road, but it's not my call.

CONSTANTINE ALEXANDER: I'll make it March if people think that's the better way

of going about it.

THOMAS SCOTT: Well, that would make four continued cases and then they have to reduce the amount of regular cases that evening.

CONSTANTINE ALEXANDER: You can't, up to a point.

SEAN O'GRADY: We may be able to --

CONSTANTINE ALEXANDER: By statute we have to render a decision by 65 days so we can't -- when people file, we hear the cases right away. We then continue them if we need to with a waiver from the person. It's a little bit of a different situation.

ATTORNEY JAMES RAFFERTY: Is the Board in the practice of only having a hearing once a month or is that just March?

CONSTANTINE ALEXANDER: Just March.

TAD HEUER: And February.

ATTORNEY JAMES RAFFERTY: And February as well.

CONSTANTINE ALEXANDER: February, yes, you're right. We always had a practice in February because typically the second hearing in February would fall during school vacation week. And so that in deference to the community and to ourselves, we only have one. This time around March is such an unusual month in terms of our case load, that we have the ability not to have any hearings in March. We don't want to have a hearing in March for just one case. And that's what we'll do if we continue this case. And no cases at this point on our regular agenda for March.

SEAN O'GRADY: For the first March.

TAD HEUER: We have to be here anyway for three continued cases?

CONSTANTINE ALEXANDER: Not the first of March.

ATTORNEY JAMES RAFFERTY: Yes, you do. You just said March 17th.

CONSTANTINE ALEXANDER: No, no, no.

SEAN O'GRADY: The first case in March is the one that got dropped. The second case in March -- I'm sorry, the first hearing that was scheduled for March 3rd we just don't have enough participation.

ATTORNEY JAMES RAFFERTY: I understand.

CONSTANTINE ALEXANDER: There's not much for the agenda on March 3rd, we don't want to put anything on there.

ATTORNEY JAMES RAFFERTY: I'm trying to do my share.

SLATER ANDERSON: That's because the filings were within the 65 notice period. Why was the March 3rd one dropped?

SEAN O'GRADY: The March 3rd one was dropped just because we didn't get enough business.

SLATER ANDERSON: And you have to file --

SEAN O'GRADY: And that's the first time it happened. So I'll be standing on the street corner tomorrow.

CONSTANTINE ALEXANDER:
Mr. Rafferty will. You won't have to do it, he'll do it.

ATTORNEY JAMES RAFFERTY: It's a crowded corner let me tell you.

CONSTANTINE ALEXANDER: Okay.

The Chair moves that this case be -- I'm sorry.

UNIDENTIFIED MALE: I would respectfully request that the abutters be notified of the new hearing date.

CONSTANTINE ALEXANDER: They'll be notified by virtue of the sign being modified. There will be no new mailings. So the word would have to be spread by word of mouth or checking with the Zoning office or reading the sign which we modify.

ATTORNEY JAMES RAFFERTY: I'll do

one better, we will send out mail -- we have, I'll get your address tonight. Whatever the date is, we're going to send out -- there's been one mailing, there will be further mailings. I can commit to that.

CONSTANTINE ALEXANDER:

Mr. Rafferty has committed to that.

UNIDENTIFIED MALE: Thank you.

CONSTANTINE ALEXANDER: And I take it that day is right for the two of you?

UNIDENTIFIED MALE: March 17th?

CONSTANTINE ALEXANDER: No, April 14th.

ATTORNEY JAMES RAFFERTY: But possibly March 17th.

CONSTANTINE ALEXANDER: If it doesn't work for them, you have a right to have it on that day.

SLATER ANDERSON: Now, there would be a mailing if it's a new filing.

ATTORNEY JAMES RAFFERTY: That's

true. Something goes on that night that escapes me, March 17th.

TAD HEUER: April 14th? That's when I'm filing my taxes.

SEAN O'GRADY: St. Patrick's Day.

SLATER ANDERSON: We'll be serving green beer.

CONSTANTINE ALEXANDER: Okay.

The Chair will move that this case be continued until seven p.m. on April 14th on the condition that the Petitioner sign a waiver of time for a decision.

On the further condition that the sign on the premises be maintained with a time and date changed. Date and time changed I should say.

And then the last condition, that to the extent that the plans that are now in our files become revised in any fashion that they be -- the revised plans be in the file, to the building office file by no later than five

p.m. on the Monday before. That allows you and any other interested parties to come to the Zoning office and to read the file and to see what plans are in the files, assuming that Petitioner doesn't reach out to you in the meantime anyway.

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

(Aye.)

CONSTANTINE ALEXANDER: Four in favor.

(Alexander, Scott, Myers, Anderson.)

CONSTANTINE ALEXANDER: Opposed?

(No Response.)

CONSTANTINE ALEXANDER:
Abstention?

(Heuer.)

CONSTANTINE ALEXANDER: One abstention.

(9:10 p.m.)

(Sitting Members: Constantine Alexander, Tad Heuer, Thomas Scott, Douglas Myers, Slater Anderson.)

CONSTANTINE ALEXANDER: We're back to starting the case and you were giving your name and address. Just do it one more time, please.

KECIA LIFTON: Kecia Lifton, 175 Maple Street, Sherborn, Mass.

MICHAEL SCHNEIDER: Michael Schneider S-c-h-n-e-i-d-e-r, 48 Clement Ave, West Roxbury, Mass. I am representing the owner of the building at 15 Homer Ave.

TAD HEUER: Who's the owner of the building?

MICHAEL SCHNEIDER: 15 Homer Ave, LLC. It's a --

TAD HEUER: Yes. Okay.

CONSTANTINE ALEXANDER: Okay, the floor is yours. You're seeking a Variance?

MICHAEL SCHNEIDER: Yeah. We're seeking a Variance to build two dormers. And the reasons for the Variance is the house is already above the allowed height.

CONSTANTINE ALEXANDER: The allowed height is 35 feet, and the building now is it almost at 43 feet.

MICHAEL SCHNEIDER: Correct.

CONSTANTINE ALEXANDER: And your dormers would be above the 35 foot?

MICHAEL SCHNEIDER: They'd be above the 35 but below the existing.

CONSTANTINE ALEXANDER: Yes.

KECIA LIFTON: We also need a Variance for a side setback, although the proposed dormer is within the perimeter of the building. It's setback and then we're also adding a small footprint for a

fireplace.

MICHAEL SCHNEIDER: They're not doing that.

KECIA LIFTON: They're not doing that. Never mind.

CONSTANTINE ALEXANDER: Okay. Let me ask you some questions. How many units are in that building now?

MICHAEL SCHNEIDER: Three.

CONSTANTINE ALEXANDER: Is it owner occupied?

MICHAEL SCHNEIDER: Not at this moment.

CONSTANTINE ALEXANDER: So, it's investment property?

MICHAEL SCHNEIDER: Yes.

CONSTANTINE ALEXANDER: The plans in your file show in the attic which is where you're going to add the dormers obviously, show three bedrooms. Are they being used as bedrooms right now?

MICHAEL SCHNEIDER: The existing?

CONSTANTINE ALEXANDER: Existing right now.

MICHAEL SCHNEIDER: They were previously, but we've already gutted the building.

CONSTANTINE ALEXANDER: Okay, before you gutted the building were they used?

MICHAEL SCHNEIDER: Yes.

CONSTANTINE ALEXANDER: So, you had that top unit, unit No. 3 was a four-bedroom unit?

MICHAEL SCHNEIDER: Correct.

CONSTANTINE ALEXANDER: And it was used actively as a four-bedroom unit?

MICHAEL SCHNEIDER: Yes.

CONSTANTINE ALEXANDER: Now you want to continue to use it as a four-bedroom unit but you want to upgrade it, if you will, for the dormers.

MICHAEL SCHNEIDER: The stair, there's one stair that accesses that floor and it's probably the worst stair I've ever seen as far as headroom issues and different heights that risers. It's really not a safe stair. And the only way that you get a stair in there with co-conforming is to put in a dormer.

CONSTANTINE ALEXANDER: And the dormers don't match. And one of the dormers doesn't comply with our dormer guidelines. Why is that?

KECIA LIFTON: That's because the stair that we're adding is going to line up with an existing stair that stops at the third floor. And because of the structure of the building and the requirements of code, that that's determined where that dormer had to be.

CONSTANTINE ALEXANDER: Is that the dormer that goes right to the ridge line?

TAD HEUER: Yes.

KECIA LIFTON: No. The one that goes to the ridge line --

CONSTANTINE ALEXANDER: Which is the one that doesn't comply with our dormer guidelines is the one that goes to the ridge line.

KECIA LIFTON: No, because my interpretation of the guidelines is that you can have the dormer that could go to the ridge if it met all the other requirements. And the one at the rear does.

CONSTANTINE ALEXANDER: Is that right?

SEAN O'GRADY: I think she may be right. I seem to think that is right.

KECIA LIFTON: I have it right here, otherwise I wouldn't have done it. But the one in the front, the only way -- the only part of that that doesn't conform is the -- I couldn't quite get the 18 inches from the side

because of the width of the stair, and it's like three or four inches off.

CONSTANTINE ALEXANDER: If we grant a Variance, as you know, we have to find a substantial hardship, one of the three conditions. Help me find what the hardship is. You have, if you will, a two-floor unit with four bedrooms. You've been renting it -- whoever the owner is has been renting it for I don't know how long as that. It's been used as that. You're looking to basically improve -- or I shouldn't say you, the owner, is looking to improve the value of the its investment. It's not a situation that we often have with dormers, where we have, usually have a young couple, but someone who needs additional living space or needs more room, and the only way to do at that is put a dormer for living space. That's not the case here. You're just looking to, I'm going to repeat myself, upgrade the value of

the investment. Why is that consistent, counted to the hardship? What's your hardship?

KECIA LIFTON: I think the existing stair is the hardship.

CONSTANTINE ALEXANDER: Well, you've been using this -- it hasn't stopped you as renting this as a four-bedroom unit all along.

MICHAEL SCHNEIDER: It was being used by the previous owner/occupant as that because it would not have met code for them to rent it out to someone else.

CONSTANTINE ALEXANDER: My problem, though, is everybody's got unused space in their buildings -- in their residences, not everybody, but most people. Usually it's in the attic. And the attics are not designed for living purposes and now people want to make them for living purposes. And they wants to vary the Zoning By-law. And they

ask us to come in and give them relief. As I said, usually for a family who occupies a building needs more space, understandable. Here it's a completely different type of situation. You're not looking for -- you don't need additional living space. Even if you can't use the top attic floor, you have a one-bedroom unit that you can rent out, not a four-bedroom unit.

MICHAEL SCHNEIDER: We are being taxed on that living space though.

KECIA LIFTON: It's always been living space. It's heated.

CONSTANTINE ALEXANDER: Well, then it will continue to be living space.

KECIA LIFTON: It's heated, it's finished, but that back stair is, I would say it's unsafe. And the building was built, what, very early 20th century I would say.

TAD HEUER: 1901.

KECIA LIFTON: 1901. And as we all

know codes have changed and improved as history has taught us various lessons about safety and what not.

CONSTANTINE ALEXANDER: The trouble is the other part of the impact is you have is this is a height issue. We're very sensitive, this Board is, to allowing structures to go beyond 35 feet. You're already almost eight feet beyond 35 feet. And now you're going to increase the massing of that too high a rooftop in a way that I understand why you're doing it, but it's not going to be the most aesthetically pleasing with mismatched dormers of how they sit on the roof. I add all that to the fact that this is an investment property, and I don't see the hardship in not allowing you to increase the value of the investment. I have a problem. That's only me. You need only four votes so I can be outvoted. I don't see the basis for granting the Variance on this case, I have to

be very frank for the reasons I just expressed. But I've said enough.

Do you have anything further? I'm not trying to cut you off. I just wanted to get my views on the table so you understand. If you want to address them, feel free. I'll go to other members of the Board and to the audience.

KECIA LIFTON: I guess one comment that I would make is that since the building already exists at that height. To me it seems less of a bad thing than if we were taking a building that was already conforming to the height and asking to exceed.

CONSTANTINE ALEXANDER: I agree with that.

KECIA LIFTON: To the building.

TAD HEUER: I think that's true, but isn't it also true in looking at this, and I think the Chairman almost understates the case. We view height as nearly inviolate.

Everything else, side yard setbacks we deal with all the time. Precedentially we tend to look at those things on a case-by-case basis. Height is one of those things that we almost never go over just as a matter of the historical course. It isn't a reasonable response to that argument that you've been blessed with eight additional feet of height that no one else in the neighborhood would ever be entitled to. Essentially you've got a free floor up there that, you know, you have but if you didn't have it, you wouldn't be entitled to in that area. And if you can use it for minimal uses, you do. If it comes down under your gross floor area and you get taxed on it, it's just because you've got a big floor up there. You can't use other. And same way anyone with a gabled structure, you know, which is they can use more with their attic and can't but it's probably thankfully they don't have to go and shovel off their

roof all the time. Isn't the argument that you've already kind of gone over height, you've got space up there, and, you know, bulking it even more yes, it's incremental. And I'm sure that Star Market doesn't really care. But, you know, you are kind of looming over that really small house on your right side. I know you don't have anyone on the left side. But, you know, when the Ordinance says 35 feet and you've already got 43, isn't it kind of -- even if it's incremental massing, you're still bulking up a really big building that's, you know, way bigger than the city wants in that district anyway.

KECIA LIFTON: Well, I think architecturally speaking it's not unusual to see buildings of that size with dormers. There are a lot of buildings like that on the Mission Hill very close together and tall, and as part of the character of that neighborhood, but I suppose you could look at

it either way.

CONSTANTINE ALEXANDER: I'll take public testimony.

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

(No Response.)

CONSTANTINE ALEXANDER: The Chair notes no one wishes to be heard. I don't have the file in my possession. I don't believe there are any letters pro or con.

SLATER ANDERSON: No.

CONSTANTINE ALEXANDER: Nothing in the file?

SLATER ANDERSON: I don't see any.

CONSTANTINE ALEXANDER: So there is nothing in our public file from the citizens of the city.

MICHAEL SCHNEIDER: We've actually had great reaction from the neighbors.

CONSTANTINE ALEXANDER: So your testimony is that you have, it's not written

support but you have verbal support for what you want to do.

MICHAEL SCHNEIDER: Yeah. They're very happy to see the building rehabbed.

CONSTANTINE ALEXANDER: Okay. I will close -- unless you have anything further to add -- close public testimony. Close further testimony.

Questions or comments from members of the Board at this point? None?

DOUGLAS MYERS: I would appreciate hearing something more from the Applicant about why the left side dormer where there's no setback from the ridge line is compliant with the dormer guidelines?

CONSTANTINE ALEXANDER: Maybe Sean can answer that.

SEAN O'GRADY: Actually, I think we'll defer and follow along.

KECIA LIFTON: After the table of contents, one, two, three -- on the fourth

page where it has this -- I think it's this, the page after the one you're looking at, sir.

DOUGLAS MYERS: Yes.

KECIA LIFTON: The diagram on the bottom, it says if the dormer meets the something setbacks.

DOUGLAS MYERS: Recommended setbacks.

KECIA LIFTON: Recommended setbacks for side, and then it was cut off. But the dormer roof -- it shows the dormer roof at the ridge line. I can't read what I have.

DOUGLAS MYERS: Does it say may start at the ridge line?

CONSTANTINE ALEXANDER: Where is it?

SEAN O'GRADY: The figure at the lower left.

CONSTANTINE ALEXANDER: Yes. Dormer needs to recommended setbacks for side, three feet six inches, front. One foot

six inches walls. The dormer roof -- it's cut off again.

TAD HEUER: It does say may, it's at the top of the page, the text, right?

KECIA LIFTON: Yes.

CONSTANTINE ALEXANDER: You're right. Thank you.

DOUGLAS MYERS: What about your setback from the rear side wall? It is three feet, but doesn't the -- don't the guidelines suggest it ought to be 3.6?

KECIA LIFTON: Well, I thought that was from the edge of the roof, not the side wall because there's no dashed line there like there is here. So it would be about that from the edge of our roof. I dimensioned it from the wall.

TAD HEUER: So what are your numbers again on that? So you're how far in?

KECIA LIFTON: I'm three feet from the wall which is -- I'm not exactly how deep

the rake is because I didn't climb up there and measure it, but I would say it's probably eight inches. So it's probably three foot eight.

TAD HEUER: From the front wall?
From the rear wall, I'm sorry.

KECIA LIFTON: Right, from the rear wall and it's 1.6 from the side.

TAD HEUER: What is the dormer on your right side? Is that a light dormer, what's that?

KECIA LIFTON: That's for the stairs.

TAD HEUER: On the right side.

KECIA LIFTON: Yes.

MICHAEL SCHNEIDER: The existing dormer?

TAD HEUER: Well, you have the build out which is, you know, it's not really a dormer. It's just an addition, right?

MICHAEL SCHNEIDER: Yeah.

TAD HEUER: And then do you have another, anything else you're putting on the roof?

MICHAEL SCHNEIDER: Yes, just the two dormers.

TAD HEUER: And then your right side new dormer.

MICHAEL SCHNEIDER: Front. New stairs.

TAD HEUER: Front. From the addition.

KECIA LIFTON: This dormer?

TAD HEUER: Yes.

KECIA LIFTON: That's for the stair.

TAD HEUER: This one is for?

KECIA LIFTON: And that's in the back. That's for a bedroom just to get more practical space in there.

SLATER ANDERSON: Am I clear in understanding that the third attic unit is going from four bedrooms to three?

CONSTANTINE ALEXANDER: No, they have the third floor has one bedroom. And then the stairs to the attic will have three more -- the attic stairs, three more.

SLATER ANDERSON: I think the plan only shows two bedrooms.

MICHAEL SCHNEIDER: The top one.

SLATER ANDERSON: The existing condition had three bedrooms.

MICHAEL SCHNEIDER: Yeah. And that was for fire protections reasons, we made the top a mezzanine.

SLATER ANDERSON: So the unit's going from four to three bedrooms, correct?

MICHAEL SCHNEIDER: Correct. Because we have to add sprinklers.

SLATER ANDERSON: You have to add sprinklers.

KECIA LIFTON: Because we would have had to put a stand pipe in.

SLATER ANDERSON: Sean, what's the

sprinkler figure on that?

SEAN O'GRADY: That's the Building Code so I'm only anecdotal.

SLATER ANDERSON: That's sort of surprising that a three-family -- but....

SEAN O'GRADY: It's automatically at four, right? Or is it?

MICHAEL SCHNEIDER: It's three now.

SEAN O'GRADY: It's three now? So that's substantial rehabilitation of a (inaudible) causes sprinklers.

MICHAEL SCHNEIDER: Yes.

SEAN O'GRADY: And you're going to do that? Okay, I'll defer to that.

CONSTANTINE ALEXANDER: Further questions from members of the Board?

THOMAS SCOTT: So what caused the deletion of the fourth bedroom then? This seems to be like an open --

MICHAEL SCHNEIDER: From the height it would have to be standpipe, and the code

was written with the intent of that being more of a commercial building with that height and --

SLATER ANDERSON: You mean the building height?

KECIA LIFTON: Yes.

SLATER ANDERSON: Because we're over 35 or something like that?

TAD HEUER: 40.

SLATER ANDERSON: 40.

MICHAEL SCHNEIDER: Right. And so to not have to do a standpipe and just to do a sprinkler system with reserved tanks, we can make that upstairs with a mezzanine level.

KECIA LIFTON: A standpipe is very expensive proposition, probably 40 or 50,000 dollars. And I had a conversation with one of the gentlemen at the fire department about, you know, what really is a standpipe for? And he told me that they would never use

a standpipe in that situation and in a building of that type, that it wouldn't make sense for the firemen to go in and use the standpipe. That they would just hose it from the exterior. And I was able to write a letter with his comments to the Building Inspector to get him to allow us not to do that because we took out the front part of the attic and made it into a mezzanine rather than a full floor.

MICHAEL SCHNEIDER: It's more of a lofted space.

SLATER ANDERSON: Yes, a lofted space.

CONSTANTINE ALEXANDER: Ready for a vote or further comments?

THOMAS SCOTT: Now, the neighbors, there's no opposition from the neighbors? I didn't see any letters.

CONSTANTINE ALEXANDER: There's nothing in the file.

THOMAS SCOTT: Nothing one way or the other?

CONSTANTINE ALEXANDER: No.

THOMAS SCOTT: There's no site plan that shows how close the neighbors are?

MICHAEL SCHNEIDER: I can show you a picture. We have one neighbor. One neighbor next to it and then --

CONSTANTINE ALEXANDER: On one side. On the other side there's the apartment house, but there's a bit of space between.

MICHAEL SCHNEIDER: And there's a big commercial building next to us. Right next to us is a big commercial building.

SEAN O'GRADY: The Assessor's map would show that.

MICHAEL SCHNEIDER: And it says apartment complex a couple buildings over.

SLATER ANDERSON: So, you've already began the renovation on --

MICHAEL SCHNEIDER: So, we've been renovating the interior and put new siding on.

SLATER ANDERSON: When was the building -- how long has it been in the current ownership?

MICHAEL SCHNEIDER: For about four months, five months.

CONSTANTINE ALEXANDER: Ready for a vote? I'm not going to cut off questions or comments. I think we're ready.

The Chair moves that this Board make the following findings:

That a literal enforcement of the provisions of the Ordinance would involve a substantial hardship to the Petitioner. Such hardship being that it would not be able to adequately use the attic space per habitation purposes.

That the hardship is owing to the shape of the structure as a non-conforming

structure built in 1901.

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

On the basis of this findings, the Chair moves that a Variance be granted to the Petitioner on the condition that work proceed in accordance with plans submitted by the Petitioner numbered A1 through A18 and Z1 through Z5. The first page of which has been initialed by the Chair.

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

(Aye.)

CONSTANTINE ALEXANDER: Two in favor.

(Scott, Anderson.)

CONSTANTINE ALEXANDER: All opposed?

(Alexander, Heuer, Myers.)

CONSTANTINE ALEXANDER: Three opposed. The Variance is denied.

The Chair would suggest the Board make the following findings, those that voted in opposition. That a literal enforcement of the provisions of the Ordinance would not involve a substantial hardship to the Petitioner. The structure is being used for residential purposes and can continue to be used for residential purposes.

And that relief granting relief wouldn't nullify or substantially derogate from the intent or purpose of this Ordinance because it would allow further massing of the structure at a height of almost 44 feet when our Zoning By-Law only permits up to 35 feet, and height restrictions are an area that is of the city this Ordinance is especially sensitive to and this Board is sensitive to, and to the extent we would change that, we would be derogating from the intent or

purpose of this Ordinance.

All those in favor of making these findings say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: The majority of the Board. All those who voted against the relief support these findings.

(Alexander, Heuer, Myers.)

(9:30 p.m.)

(Sitting Members: Constantine Alexander, Tad Heuer, Thomas Scott, Douglas Myers, Slater Anderson.)

CONSTANTINE ALEXANDER: I'm going to go out of order for a second. The Chair is going to call case No. 10053, 17 Lakeview Avenue. Is there anyone here wishing to be heard on this matter?

ATTORNEY JAMES RAFFERTY: Good evening, Mr. Chair, members of the Board, James Rafferty on behalf of the Applicant. We filed a request to continue this case. And if there's any availability on April 14th, we'd be happy to return at that time.

CONSTANTINE ALEXANDER: April 14th

works?

SEAN O'GRADY: Yes.

CONSTANTINE ALEXANDER: The Chair moves that this case be continued until seven p.m. on April 14th. This being a case not heard, on the conditions that the Petitioner sign a waiver for a time for decision.

On the condition that the sign also on the premises continue to be posted except that the time and date be changed to seven p.m. on April 14th.

And just the Chair would remind the Petitioner and his counsel that to the extent that the plans are now in our files change, that those new plans, revised plans be in our public files no later than five p.m. on the Monday before April 14th.

All those in favor say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor.

(Alexander, Heuer, Scott, Myers,
Anderson.)

CONSTANTINE ALEXANDER: The Chair
would like to take a five-minute recess.

(A Short Recess was Taken.)

(9:35 p.m.)

(Sitting Members: Constantine Alexander,
Tad Heuer, Thomas Scott, Douglas Myers,
Slater Anderson.)

CONSTANTINE ALEXANDER: The Chair
will call case No. 10052, 21 Cornelius Way.
Is there anyone here wishing to be heard on
this matter? Sir, give your name and address
for the stenographer.

RICHARD FANNING: Richard D.
Fanning, 21 Cornelius Way.

CONSTANTINE ALEXANDER: You're here
seeking a Variance?

RICHARD FANNING: Yes, sir. I have
a little -- thank you. My name is Richard D.
Fanning. I live at 21 Cornelius Way in the

east half of a duplex townhouse in which I propose to build an addition to the east towards the grand junction railroad tracks. I'm requesting relief from the Zoning Ordinance section 8.223 vertical 8 non-conformity. The townhouse development in which I live is known as Linden Park, the planned unit development constructed in 1982 and subsequently re-zoned Residence C-1. The relief sought is to exceed the maximum area permitted to the addition under the section reference. When the addition is completed, my townhouse will fully comply with all Residence C-1 Zoning requirements.

Board members may have noted that my application to sought relief from the second section of the Ordinance. Subsequent review by Mr. Sean O'Grady revealed that such was not necessary. The purpose of building the addition is to allowing me to move the model making equipment and woodworking hobby

machinery from the first floor living and dining room -- dining area of my house to the first floor of the addition and above storage living space perhaps for Home Office when the grand recession ends. Included in my submission I have 27 signatures of my Linden Park neighbors approving my addition.

I would like to present another signature tonight that of the new -- in December homeowners of the other half of my duplex.

CONSTANTINE ALEXANDER: Do you have those? I don't think we have in the file the Petition that was filed by the 21 persons. Do you have it with you?

RICHARD FANNING: Yes, sir.

CONSTANTINE ALEXANDER: We should have it as part of our record, that's why. And while you're at it, the Chair will note we have a letter of support for your Petition from City Councillor Timothy J. Toomey, Jr.

RICHARD FANNING: I don't have it.

CONSTANTINE ALEXANDER: You don't have it? Okay. But your representation is that you have a Petition that was in support. I've seen it on the Board in front of your house.

TAD HEUER: Here it is.

CONSTANTINE ALEXANDER: Here it is. We have it here.

TAD HEUER: We got it.

RICHARD FANNING: Oh, okay. I'm sorry I left it home.

I have the -- my new neighbor moved in in December, also signed the Petition and unfortunately I left that home and I will give that to Mr. O'Grady tomorrow morning.

CONSTANTINE ALEXANDER: Are you have the original occupant of this premises by the way?

RICHARD FANNING: Yes, sir.

CONSTANTINE ALEXANDER: You've been

living there since 1982 when these units were constructed?

RICHARD FANNING: I was the architect.

CONSTANTINE ALEXANDER: Oh, you were?

TAD HEUER: Sean, what's the relief that was being requested that's no longer needed?

SEAN O'GRADY: There was a site for Article 5, 5.31 the idea being that there's an existing non-conformance. Of course that only trips him into Article 8, and he only needs relief from Article 8.22. Well, 8.22.3 says he needs a Variance.

TAD HEUER: Right. So, it's almost assumed in the Article 8. Because it wouldn't be an Article 8 without the Article 5?

SEAN O'GRADY: Yes, the distinction is that the addition itself is wholly

conforming, but because it's to a non-conforming building under Article 5.3 but he doesn't technically need relief from 5.

TAD HEUER: I understand.

CONSTANTINE ALEXANDER: Thank you, sir.

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

(No Response.)

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

As indicated, we have letters of support, of neighborhood support in favor of the relief being sought, and there's nothing in our files that's in opposition. I'll end public testimony.

Questions or comments from members of the Board at this point?

DOUGLAS MYERS: Yes, I have a question.

CONSTANTINE ALEXANDER: Go ahead.

DOUGLAS MYERS: I'm going to hand you a photocopy that I made of the plan, a portion of the plan that appears in the file.

RICHARD FANNING: Yes.

DOUGLAS MYERS: And you'll see that in the file there are two parcels, I take it these are east?

RICHARD FANNING: I'm sorry.

DOUGLAS MYERS: There's no compass.

RICHARD FANNING: This is my half. This is my property. This is the other townhouse.

DOUGLAS MYERS: So the addition is going to be built on --

RICHARD FANNING: Oh, A and B.

DOUGLAS MYERS: -- both A and B?

RICHARD FANNING: This was an original survey when I was going to do it long ago and I didn't have the money. This is one addition. I made this change here so I

wouldn't have a jog for security reasons. But the -- I will submit a when a foundation is poured, I will submit a final.

DOUGLAS MYERS: Regardless of the jog, is the addition going to be built on A and B?

RICHARD FANNING: Yes, it will be one building.

DOUGLAS MYERS: And that's on the side?

RICHARD FANNING: This is where the railroad tracks is, over here.

DOUGLAS MYERS: The road that --

CONSTANTINE ALEXANDER: The road comes -- the street comes along this and makes it right across the front of his house. It turns almost 90 degrees to the left and behind him --

DOUGLAS MYERS: So the railroad tracks are between the Kendall Square garage and your property?

RICHARD FANNING: No, they're on the other side of -- this is just one strip about 20 feet wide which is Kendall Square property. Beyond that is --

DOUGLAS MYERS: Oh, I see.

And I'm going to show you another picture which comes out poorly. You have a color picture in the file which is much clearer, but I'm just trying to get straight in my mind there seems to be on the side where you're going to build the addition, there seems to be a row of trees.

RICHARD FANNING: Yes.

DOUGLAS MYERS: Is that correct?

RICHARD FANNING: That's correct. That's -- those are on my property.

DOUGLAS MYERS: Okay. And could you just for my benefit, could you point to where that row of trees would be located on this other plan?

RICHARD FANNING: Row of trees runs

between this border.

DOUGLAS MYERS: Between the railroad tracks and your property?

RICHARD FANNING: It's on my property.

DOUGLAS MYERS: It's on your property?

RICHARD FANNING: Yes, sir.

CONSTANTINE ALEXANDER: There is sort of a buffer, if you would, from the railroad tracks --

RICHARD FANNING: Yes. See?

TAD HEUER: The addition goes there. Those are the trees.

DOUGLAS MYERS: That's exactly my picture, right. And on the other side of it --

TAD HEUER: Those are the tracks.

DOUGLAS MYERS: The railroad tracks.

RICHARD FANNING: These little

triangles which probably didn't show up, might be more explanatory as to how they look. This is Cornelius Way here. This is page two which is that.

DOUGLAS MYERS: Okay. You've answered my questions. Thank you very much.

RICHARD FANNING: Okay, thank you, sir.

CONSTANTINE ALEXANDER: Further questions from members of the Board?

(No Response.)

CONSTANTINE ALEXANDER: We have two -- I'm trying to tie -- when we grant relief or make a motion to grant relief, we tie it to specific plans so there's no question. And I see one plan here that shows the proposed addition. Another one that shows the proposed addition, it's a different plan. Maybe the same dimensions. Which one do you want -- there's a third one really.

RICHARD FANNING: Whichever one

is -- this may be -- this may be the clearest, sir.

THOMAS SCOTT: There's one with the jog. I think the building goes like this now.

CONSTANTINE ALEXANDER: I think you're right.

SLATER ANDERSON: Were those the same in the plans?

CONSTANTINE ALEXANDER: The setbacks show that, yes.

SLATER ANDERSON: I'm just saying.

RICHARD FANNING: I don't know if that would be.

CONSTANTINE ALEXANDER: We have this in our files, too. It still says ten and a half.

TAD HEUER: Yes, because you're going to the widest point.

CONSTANTINE ALEXANDER: I just want to make sure the plans are consistent.

RICHARD FANNING: If you want to use the survey, that's --

(Discussion over plans).

SLATER ANDERSON: Sean, is the non-conformity because of the --

SEAN O'GRADY: The zero lot setback.

SLATER ANDERSON: All right.

CONSTANTINE ALEXANDER: So I think this is the plan that we're going to tie the relief to, the one with the color picture on the bottom, it does eliminate the jog.

RICHARD FANNING: It clarifies it.

CONSTANTINE ALEXANDER: Okay. And I want to make sure you understand, you can't modify these plans once we approve them unless you come back to this Board. This is it. You're comfortable.

RICHARD FANNING: Let me check my --

CONSTANTINE ALEXANDER: Sure, take your time. This is the one that's key. Okay, you comfortable with that?

RICHARD FANNING: Yes, I'm comfortable.

CONSTANTINE ALEXANDER: The Chair moves that this Board make the following findings:

That a literal enforcement of the provisions of the provisions of the Ordinance would involve a substantial hardship to the Petitioner. Such hardship being that the Petitioner needs additional living space to stay in the structure that he's inhabited for close to 30 years.

That are the hardship is owing to basically the shape of the structure and the nature of this residential development.

That it's a non-conforming structure so that any change to the structure, including with conforming addition to it that's non-conforming structure requires Zoning relief.

And that relief may be granted without

substantial detriment to the public good or nullifying or substantially derogating from the intent or purpose of the Ordinance.

At this regard the Chair would not that this matter has got unanimous community support. That the change is modest in nature. In fact it is, as I said, a conforming addition to a non-conforming structure.

And that also that this structure sit in an area that is bounded by a railroad. So that the impact, if any, on the privacy of neighbors is non-existent really. Unless you consider the railroad your neighbor.

On the basis of these findings, the Chair moves that a Variance be granted to the Petitioner on the grounds that the project proceed in accordance with the dimensions set forth on the plan initialed by the Chair.

All those in favor of granting the Variance please say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Four in favor.

(Heuer, Scott, Anderson, Myers.)

CONSTANTINE ALEXANDER: I'm going to abstain not because I oppose the granting of the relief, but I think the standard that should be applied in this case is not a Variance but a different Special Permit standard under our statute. I think you would have met that if you had applied under that section, so I have no problem with granting you the relief. But I just believe this is not the way to approach the case.

RICHARD FANNING: That means I can go forward?

CONSTANTINE ALEXANDER: You can go forward. That's only my hang up. You don't have to worry about it.

(9:50 p.m.)

(Sitting Members: Constantine Alexander, Tad Heuer, Thomas Scott, Douglas Myers, Slater Anderson.)

CONSTANTINE ALEXANDER: The Chair will call case No. 10054, 29 Bellis Circle. Is there anyone here wishing to be heard on this matter?

KATINA LEODAS: Hi, how are you? Sean told me a couple days ago that there was an error in my original supporting statement.

CONSTANTINE ALEXANDER: Yes.

KATINA LEODAS: I don't know how many of them there were.

CONSTANTINE ALEXANDER: Give it to us, but you'll also cover it in your oral presentation. The floor is yours.

KATINA LEODAS: My name is Katina Leodas as I'm the homeowner of 29 Bellis Circle. This is a single-family home, three stories high, about 150 years old on a very odd shaped lot. But the part -- it's an odd shaped lot in that it goes from Bellis Circle back to the line with Danehy Park. So my backyard basically abuts Danehy Park, and then there's this weird little sliver that's off to the side, but that's not particularly relevant to this.

And when I bought the house seven or eight years ago, it's a house that when you walk into it, it was very charming when I first saw it because it's on various different levels. And actually, when I bought the house, the kitchen had been what I call remuddled many years earlier. And the

kitchen was right at the front door. So you walk in and the first thing you'd see was the dirty dishes in the sink.

CONSTANTINE ALEXANDER: So the solution to that is --

KATINA LEODAS: Yeah, right, indeed. But anyway I decided at some point to sort of flip the house and put the kitchen at the back of the house where there also is a set of sliding glass doors, a very small diminutive little back -- it's not really even a porch. You can put a grill on it or a little table for one. And a lot of light and a beautiful view of Danehy Park. And the dining room is on a -- it's on a completely different level. So I described this in my Petition, there's a lot of hiking up and down stairs with --

CONSTANTINE ALEXANDER: The difference in levels is a couple of stairs.

KATINA LEODAS: No, it's five or six

stairs. And it kind of goes around like that. It's not a grand staircase.

But anyway, unless you're sitting, you know, one or two people or three people at the kitchen counter, if you want to feed more than three, you're down in the dining room and you're going back and forth and back and forth. And I have tried to put a table out on this little deck that's at the same level of the kitchen, and it just doesn't work. You can't, you can't fit enough people at a table. You're constantly banging into the edge of the deck.

So, what I am requesting a Variance to extend -- the back deck, this little back deck has to be rebuilt anyway because it's rotting. And it occurred to me if I was going to replace it, it would be much nicer to make it a little bigger, extend it back slightly over to the side, make a little bit more space there.

CONSTANTINE ALEXANDER: How big will the deck be that you're seeking approval for? I think 12 feet by 16 feet?

KATINA LEODAS: 12 feet by 16 feet exactly.

CONSTANTINE ALEXANDER: Okay. And the same height as the old deck, about four and a half feet from the ground?

KATINA LEODAS: Yes, exactly the same height. In fact, we're going to use the same, you know, support.

CONSTANTINE ALEXANDER: Support.

KATINA LEODAS: Yeah.

CONSTANTINE ALEXANDER: Keep going or is that it?

KATINA LEODAS: I don't know what else there is to say about it.

CONSTANTINE ALEXANDER: Why don't you address what's the hardship? You know, under our Zoning Ordinance --

KATINA LEODAS: I realize that.

CONSTANTINE ALEXANDER: -- to grant you the Variance, we have to make three kinds of findings. And the area you referred to which you forgot to address in your supporting statement is the hardship requirement. Would you do -- orally summarize that for us.

KATINA LEODAS: I think the most honest and direct thing I could say is the logical and practical place to put an expanded deck for family dining, you know, I have kids, grand kids, a lot of people around want to have a meal altogether on the same level where the kitchen is. The obvious place to put that is adjacent to the kitchen.

CONSTANTINE ALEXANDER: Well, let's take that one step. The hardship is you don't have sufficient living space in there for dining purposes for a family who occupies the building, and so you want to solve that problem by creating a deck where you can use,

at least when the weather permits, not now, when the weather permits for living purposes basically.

KATINA LEODAS: Thank you, you put it so much more eloquently than I did.

TAD HEUER: They don't occupy the building.

KATINA LEODAS: They don't occupy the building.

CONSTANTINE ALEXANDER: I thought you said in your application that you had six people living in the structure right now.

KATINA LEODAS: I never said that.

TAD HEUER: They come to the house frequently for meals.

CONSTANTINE ALEXANDER: Oh, I'm sorry. I misunderstood. Thank you for correcting me.

KATINA LEODAS: I'm a single grandma. I have a lot of people coming over to the house all the time. My house is the

center gravity.

CONSTANTINE ALEXANDER: My mistake.

TAD HEUER: I have a --

CONSTANTINE ALEXANDER: Questions from members of the Board at this point or do you want to take public testimony first?

KATINA LEODAS: I guess the other thing I would say is I understand the hardship standard. I would hope that you might look on this, you know, more kindly because I'm not really impacting any -- any other neighbor. I mean, this is going back towards Danehy Park.

CONSTANTINE ALEXANDER: You are impacting one neighbor. The neighbor has consented and sent a letter of approval, but you are affecting that neighbor and whoever occupies the structure after your neighbor departs.

KATINA LEODAS: Which neighbor?
The neighbor to the --

CONSTANTINE ALEXANDER: The one you're going to get too close to the lot line to.

KATINA LEODAS: Oh, yeah.

CONSTANTINE ALEXANDER: Whoever occupies those premises, the current neighbor and future occupant are going to be affected by the deck that you are speaking to build.

KATINA LEODAS: Right, I'm seeking to go four feet.

CONSTANTINE ALEXANDER: You're seeking to go under our Zoning Ordinance, too close to the lot line.

KATINA LEODAS: You're saying on the north side?

CONSTANTINE ALEXANDER: I don't know what side it is. But the side that -- is it the north side?

TAD HEUER: Well, you're going to go into your rear setback and you're going --

CONSTANTINE ALEXANDER: Yes, the rear setback.

KATINA LEODAS: The rear setback is --

CONSTANTINE ALEXANDER: And Danehy Park and who cares?

KATINA LEODAS: A couple raccoons I think.

CONSTANTINE ALEXANDER: Her point is there's no real privacy impact because it's raccoons only back there.

KATINA LEODAS: Right.

CONSTANTINE ALEXANDER: But there is an impact on one of your -- I forget which side -- one of your abutters. I want to be very clear about that.

KATINA LEODAS: Okay.

CONSTANTINE ALEXANDER: It's not a complete case of no harm no foul. The point is with regard to the rear yard.

KATINA LEODAS: Although it is also

difficult -- I mean, we have fences between the properties. It's actually difficult to see. If you're in her house and you look out her window --

CONSTANTINE ALEXANDER: There are noise elements though, too. The fence may protect against visual intrusion of privacy, but if there's a party going on, and all six of you are having a dinner out on the deck, there could be noise that would disturb the people that live in the house next to you. Let's be fair.

KATINA LEODAS: Yeah, okay.

DOUGLAS MYERS: And if I may just add to the Chair's comment, one of the factors that just struck me about your application is that there's a very avowed intention virtually to live on that deck in terms of the frequency of dining and meals and family gatherings and so on, which certainly could contribute to the noise factor.

KATINA LEODAS: I don't think we're a really rowdy family.

DOUGLAS MYERS: Dining involves conversation.

CONSTANTINE ALEXANDER: You're not going to live there for eternity. And we don't know who is going to live their next. And apparently the neighbors who are in support are not going to be there for eternity. The decision we make could have -- may be eternal consequence.

KATINA LEODAS: But my neighbor has been there for eternity.

CONSTANTINE ALEXANDER: But that's why we have to --

THOMAS SCOTT: There's a deck there now, right?

CONSTANTINE ALEXANDER: A porch.

KATINA LEODAS: Yeah, there's small porch there now. And, you know, yeah, we're out there.

SLATER ANDERSON: What's the new dimension. We're going six by 11 to --

CONSTANTINE ALEXANDER: 12 by 16.

DOUGLAS MYERS: 4.5 by 11.

CONSTANTINE ALEXANDER: Four and a half feet off the ground.

TAD HEUER: I have a question. Somewhere in your statement you note that your architect said that the size of the deck that he would recommend is 12, 12 and you propose 12, 16. If 12, 12 fits what he says what you want in terms of what you've asked for, you know, a table you can sit six people around comfortably, why should we be looking at -- why aren't we looking at a 12-foot by 12-foot deck perhaps with your stairs tucked in the corner near the existing tree on the right side of the property line as opposed to a much larger deck that's 12 by 16? I understand that, you know, people want the largest deck you can get, but if you're

architect himself says 12, 12, is there any reason we shouldn't be looking at 12, 12?

KATINA LEODAS: I mean, it's for me it's not so much that I want the biggest deck I can get as that, I thought -- I think that it's -- it's more aesthetic. And the only thing that I thought of, you know, one way that I've thought to limit, limit my coming out towards the back, towards the line with Danehy Park is conceivably I was thinking what if we could put this -- specifically put this stairway here which adds another what, three feet or something. What if we put the stairway going down here? And the problem with that is it interferes with this seating area. I'm thinking of this as over here as the seating area. But then suddenly you couldn't have this as the seating area because we need to have an opening here for the stairway. Do you follow what I'm saying? I don't think I'm describing it very well.

So the stairway here, I had thought okay so what if we don't -- these extra three feet out, what if we put the stairway here and somehow kind of link this with that.

TAD HEUER: Yes.

KATINA LEODAS: It's not easy. It's not an easy thing to do.

TAD HEUER: Is this the egress out onto the porch is the only egress out?

KATINA LEODAS: Yes.

CONSTANTINE ALEXANDER: Those are the stairs.

TAD HEUER: Yes, but from the house?

KATINA LEODAS: From the house this is the only way out onto this deck.

TAD HEUER: So my question is --

KATINA LEODAS: Do I even need a staircase?

TAD HEUER: No, you do need a staircase. That if your egress is essentially here I'm betting, down in the

middle of the existing deck, if your stairs were -- if you're going to already move towards your property line, you're at six feet and you're going to be moving to two feet, if you put your stairway here, that gives you a deck that's 12-by-12 which is what your own filing suggests is a good size, brings you in here. You're not intruding that much further, and you have a reasonably sized deck that is more conforming to the non-conformities than what you've got here.

KATINA LEODAS: The problem with the deck over here is this is a very kind of -- this is just a very sort of -- this big tree over here. It's a very funky space. You have to kind of go around -- and you have to kind of like go underneath the bows of the tree over here. This is a big fir tree. I'd have to cut this way back to get around here to just kind of --

TAD HEUER: You're saying a fir tree

here is not a fir tree on the property?

SLATER ANDERSON: It hangs low.

KATINA LEODAS: It hangs low. It hangs low and you have to kind of go underneath it. And it's also very fast growing. This tree is probably doubled in size since I bought the house seven years ago. So you have to kind of get underneath it here.

And the other thing is one of the reasons to put the staircase either here or over here is that, you know, there's a whole other yard here. The yard goes out this way. And so it's kind of like having to go all the way around the mulberry bush to get to where anything else is happening in the yard. I mean, if it's -- if it's really an issue, I'd cut the deck there or even just expand it out here. I'd compromise and --

CONSTANTINE ALEXANDER: I for one would like it --

TAD HEUER: I prefer it heading out

towards Danehy Park where there's no one, rather than four feet into the other person's property.

KATINA LEODAS: Rather than --

TAD HEUER: If you're going to invade one setback or the other, I'd prefer to be invading the rear setback where there's no one to run into then you're already close side setback where there is someone.

SLATER ANDERSON: What's the rear setback? Is it 20 there?

TAD HEUER: It's 20, but it goes out into infinity. You run into the bike path and then the park. There's a fence back here, right?

KATINA LEODAS: I mean the other reason why I wanted this was an aesthetic one. Which is you've got the sliding glass doors here. And if I could put the grill here, then it's not the first thing that you see when you look out glass doors is oh, the grill, which

is sort of what I've got right now. That's where the grill is, that's the only thing you'd see. I thought I could tuck it over here a little bit. But I could -- what if I came out just enough to sort of tuck it over here?

THOMAS SCOTT: Even if you bring this line straight back --

KATINA LEODAS: Yeah.

THOMAS SCOTT: -- you're still going to have a little bit of a recess here.

KATINA LEODAS: I still have a little bit of recess.

THOMAS SCOTT: (Inaudible.) And you eliminate all this which still.

KATINA LEODAS: And I'm certainly willing to look at the possibility of putting this -- instead of putting a staircase here, putting it here. But, you know, this might work.

TAD HEUER: Well, if it were a moving

a stair thing, we wouldn't be able to do that tonight. We'd have to come back.

KATINA LEODAS: Right. You would prefer to leave this here and come over here?

TAD HEUER: If we made this flush to this edge line here which I think would give you enough room to put a grill over here, it would minimize the intrusion into your side lot line. I think that I would be willing --

CONSTANTINE ALEXANDER: I agree with you.

TAD HEUER: That's just me.

CONSTANTINE ALEXANDER: No, it's me too.

SLATER ANDERSON: Does the existing deck have a stair now from it?

KATINA LEODAS: No. It's miserable. We hop off over the edge.

CONSTANTINE ALEXANDER: We have to modify this plan right now.

Is there anyone wishing to be heard on

this matter?

(No Response.)

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

We have letters of support from two of your neighbors that you submitted to the file. They'll be part of our record. We'll give Mr. Scott a little bit more time to modify your plans and show them to you.

If we grant relief, it would be on the basis that you have to build on the basis of those plans.

KATINA LEODAS: Yes.

CONSTANTINE ALEXANDER: If you're satisfied. If you're not, if you want to think about it some more, we'll continue the case to another day.

KATINA LEODAS: No, I'm sure we can live with it.

CONSTANTINE ALEXANDER: Okay. We agree with you on that. I just wanted to make

sure you know your rights.

KATINA LEODAS: And do I need to pull a permit to do this?

CONSTANTINE ALEXANDER: Oh, yes. And then the Building Department will make sure that when you build the deck, it conforms to the plans that we're going to approve as modified. That's what this is all about.

THOMAS SCOTT: Here you go.

CONSTANTINE ALEXANDER: The deck would be here.

KATINA LEODAS: Sure.

(Discussion over plans.)

KATINA LEODAS: How many feet have I lost?

CONSTANTINE ALEXANDER: 3.2 feet.

KATINA LEODAS: So how many square foot did I lose altogether?

SLATER ANDERSON: 36 square feet. You still have 144 plus. And you had 66.

CONSTANTINE ALEXANDER: I think

we're ready for a motion.

The Chair moves that this Board make the following findings:

That a literal enforcement of the provisions of the provisions of the Ordinance would involve a substantial hardship to the Petitioner. Such hardship being is that the structure as currently configured is not amendable to a habitable use and is insufficient in terms of size. That the hardship is owing to the fact of the nature of the structure. That cannot be modified without some Zoning relief given the nature of the neighborhood and the location of the structure on the lot.

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

In this regard the Chair would note that this Petition has the support of those

neighbors most directly affected.

That to the extent that there are setback intrusion which is why relief is being sought, most of that setback intrusion involves property that abuts Danehy Park and so privacy issues, at least to people to the rear of your structure, is non-existent and that otherwise -- well, I'll stop right there.

On the basis of these findings the Chair moves that a Variance be granted on the condition that the work proceed in accordance with the plans initialed by the Chair, submitted by the Petitioner and approved by the Petitioner at this hearing as modified by this Board. I have initialed the page that it also is -- I'm looking for a date. I don't see a date on here. The deck detail one page in nature. Initialed by the Chair.

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

(Aye.)

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

KATINA LEODAS: Thank you very much.
(Alexander, Heuer, Scott, Myers, Anderson.)

(10:10 p.m.)

(Sitting Members: Constantine Alexander, Tad Heuer, Thomas Scott, Douglas Myers, Slater Anderson.)

CONSTANTINE ALEXANDER: The Chair will call case No. 10055, 16 Fairfield Street. Is there anyone here wishing to be heard on this matter?

ATTORNEY JAMES RAFFERTY: Good evening, Mr. Chair, members of the Board, James Rafferty on behalf of the Applicants. Seated to my left Margherita Hull, M-a-r-g-h-e-r-i-t-a H-u-l-l. And Ms. Hull's architect is to my far left, John Altobello, A-l-t-o-b-e-l-l-o.

CONSTANTINE ALEXANDER: Just to

be -- and I think you're going to discuss it, to be very clear all we're going to decide tonight is whether this is a repetitive Petition. We're not going to get into the merits of what you're proposing except to the extent it relates to whether it's a repetitive petition. Should we grant relief, i.e. determinative it is not a repetitive petition, than this matter has got to go back before the Planning Board. And then if they agree with our decision, it come back before us and we'll then review on the merits the plans that are being proposed. Just to be clear, and also for the members of the audience who might have an interest in this case.

TAD HEUER: By that time it might be two years and you only have a --

CONSTANTINE ALEXANDER: I'm going to point that out, but you beat me to it.

ATTORNEY JAMES RAFFERTY: Well,

thank you, Mr. Chair, and that is correct. The Petitioner was before the Board in July I believe of 2009. So approximately six months ago. And the timing isn't arbitrary. It is understood that at the time her application for Special Permit to enclose her front porch was not approved, and she took to heart the comments of the Board and we did talk about the nature of the repetitive petition. The enclosure at the time looked like this (indicating). This is the application that some board members tonight have sat on that case. I don't know if the file was pulled. But what we did was we got a copy of the transcript of that hearing to try to understand some of the concerns. Mr. Scott sat on that case and he expressed appreciation for the bay windows on the existing house which are a nice design feature not typically found on three families of this genre. I would suggest, two families

rather. So picking up on that and trying to look at a different massing impact, because there was comment about the change in massing that would occur here, Mr. Altobello came up with a design that's different in several respects. And we're now speaking to the material nature of the change. Before it went completely across the front of the house and really represented just a wall being added and two open porches. If you look at the site plan, you'll see there's also interesting change, there's actually less mass in this design. The stairs have been pulled in closer to the property. The property is approximately 11 feet. The wall of the porch is 11 feet from the front. But by adopting the bay window, bay front style, actually clips the mass here, removes the mass here and sets the porch back in this new design.

CONSTANTINE ALEXANDER: And that

reduces the footage by 100 feet.

ATTORNEY JAMES RAFFERTY: Exactly. There's actually reduction in GFA. So without spending a lot of time on the merits as to why we think it's good, I understand the issue before the Board tonight is does this proposed change represent a sufficient -- according to the findings -- that's specific and material changes in the conditions upon which the previous unfavorable action was based? Do they exist in this design? Mr. Altobello has a finer ability to describe the changes, but it's largely his review of the prior submission, his review of the transcript, and this massing design that allows us to come forward asserting that we believe that these are material changes and we hope the Board would allow us the opportunity to proceed at this time as opposed to having to wait six months and perhaps lose the construction

season.

It is a Special Permit case as I noted. Often times these cases involve Variances. This is a Special Permit case, and Ms. Hull would welcome the opportunity to have a full hearing of this design at a later time if the Board was able to reach the conclusion tonight that the material change is necessary and present in this application.

CONSTANTINE ALEXANDER: I have one question that is relevant to what you're talking about. The dimensional form, the one you submitted this time, or your client did, has different numbers and relevant numbers than the numbers that were in the dimensional form we saw the last time. For example, and more specifically the front yard setback, the first time around you said it was going to be six feet. You're now six feet from the street line. And you're going to stay at six feet. Now it's eight feet and

you're going to stay at eight feet. What is it? How close are you to the street? What is your front yard setback?

ATTORNEY JAMES RAFFERTY: I understand it's 11 feet.

JOHN ALTOBELLO: No. He's speaking of the -- to the actual front porch is -- I had a dimension of eight feet based on the site plan. I know that's different from what the previous designer presented, but my assessment is that it's eight feet.

CONSTANTINE ALEXANDER: But you're not going to --

JOHN ALTOBELLO: We're not changing.

CONSTANTINE ALEXANDER: That's what I'm trying to get that out because it's different numbers.

JOHN ALTOBELLO: No. It respects the existing setback.

CONSTANTINE ALEXANDER: You also

have a much -- this time around you have much higher gross floor area than the last time around, more than 200 feet, the structure itself.

JOHN ALTOBELLO: Less, less, less.

CONSTANTINE ALEXANDER: Well, let's see. This time you're saying that you currently have now 4,975 feet and you'll go to 4,873 if we allow relief. The last time it was represented to this Board that the structure had gross floor area of 4,759 feet which would not change.

JOHN ALTOBELLO: My calculation was that the --

CONSTANTINE ALEXANDER: So you recalculated, you're not the architect from before and you believe these are the correct dimensions?

JOHN ALTOBELLO: Yes, I do. And what I'm stating is that what we are requesting is less gross floor footage --

CONSTANTINE ALEXANDER: That's why you think it's the material change?

JOHN ALTOBELLO: Definitely.

ATTORNEY JAMES RAFFERTY: But in fairness, we did essentially with Mr. Altobello go back to square run and not merely rely on the prior submission.

CONSTANTINE ALEXANDER: That's obvious.

ATTORNEY JAMES RAFFERTY: And to the extent that there's some inconsistencies, it's Mr. Altobello's opinion that his finding is frankly more accurate. So he wasn't able to -- he didn't land in the same place. And I think it's a reflection of the earnestness of his work. That the easier thing would simply be to adopt someone else's, but Mr. Altobello made it clear he would have to make his own measurements to work with the project.

CONSTANTINE ALEXANDER: Thank you.

TAD HEUER: Thank you.

CONSTANTINE ALEXANDER: Yes, we like to have correct dimensions.

Anything further, Mr. Rafferty?

ATTORNEY JAMES RAFFERTY: Nothing.

CONSTANTINE ALEXANDER: Is there anyone wishing to be heard in this matter? Again, we're not talking about whether this is going to be allowed. Whether this is a different -- whether material conditions are different from the last time. Your name and address, sir.

PETER KIM: Yes, sure.

My name is Peter Kim. I live at 37 Fairfield Street. I'm the neighbor down the street. You know, I've seen the original plans, and I have seen the new plans. And I believe these to be substantially and materially different in nature, you know. As to the merits of it I will say a piece at another time. I own a three-family and a

four-family and I find that anything that makes these properties more liveable for a family to live in and to be able to rent out and maintains these properties as rental units which I believe adds to the character of the neighborhood, and as for the actual suggested changes, our street is a reflective mix of various kinds of housing, and I find that the suggested changes fitted very well with the nature.

CONSTANTINE ALEXANDER: You're getting into the merits.

PETER KIM: Okay.

CONSTANTINE ALEXANDER: Anyone else wishing to be heard?

(No Response.)

CONSTANTINE ALEXANDER: I don't think there are anything in four files that address this issue.

ATTORNEY JAMES RAFFERTY: There are. With all due respect, I think there

were two letters. One from a Joyce Gerber. And another from a Jeremy Gould both on Fairfield Street that speak directly to the issue of before the Board this evening.

Do you have Mr. Gould's letter?

CONSTANTINE ALEXANDER: I do. It wasn't in the file two days ago when I looked at it. So I'm looking at it quickly. And they are in support.

ATTORNEY JAMES RAFFERTY: The notion that these are substantially different. And there is a third letter to the effect -- oh, there's also a letter from Katalina.

CONSTANTINE ALEXANDER: The letter will speak for itself.

ATTORNEY JAMES RAFFERTY: Okay. We thought that was in the file as well. It's expressing the view that there is a material change from the prior submission.

CONSTANTINE ALEXANDER: Is there

anyone else wishing to be heard on this matter?

(No Response.)

CONSTANTINE ALEXANDER: The Chair notes no one else wishes to be heard. You're all finished I think you said?

Any comments, questions from members of the Board?

TAD HEUER: So just so I know my standard here, your -- and I guess part of my question is I see the GFA goes down. Most of the GFA that's going down is in what was previously a porch, right?

ATTORNEY JAMES RAFFERTY: Yes.

TAD HEUER: Okay. And the issue from reading the transcript, because I didn't sit on the first case, was massing. Is a reduction in this porch or not that porch really -- does that factor into what we do because that was what we were tasked with almost keeping in a sense under the Ordinance

because you're asking for a Special Permit to fill that in. So the fact that it disappears versus the fact that it was going to stay as a porch, do I think about that GFA that's being removed differently because it seems to be kind of immaterial to the question that we're talking about which is the massing over here on the right side, and that massing only changes by these triangle cutouts. So, and not to say that it isn't a much better design, because I personally think it is and that goes to merits. But can I really think about that change of GFA as impacting this project because it doesn't really affect the massing issue which is really happening on the right side.

THOMAS SCOTT: I would disagree with that.

CONSTANTINE ALEXANDER: I would disagree too.

ATTORNEY JAMES RAFFERTY: I would

strongly say that it's a change. How much weight you want to attribute to it is left to yourself. But what the Board, minusing the Board's role at this juncture, is there are a variety of changes to this. And the question is whether or not -- that included, I'm not suggesting it's dispositive to the larger question about the Special Permit, but do those changes, including a changed entry, a recessed stair, a removal as opposed to this massing question?

CONSTANTINE ALEXANDER: Let me --

TAD HEUER: But the projects not necessarily the massing of the item that was of concern to the Board in the previous case, right?

ATTORNEY JAMES RAFFERTY: Well, I mean --

TAD HEUER: Overall change of the facade.

ATTORNEY JAMES RAFFERTY: Well,

there was one Board member that voted for it.

CONSTANTINE ALEXANDER: Two.

ATTORNEY JAMES RAFFERTY: Two, right. I think if we were to go one Board member at a time --

TAD HEUER: Right.

CONSTANTINE ALEXANDER: Let me, if I can commented on it. I don't mean to put words in your mouth. Your position essentially is that it is a -- you meet the standard of material, a specific and material changes in two respects. The issue before the Board that caused the Petition to be turned down last time was massing. Too much massing was in front of the house. You're addressing that massing with new plans:

One, by reducing the amount of the massing, a hundred square feet.

And two, by redesigning the rest of the addition to have a less aesthetic impact, yet massing to the extent that it's there, same

amount of space, less a hundred feet, is less obtrusive to the street front by virtue of the redesign. And that is why you have specific material change. We may not agree with you when we get to the merits, assuming that we do it, but that's why you see it as not as a repetitive petition. You've addressed the massing issue in a different way and it's up to us to decide whether we think we agree with you. Although we think -- I would agree with you that you have done it in a way that avoids a repetitive petition and deserves another hearing on the merits.

ATTORNEY JAMES RAFFERTY: I gladly welcome the placing of those words in my mouth. Thank you, Mr. Chairman. I do think that's the issue. And it's also if we were to go to comments, one board member specifically the loss of the bay front architecture feature, and that is in this -- that feature didn't exist. The

massing aside that feature simply was lost in this design.

TAD HEUER: I think I agree. I think it's probably only a more legal problem than anything else. I still think the issue that I would grant a non-repetitive nature on is that the entire project front has changed. I think the mass has always been on the right side, and I don't think that the -- creating the bay is necessarily a material change on the issue of massing that would make it a material change in the project. I think that in conjunction with other things being built to the porch, changing the entire facade leads it more into a material change to the previous application, but not necessarily -- I wouldn't say the massing alone being changed by making the corners and making them both run would be sufficient to get you over the hurdle even though, as I said, I think it's a better plan.

THOMAS SCOTT: And I would disagree with that just because a minor change like that in an architectural aesthetic can have a major impact. We're going to two windows to three windows. You know, by cutting the massing back you're just creating a softer front architecturally more appealing. And I don't want to get into the merits of the case either, but I think it is changed substantially.

CONSTANTINE ALEXANDER: I think we're ready for a motion. Doug, do you have any comments?

DOUGLAS MYERS: No questions.

CONSTANTINE ALEXANDER: The Chair moves that based upon the plans submitted with this Petition that there are specific and material changes in the conditions upon which the previous unfavorable action was based, and, therefore, that what is being proposed is not a repetitive petition under

Section 10.51.

So on this basis the Chair would move that we adopt the motion that I just made, that this is not a repetitive Petition, and I'll address the rest of it later on.

All those in favor of holding that this is not a repetitive petition, please say "Aye."

TAD HEUER: Do we need to make findings so the Planning Board know --

CONSTANTINE ALEXANDER: I think I did in the context of our minutes. In the comments that I made or Tom made. If you want me to put it in the decision, I can do it. When you write the decision, Sean --

SEAN O'GRADY: Would you actually throw it into the finding, because they actually talk about that being in writing?

ATTORNEY JAMES RAFFERTY: But I think procedurally we don't see a decision at this stage.

CONSTANTINE ALEXANDER: You do see a decision on the repetitive petition. I think we sort of bifurcate. You have to make a decision.

ATTORNEY JAMES RAFFERTY: I don't think it's subject to appeal. I don't think it gets recorded in the --

CONSTANTINE ALEXANDER: That may be right.

ATTORNEY JAMES RAFFERTY: It's a single BZA case, so I think what will happen when I've done this in the past, is that there will be a transmittal -- a communication that will go to the Planning Board indicating such a finding has been made, it may include a transcript or whatever. At the end of the day my practice is it's a single decision that will get issued here.

CONSTANTINE ALEXANDER: So, I think that's right. That is sufficient to give the transcript to the Planning Board, they'll

have all the commentary.

SEAN O'GRADY: Yes. It's easier for me.

CONSTANTINE ALEXANDER: How long -- this is not necessarily relevant, but what's the timing to going to the Planning Board and how much will that timing be for the need to wait for a transcript?

ATTORNEY JAMES RAFFERTY: Not long. They're hard working. They meet twice a month.

CONSTANTINE ALEXANDER: But not in March.

ATTORNEY JAMES RAFFERTY: They do. We would -- I've already talked to the Planning Board. And they -- what the Planning does is they put this on their general business agenda. So there's not an advertising, and you can get on the general business agenda within a week of the hearing.

SEAN O'GRADY: Jim, if I may, I think

C actually is going to require some sort of advertising.

ATTORNEY JAMES RAFFERTY: Well, this isn't our first road, you know, however to do it.

SEAN O'GRADY: I mean, I don't worry about what they're doing, but just on that issue.

ATTORNEY JAMES RAFFERTY: I think that notice was satisfied with tonight's hearing. The Planning Board agenda, they don't -- they don't re-mail to abutters is my point. In my experience this appears --

SEAN O'GRADY: I guess I'm just pointing out that if you read C, it says "The proceedings." And I would suggest that that probably is the Planning Board also and that C would seem to indicate that notice would be required.

ATTORNEY JAMES RAFFERTY: I would presume that the Planning Board will comply

with the requirements of the Ordinance as they see fit.

CONSTANTINE ALEXANDER: The issue only comes up do we need to expand the decision tonight to include the reasons or whether the supplying of the transcript is sufficient?

TAD HEUER: Or do you wish us to do so for the ease of the Planning Board? Or do you not want us to make that effort and let our words speak for themselves?

CONSTANTINE ALEXANDER: That's the question.

ATTORNEY JAMES RAFFERTY: I think your words are fine. At the risk -- I wouldn't want to disappoint. I've done a few of these at the Planning Board. They generally spend --

CONSTANTINE ALEXANDER: About 30 seconds.

ATTORNEY JAMES RAFFERTY: Closer to

60. I think there's great deference shown to the BZA. They've never seen -- frankly, they wonder aloud what are we doing and why is before us? We've never seen this. We don't understand it. The people that saw it last time say it's different. What is it that we're supposed to do? And I generally say --

DOUGLAS MYERS: And you tell them.

ATTORNEY JAMES RAFFERTY: I tell them well, I don't necessarily agree with this interpretation of the statute, but that's a whole other thing.

So my point is I appreciate that. I think the transcript is more than adequate for the level of information that they typically receive in the amount of time they spend in deliberation of this. They do show great deference to the fact that this is the body. I mean, they know very little obviously about the prior case and this case and they don't see any level of detail. So.

CONSTANTINE ALEXANDER: Then Mr. Rafferty is satisfied and other members of the Board is satisfied, I think my motion will stand as proposed.

DOUGLAS MYERS: The vote on your motion is majority?

ATTORNEY JAMES RAFFERTY: No, four out of the five.

CONSTANTINE ALEXANDER: Four out of five, yes. Technically the same vote it would be to grant the relief ultimately.

SEAN O'GRADY: It may be three out of five.

ATTORNEY JAMES RAFFERTY: No, it says in Section A here, four out of five.

CONSTANTINE ALEXANDER: All those in favor of approving the motion I just made say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. It's not a repetitive petition.

(Alexander, Heuer, Scott, Myers, Anderson.)

CONSTANTINE ALEXANDER: Now, I guess we have to continue --

ATTORNEY JAMES RAFFERTY: You give us the continued date.

CONSTANTINE ALEXANDER: As a case heard.

TAD HEUER: It's one case.

ATTORNEY JAMES RAFFERTY: Right, right.

CONSTANTINE ALEXANDER: So, and I know you want to move quickly. April 14th?

ATTORNEY JAMES RAFFERTY: Now you're going to tell me we have too many continued cases.

SEAN O'GRADY: You now have three continued cases on April 14th. This will be the fourth.

CONSTANTINE ALEXANDER: That's okay.

ATTORNEY JAMES RAFFERTY: If we go with four could we go on the 17th?

SEAN O'GRADY: Just to be clear, this is the fourth case on the 14th.

ATTORNEY JAMES RAFFERTY: It will be four on either night.

CONSTANTINE ALEXANDER: First of all, can everybody be here the 17th? St. Patrick's Day -- March 17th can everybody be here for that?

ATTORNEY JAMES RAFFERTY: I think the notion is if you're going to do four -- either way you're going to end up with four continuances.

SEAN O'GRADY: And a filing and another filing on the other case.

ATTORNEY JAMES RAFFERTY: What other case?

SEAN O'GRADY: The filing on the Lakeview case.

CONSTANTINE ALEXANDER: The one we

made you continue to the 17th and you were threatening us you were going to re-file.

ATTORNEY JAMES RAFFERTY: No, but there could be a whole bunch of cases coming on the 17th.

CONSTANTINE ALEXANDER: That's exactly right. We don't know what's going to happen on the 17th. We're not going to hear any more continued cases.

ATTORNEY JAMES RAFFERTY: But you're in the exact same position on both dates with the amount of continued cases. So, if a date is going to take four --

TAD HEUER: Well, unless you re-file for a regular agenda on March 17th, then you free up that space on the 14th that you would otherwise be taking with the continued case it would be resolved on the 17th.

ATTORNEY JAMES RAFFERTY: Yes.

DOUGLAS MYERS: April.

CONSTANTINE ALEXANDER: March 17th

going once, going twice, three times.

The Chair moves that this case be continued as a case heard until seven p.m. on March 17th on the condition that -- I guess we do need a waiver of time for a decision. On the further condition -- you probably do.

ATTORNEY JAMES RAFFERTY: Why not?

CONSTANTINE ALEXANDER: Why not?

Exactly.

On the condition that the sign that's on the premises be continued to be maintained but you've got to change the date and time to seven p.m. on March 17th. And on the further, I guess just noting, that to the extent you modify your plans further, you decide to modify from what's in the files now, make sure they're in the files no later than five p.m. on the Monday before March 17th. If you don't do that and you modify the plans, we're not going to hear the case.

All those in favor of continuing the

case on that basis say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. I guess we'll see on 17th unless the Planning Board decides it's repetitive petition, we won't see you on the 17th.

ATTORNEY JAMES RAFFERTY: Thank you very much. Have a good evening.

(Alexander, Heuer, Scott, Anderson, Myers.)

(10:30 p.m.)

(Sitting Members: Constantine Alexander,
Tad Heuer, Thomas Scott, Douglas Myers,
Slater Anderson.)

CONSTANTINE ALEXANDER: The Chair
will call case No. 10056, 1686 Mass. Ave. Is
there anyone here wishing to be heard on this
matter?

ATTORNEY DONATOS LALLOS: Good
evening, Mr. Chairman and the Board. I
represent Mr. Michael Stamatakis. As I
indicated, I'm the attorney for
Mrs. Stamatakis. This is a petition to

relocate a pizza shop from what currently is 1706 Mass. Avenue to 1686 Mass. Avenue. The name of the business is Harvard House of Pizza. It has been in business for approximately 30 years in the operation, control of my client. It has been more from a prior owner of the business.

CONSTANTINE ALEXANDER: It used to be Leaning Tower of Pizza. When I was in law school, that was the name of that business.

ATTORNEY DONATOS LALLOS: I was not aware of that.

The situation is my client has been renting this property since 1973. Excuse me, 1973 prior owner. He's been renting it since 1983. The property in question is 1706 Mass. Avenue. Mr. Stamatakis has about -- in about 1991 purchased 1686 Mass. Avenue. He has been paying mortgage on that property. He has been keeping it up. There's some residential property on top of

it. There's been no problems with the tenants. Everybody's happy, including the current tenant in that particular location. He was very understanding of the situation that Mrs. Stamatakis is in.

The problem that Mr. Stamatakis finds himself at this time is that because of the economic situation, there's been detraction in business, less business, more costs, the costs keep increasing. The problem -- the No. 1 problem with cost is he's a tenant at 1706 Mass. Avenue and unfortunately the current landlord has been raising the rent on a frequent basis, and it's reached a point where as a tenant at will he cannot at this point in time continue to operate his business and stay in business with the detraction in business and the increase in cost, specifically the rent.

CONSTANTINE ALEXANDER: Excuse me. But the issue before us whether we grant a use

variance at 1686. Why should we -- what's the basis of granting the use variance?

ATTORNEY DONATOS LALLOS: The use variance says that this location of 1686 is within six stores of the current location. That it's --

CONSTANTINE ALEXANDER: Is the current location a non-conforming use?

ATTORNEY DONATOS LALLOS: I don't believe so. I believe it's a conforming use.

CONSTANTINE ALEXANDER: Six doors down is zoned for --

ATTORNEY DONATOS LALLOS: Yes.

TAD HEUER: (Inaudible.)

CONSTANTINE ALEXANDER: No, no. I don't think any -- I thought it was prohibited even down where you are now. I think I'm wrong.

ATTORNEY DONATOS LALLOS: To the best of our knowledge --

CONSTANTINE ALEXANDER: Anyway,

keep going.

ATTORNEY DONATOS LALLOS: -- it's a gone forming use.

And the location that it's going to be moved to the proposed location if the Petitioner were to be allowed is within the six doors. My client has operated that business in conformity with the neighborhood, that has had no problems whatsoever with anybody ever making any complaints. He's been on a good relationship with all the abutters. And in fact, there's been people that have indicated that he should move to the location of the property that he owns.

CONSTANTINE ALEXANDER: The new location has a bigger --

ATTORNEY DONATOS LALLOS: It does.

CONSTANTINE ALEXANDER: More seating?

ATTORNEY DONATOS LALLOS: More

seating. It will have more seating than the current location. It will have a better -- he would have better control over the maintenance and control of the building because in fact he owns the building. There will be no change in the front of the building. It will be strictly on the inside of the building, which again, as the Chairman has asked, it will seat more people. It will have modern interior. Modern kitchen. Modern ovens that will be placed in this particular new location.

There are other restaurants in that particular area, and the fact is once he were to move, we would assume that there would be no other pizza shop or a fast food in that particular location that he would be vacating. So there's --

CONSTANTINE ALEXANDER: How do you know that?

ATTORNEY DONATOS LALLOS: At this

point in time we believe there will be no other store, no other restaurant going in that location.

CONSTANTINE ALEXANDER: I want to go back to a point. You've said there's been no complaints by neighbors about trash or noise --

ATTORNEY DONATOS LALLOS: No.

CONSTANTINE ALEXANDER: -- from where you are now?

ATTORNEY DONATOS LALLOS: No. There's been no violation notices. There's been no complaints. There's been no proceedings civilly or criminally.

CONSTANTINE ALEXANDER: I'm not worried about that. I'm more focused on whether there have been complaints -- I understand there's no criminal.... but no complaints.

ATTORNEY DONATOS LALLOS: No complaints.

CONSTANTINE ALEXANDER: So the hardship is what? What are the circumstances?

ATTORNEY DONATOS LALLOS: The special circumstances that we believe if we are able to relocate, it would create a better atmosphere for the business, create more seating capacity for the particular location, and also assist my client in maintaining that property based on the fact that there's limited, his income has been decreasing while in fact the property value has been increasing. The tax has been increasing. The cost have been increasing. But more specifically he's been put in a situation where not controlling the ability for the rent that's required, he's having difficulty maintaining the business. It's been in business for a long period of time. It's been a good business. He would like to continue to be able to stay in business, and

we feel that this particular situation would increase his business. And the fact that there would be more room, he could satisfy the clientele that he's had for an extensive period of time. They've indicated that they would prefer that there would be a better facility for them to be able to enjoy what they believe is a good tasty meal for a reasonable price that has been provided to the neighborhood.

CONSTANTINE ALEXANDER: Is there anyone here wishing to be heard on this matter? Okay. One at a time. Mr. Patel.

BUTEPASH PATEL: I just have a letter from approximately 20 neighbors. I'm just going to read it. Is that okay?

CONSTANTINE ALEXANDER: Okay. I'm sorry, give your full name for the stenographer.

BUTEPASH PATEL: It's Butepash Patel, resident at Three Bowdoin Street. I

reference to the change of use for a --

CONSTANTINE ALEXANDER: I'm sorry, want to start again, please, a little slower?

BUTEPASH PATEL: Sure.

In reference in change of the use for (inaudible) a restaurant, specifically the Harvard House of Pizza, 1686 Mass. Ave. We all enjoy the Harvard House of Pizza and consider it one of our neighborhood pizza places. Generally we support the preservation of the local pizza vendor. The owners of the Harvard House of Pizza are motivated to move from the present space from 1706 which they rent, to 1686 which is a retail space in a building they own. However, there are several ongoing problems we are presently in the process of resolving with the existing neighboring restaurants and grocery store. These problems are clearly detrimental for the residents and are epidemic and unacceptable. Most owners also

have tenants as there are nine, two-family homes on the lower Bowdoin, which is the street directly behind the restaurant.

UNIDENTIFIED FEMALE: Could you speak up a little louder, please, I'm sorry?

BUTEPASH PATEL: Sure.

UNIDENTIFIED FEMALE: Thank you.

BUTEPASH PATEL: These tenants have also raised the same problems at the existing three restaurants and grocery store, even resulting with one tenant walking out on a lease. So I'll show you --

TAD HEUER: So that's Evergreen and who else?

BUTEPASH PATEL: Path say it again?

TAD HEUER: Who are the three restaurants?

BUTEPASH PATEL: There's Rafiki, and Westside Lounge.

TAD HEUER: Temple Bar?

BUTEPASH PATEL: Temple Bar. And

this is going to be them going in. And there's a Starbucks over here and the wrap around place, the ice cream place. I can never remember the name of it.

TAD HEUER: Berry Line?

BUTEPASH PATEL: There you go.

TAD HEUER: They would take issue that they are a yogurt.

CONSTANTINE ALEXANDER: That's right.

BUTEPASH PATEL: Tastes like ice cream.

The abutting restaurants, including Temple Bar, Rafiki, Westside Lounge and the Evergreen Grocery Store are in the process of resolving the issues with Temple Bar, Rafiki, Westside Lounge and Evergreen.

Obviously we feel that the Harvard House of Pizza as a fourth restaurant could possibly repeat the same issues and further exacerbate the problems. The conditions we

firmly request to be met are listed below. And the most frequent listed first and the least frequent listed last. I won't read through each one --

CONSTANTINE ALEXANDER: How many are there?

BUTEPASH PATEL: There's just six.

CONSTANTINE ALEXANDER: So you're asking us to -- you're not opposed to relief, but you're asking if we do grant relief, that we impose the conditions that you've listed on there?

BUTEPASH PATEL: Yes. Which is the same conditions we're trying to work out with the other restaurants.

CONSTANTINE ALEXANDER: Has the Petitioner seen the list?

BUTEPASH PATEL: He's seen a shorter version of it two years ago when -- I don't know if they actually went in at the: Licensing I think is what it was. That's

what this letter is based on to some extent.

CONSTANTINE ALEXANDER: It's a little bit -- my only reason I ask that if we're going to think about putting conditions, he hasn't had a chance to consider them or, you know, oppose them, support them, modify them.

BUTEPASH PATEL: That's true.

CONSTANTINE ALEXANDER: It's a little bit -- I mean, why wasn't this given to the Petitioner before tonight is what I'm trying to say?

BUTEPASH PATEL: Mainly just because it took this long to get everyone to agree to the conditions, write it up more than anything else.

The employees never and enter and exit from the rear door, loiter or smoke in rear.

CONSTANTINE ALEXANDER: Are you reading from the conditions now?

BUTEPASH PATEL: That's No. 1.

CONSTANTINE ALEXANDER: What's it again, please?

BUTEPASH PATEL: The employees never enter and exit from rear, loiter and/or smoke from rear. It's basically the back of the property.

CONSTANTINE ALEXANDER: Yes, I follow. I just question whether it's an appropriate condition for Zoning to grant Variance, that's all.

TAD HEUER: Is that legal?

BUTEPASH PATEL: Say it again?

TAD HEUER: Can you prohibit the use of a rear means of egress?

BUTEPASH PATEL: We're just asking that they don't loiter and smoke in the back and use that door, to do just that basically.

And any and all deliveries must use front door and use the two other utilized loading zones in front of the restaurants.

All trash must be deposited in totes and

stored exclusively inside the restaurant. There's a very small backyard area, and a lot of residents are concerned that it's quite a tight little space. And because it's so close to the residents here, they wouldn't want the trash to be stored out here especially because there's no real way for them to get the trash out into the street.

THOMAS SCOTT: So you want them to store the trash in the restaurant?

BUTEPASH PATEL: We're suggesting they store it in the restaurant, exclusively using the front door to exit and basically take the trash in and out and put it onto Mass. Ave. to allow easement of the trash companies to pick up on Mass. Avenue rather than assume that they're going to come around the back.

The next one is maintenance and service to equipment must be completed from Mass. Ave. front door exclusively. We just had an issue with some of the duct work that's been

serviced in the back. And they eventually come around back, they power wash the duct work and they just let the fluid rundown to Bowdoin Street and puddle up there. We had to call the health department a few times. Once every four months there will be an issue of it sitting on the street. So we know that the restaurant will be put in and obviously they'll be putting a hood in, and we're hoping that the hood will be ducted to the front of the building where there's a one-story portion rather than the back of the building where there's a one-story portion. That would basically ensure that when the equipment is serviced, when the duct work is power washed, that it be power washed from the inside and from the roof in the front rather than from the back.

All mechanical equipment must be installed on the roof as near to the front of the facade of the building as possible. And

a fence with perimeter sound boards as is typical to live within earshot of residential apartments. This system directs (inaudible) in all directions. It's the same thing. We just had equipment that was installed on Rafiki which has become an issue mainly because the fan belts start to squeak after a few months and we have to --

DOUGLAS MYERS: Could you repeat the first part of that last condition, please?

BUTEPASH PATEL: All the mechanical equipment must be installed on the roof as near to the front of the facade of the building as possible. And fence with perimeter sound boards as is typical to live within earshot of residential apartments.

DOUGLAS MYERS: Thank you.

BUTEPASH PATEL: There must be only one rear door at all times unless being locked from the outside and have a panic bar connected to the fire alarm on the inside, and

used for emergency egress only. This would make the above conditions to be idiot proof and when any detour of the above conditions occur, we would have a formal complaint to force any newly hired manager unaware of the conditions would have to disengage the rear door to use the rear door. As an example, the present Rafiki Restaurant has the same agreement as has been made in the seventies with the neighbors which we have asked License Commission to continue to enforce when they transfer their Victualer license.

In conclusion we would like the six conditions noted above to be attached to the property if it was granted the change of use. This retail space is the last retail space left and will complete the four restaurant row plus the grocery store, making a very active, concentrated corner of Mass. Avenue. I believe it exists at that level anywhere between Harvard and Porter Square when you

have some four restaurants in a row.

Therefore, we will support the change in use only if all the above conditions have been attached to the building's use --

CONSTANTINE ALEXANDER: You know, I must comment on something, we have as you well know, you've been before us. When someone wants to come in for -- a Petitioner comes before us with plans, we say that the plans must be in the files by five p.m. -- no later than five p.m. on the Monday before so that members of this Board can read them, think about them and the members of the public can read them and think about that.

BUTEPASH PATEL: I understand.

CONSTANTINE ALEXANDER: This is a converse situation with the exact same situation. You're asking the Petitioner to react on the fly to these conditions. You're asking this Board to deal with these conditions when we haven't even been exposed

to them until a few minutes ago.

BUTEPASH PATEL: Well, the
Petitioner --

CONSTANTINE ALEXANDER: I don't
think it's fair. I don't think it's fair to
us. I don't think it's fair to members -- I'm
not saying they're wrong.

BUTEPASH PATEL: No, I understand.

CONSTANTINE ALEXANDER: But can you
respond? Do you feel you're in a position to
respond to those conditions right now?

ATTORNEY DONATOS LALLOS:
Absolutely not. At this point in time I
would have to go over it with my client to
respond to each and every one of those
conditions.

CONSTANTINE ALEXANDER: You're
entitled to make these conditions, but I'm
not sure I'm ready -- speaking for myself, I'm
ready to act on this matter. Or at least to
impose any of those conditions. I don't just

think it's appropriate. I want to hear a considerate response from the Petitioner to what you and the neighbors are proposing.

BUTEPASH PATEL: I understand.

CONSTANTINE ALEXANDER: And they can't do that tonight. But maybe other members the Board feel the same way.

THOMAS SCOTT: I would feel the same way. I would hesitate to act on any condition that seems to be tied to the Building Code. I'm not sure like for instance, the egress door connected to an alarm. I've never heard that before. I don't know. There's no way I would act on that. But I would like some time to read them and understand them.

CONSTANTINE ALEXANDER: And typically some of these conditions -- I'm sorry to interrupt you, Tom.

THOMAS SCOTT: Sure.

CONSTANTINE ALEXANDER: Some of

them are not zoning type conditions, but are meaningful. Particularly the neighbors sit down with the Petitioner and negotiate. And often what comes out of that is a contract or an agreement which is not part of our Zoning purview. And that's your protections and those are the rules the Petitioner lives under. I don't hear that you've reached out to the Petitioner to try to do this first.

BUTEPASH PATEL: Well, this is based on a letter that was submitted to the Petitioner two years ago, and they were in agreement that they wouldn't use anything in the back door. So we didn't think it was something that was inconsistent with what was already gestured two years ago when he thought about moving then. But we wanted to be explicit because now we set up a level of agreement with some of the other restaurants that's a little more --

CONSTANTINE ALEXANDER: The irony

here is that typically the response is to continue the case, but here the person who's going to be heard by the continuance are the Petitioner. They want to know up or down where we're going. And I don't know what else we can do. I'm not ready to act on this case. I don't think it's fair for us to require the Petitioner to respond to these conditions on the basis of this presentation tonight.

Let me ask you a question, sir. I mean, if we have to -- not have to, but if we choose to postpone this case to give you time to consider those conditions, to give you time to talk further with the neighbors, how much of an imposition is that on you or your client?

ATTORNEY DONATOS LALLOS: Well, not talking to my client, Mr. Chairman, I can indicate to you he came back early from a vacation overseas to address this issue.

UNIDENTIFIED FEMALE: Could you speak up, please?

ATTORNEY DONATOS LALLOS: My client came back early from overseas to address this issue. He was very concerned about the fact that he is being squeezed economically. I know that he indicated to me to move this as fast as possible so he can see where they stand in the future, especially where their landlord is putting pressure on him to agree to what he believes to be unreasonable terms and conditions as to the rent.

TAD HEUER: Other people want to be heard.

CONSTANTINE ALEXANDER: Okay. I'm going to take further comments. I'm sorry, are you done, Mr. Patel?

BUTEPASH PATEL: Yes.

CONSTANTINE ALEXANDER: Let's have that letter, please.

BUTEPASH PATEL: Sean has it.

CONSTANTINE ALEXANDER: Who else wishes to be heard?

LYNN MEYER GAY: I'm Lynn Meyer Gay. I live at Ten Bowdoin Street which is directly behind this building, and I own units No. 5 and 6. It's a six-unit condo. And I'm 71 years old. I live in one unit, the other unit provides part of my retirement and I have had difficulties with different things occurring around the building that have caused tenants to leave.

In 2007 when this Petition came up for many of these issues, I addressed and I received some verbal promises from Mr. Stamatakis and his wife about the conditions that would be at the back of the building. That there would be no deliveries back there. There would be no garbage storage or pick up. This is, by the way, the letter that I sent in in 2007 just with slight changes. No garbage storage or pick up,

entry and exit by employee -- and no entry or exit by employees and other patrons at the back of the premises or through our backyard. If they were coming out their unit, that's our backyard and we have bedroom windows right there. And we already have great difficulties with Rafiki and with Westside Lounge. We have a real problem with garbage smells, employees out there smoking. It's a problem. This is all a problem.

And so I don't know if you want me to go on with itemizing other things.

CONSTANTINE ALEXANDER: Let me ask you a question. Do you support the conditions that Mr. Patel --

LYNN MEYER GAY: Largely --

CONSTANTINE ALEXANDER: Do you have additional ones you would like to impose?

LYNN MEYER GAY: No.

CONSTANTINE ALEXANDER: Basically you're speaking in support of the

neighborhood petition.

LYNN MEYER GAY: And that this was -- and that they knew about this before.

CONSTANTINE ALEXANDER: Okay. Fair enough.

LYNN MEYER GAY: And I've had verbal promises from them, that they would not.

CONSTANTINE ALEXANDER: Leave a copy of it with Mr. O'Grady so it's part of the record.

LYNN MEYER GAY: Let me see if I have anything else.

CONSTANTINE ALEXANDER: Now's your time.

LYNN MEYER GAY: I'm not used to do this.

CONSTANTINE ALEXANDER: That's okay. Take your time.

LYNN MEYER GAY: They also promised me in 2007 that they weren't going to add any ventilation or air conditioning systems in

the back of the building. And if you grant this Variance, I would very much like it written into it so that this restaurant and further ones would never do that. We have problems with the air conditioning units with Westside Lounge. It's really horrendous. I have Andrea Boyer out there, you know, every six months testing all the noise. And it's -- in Rafiki hasn't -- well, Rafiki is becoming worse, too.

CONSTANTINE ALEXANDER: Well, Rafiki's not before us tonight.

LYNN MEYER GAY: Yeah, yeah, right. Oh, and so, just I would like to -- the hours of operation not to extend past one o'clock in the morning. We've made -- we've had Temple Bar and Westside Lounge, they wanted to stay open until two and we -- I can't remember the process we went through, but it was agreed that it would only stay open until one o'clock.

CONSTANTINE ALEXANDER: This is all in your letter?

LYNN MEYER GAY: This is in my letter.

CONSTANTINE ALEXANDER: Again, you can read it through. We're going to review this file later, we'll have the ability to read your comments in writing.

LYNN MEYER GAY: Right. I've been eating pizza at Harvard House of Pizza for 32 years. I certainly would not want to see the organization collapse in any way. I do think lining up four restaurants along one after another is a huge mistake.

Thank you.

CONSTANTINE ALEXANDER: I think the sum and substance is that there is neighborhood support for the Variance provided that conditions are imposed to protect the neighborhood. And those neighbor conditions are outline in your

letter and certainly Mr. Patel's Petition.

LYNN MEYER GAY: Yes, his is more thorough than mine.

ANNAMARIE CARDINS: My name is Annamarie Cardins (phonetic). I own the unit on the ground floor directly behind 1686. It's No. 2 at Ten Bowdoin Street. My letter is essentially just a reiteration of what Lynn and Butepash have already said with the only difference being that I am the first entrance bedroom that is essentially surrounded on all sides by these restaurants. Three currently, Rafiki, Temple and Westside a little further down -- or Temple a little further down and Rafiki next to me. I could just read you the letter if --

CONSTANTINE ALEXANDER: No need to.

ANNAMARIE CARDINS: If it's just included as the concerns that we have, but just to reiterate, the noise level comes literally just -- I mean, it's within 20

feet. The vents are within 20 feet of my windows. The dumpsters are there. The smell is awful in the summertime. I do keep the windows closed because just the like sludgy fluid of dumpster garbage is right next to me. I'm happy to support another eatery. Obviously I live in that part of town because I like the convenience of having urban living and all the things that come with it, but my concerns are the same as everybody else. That, please, conditions be sort of put in there that the restaurants, this one and any other that would be petitioning for the neighborhood, basically patrol themselves so that we are not constantly having to ask could you just be considerate? You know, the trucks that come down the street, the trash, it's just -- we're in a tricky situation where we are urban and we're residential and we sort of juggle this, and we would I think as a residential

neighborhood really appreciate the commercial side of it. But take into concern the fact that we are trying to be sort of a quiet neighborhood even though we are located where we are located.

CONSTANTINE ALEXANDER: Thank you. Leave your letter with Sean.

ANNAMARIE CARDINS: Thank you.

CONSTANTINE ALEXANDER: Anyone else wishing to be heard? I only say if you're just going to repeat comments other people made, please don't because the hour is late.

ALLEN SAYEGH: My name is Allen Sayegh A-l-l-e-n S-a-y-e-g-h. I'm the owner of 1684 Mass. Avenue, the building just next to this property and I would like -- I'm not in favor of this. I don't just for obvious reasons. I don't like the idea of having a fast food pizza moving right next to me. My building is going to be an office for a design and architecture. It's an

architecture office, plus residence. So I'm concerned with all these concerns that there are trash and everything.

In addition, I don't see the hardship on the building because it's a retail space now and can generate income. So that's my stance on this.

Thank you.

CONSTANTINE ALEXANDER: Thank you.
You want to speak?

DIANA MABARDI: Yes. I'm Diane Mabardi M-a-b-a-r-d-i. I'm one of the co-owners of 1684 Mass. Ave, and I just want to reiterate there's no hardship on the building itself. It might be a hardship to the family but it's not a hardship on the building. It's a retail spot. Retail spots are very valuable in the City of Cambridge, and so -- we think it should be continued as a retail spot.

CONSTANTINE ALEXANDER: Thank you.

Anyone else wishing to be heard?

(No Response.)

CONSTANTINE ALEXANDER: I will close public testimony.

If I may, I'm going to make some observations. The case before us, we haven't really done much with it except for the last two speakers, is whether the requirements for a Variance have been met. You're looking for a use variance. We could tonight, and I'll talk to fellow members of the board, take action on that use variance if we think we're not going to grant it, and put this thing to an end. If we think we're open to granting the use variance, and I think it seems to me it would be on the basis of certain conditions, and we don't those conditions are, although they've been -- I don't want to say sprung, but they've been given to us tonight without a chance for us to consider them or for the Petitioner to

consider them. So I guess what I'm going to do is ask what the sense is of the Board. If the sense is of the Board is not to grant the Variance at all, conditions or no conditions, let's know it right now. But if people are open to maybe granting the Variance depending on the conditions, then I think we should continue the case, recognizing this is a bit of inconvenience to you, but I don't think we have any choice.

So, people disagree with that approach? Are people disposed to perhaps to granting the use variance so the case should be continued or not? I for one am willing to continue the case. I still have an open mind as to whether it's a use variance. But I don't think, sir, you addressed the legal issues very well, and I think if we do continue the case, you better focus on whether you meet the standards for use variance. The fact that you've economic

problems in your old facility is nice, but it's irrelevant to what the relief you're seeking tonight.

Anyway, I for one would continue the case. It would have to be a case heard. But what do other members want to do?

THOMAS SCOTT: I'm opening to continue the case based on the review of the conditions by the Applicant.

CONSTANTINE ALEXANDER: Other members?

DOUGLAS MYERS: I am, too. I mean, I feel the public's case urging public comments is serious and substantial, and the fact that it's late in the day, I don't think we should close the door to considering these objections and having them be part of the process. So I would favor a continuance. However, in recognition of the fact that it's -- these are late objections, I think we should do everything possible to expedite the

next hearing of this case in March.

CONSTANTINE ALEXANDER: It will be April. It will be an April case.

DOUGLAS MYERS: Nothing left in March? It's all been taken?

TAD HEUER: What was wrong with having a March 3rd event?

SEAN O'GRADY: We're making our own bed here.

CONSTANTINE ALEXANDER: Slater, how do you feel?

SLATER ANDERSON: I think that the conditions, there need to be some conditions.

CONSTANTINE ALEXANDER: You're open to providing a use variance provided --

SLATER ANDERSON: I am. I mean, I think there are, you know, concerns but it seems like there's potential to reach some consensus here. I'm concerned that the residential and commercial, there's always a conflict there, particularly with this kind

of an eateries, restaurants, markets, you know, do generate nuisances that can conflict with residential use. So there's an opportunity here I think by granting this, assuming conditions can be met, to maybe help the neighbors establish a standard that they may be able to point to with future or well existing restaurants and potentially future restaurants that may move into those spaces. So there's an advantage I think in some ways to the residential neighbors to see this move forward with some sort of recorded conditions.

CONSTANTINE ALEXANDER: Given all this your views are irrelevant, but --

TAD HEUER: Seeing if I have so sit through the whole thing, I should be able to say something. I -- although the case -- I am concerned that we're getting concerns from neighbors that have been longstanding now. And particularly if they are longstanding and

they can be articulated in a six-page letter from 20 petitioners. There's nothing -- I understand the value of force in numbers. We see every week individuals who send the same letter signed themselves at the time they're able to send it. If these issues have been going on for four years, there's nothing from preventing anyone on their own saying I have concerns. I'd also point out that a lot of concerns, while we can put pretty much anything in a Variance, aren't historically Zoning concerns. These are concerns for Licensing Commission. These are concerns for Inspectional Services on the noise side. They're not generally things that we put into Variances precisely because there are other agencies in the city that are required to deal with them and have been tasked as their responsibility. If we put them in a Variance, we run the risk of Sean O'Grady from Inspectional Services go out and try to see

whether someone is smoking. I for one am not prepared to have the limited resources of the city that are supposed to be devoted to Zoning and building enforcement devoted to whether someone's smoking, and that's stupid. That being said -- oh, and additionally, the reason we're here now is because it's a fast food variance. I believe most restaurants that do not require a matter of right in many situations would not require a Variance from us and would not be subject to any of these types of restrictions on their operation by matter of law unless they were coming into the noise ordinance or something else.

CONSTANTINE ALEXANDER: I'm not sure that's right, but it's not relevant. In this district unfortunately I don't think restaurants are a permitted use.

SEAN O'GRADY: BA2. I was wrong on the BA2 last time.

ATTORNEY JAMES RAFFERTY: No,

restaurants are.

CONSTANTINE ALEXANDER:

Restaurants are? They are? Okay. I'm wrong.

TAD HEUER: So, I mean in that situation what we have here is a somewhat unique situation where they're in front of us because they have to be here. But other facilities that are creating the same problems won't necessarily be in front of us and won't be subject to these type of requirements. I grant that it's a fast food variance and it's in front of us and we can deal with it that way, but just to point out that it doesn't necessarily become a standard of care so to speak because other similarly situated entities won't necessarily have to be put through that hoop.

CONSTANTINE ALEXANDER: That's good advice for the people in the audience. I trust you understand what Mr. Heuer is

pointing out, that to the extent you think you're setting a set of ground rules for all the restaurants on that street, you're not. Assuming we do grant the Variance with conditions.

TAD HEUER: Right. So I understand the need for conditions. I'm not sure how many of these conditions we can grant. I'm a bit perturbed that they've come to us late. I'm sympathetic to the owners coming before us in good faith and not expecting quite frankly to be blindsided by some of these issues, at least in written form, not having an opportunity to respond to it and then put at his detriment in order for them to be able to be addressed.

SLATER ANDERSON: Can I ask a clarification on that point? The comment was made that there was communication in 2007 about these issues. Was there a plan previously to consider moving into this

space?

CONSTANTINE ALEXANDER: Yes.

SLATER ANDERSON: There was. Okay. So, I don't know if it's totally true -- the Applicant has gone forward in this case and obviously hasn't considered the conditions that are before us right now, but there was awareness on the part of the Applicant that there were neighborhood concerns.

CONSTANTINE ALEXANDER: Yes and no. Slater, if my memory is correct, there was a case on our docket to do what wants to be done now. It got withdrawn. And there was never anything in the file, at least written, that would put the Petitioner on notice.

SLATER ANDERSON: My understanding was there was conversations previously.

CONSTANTINE ALEXANDER: Not tonight.

SLATER ANDERSON: Understood.

TAD HEUER: So --

UNIDENTIFIED FEMALE: Written letter. Not just a conversation, a written letter to the Board.

CONSTANTINE ALEXANDER: Go ahead.

TAD HEUER: I'm willing to vote for a continuance. Quite frankly I'm not really that happy to do it. Because I think the conditions that are going to be imposed are going to be fairly minor given the scope of our authority, and that the real issues are about the hardship which, again, I don't think were addressed. I prefer to be addressing hardship issues tonight and voting on it tonight.

CONSTANTINE ALEXANDER: Let me say on that I think we are going to continue the case. It would behoove you to sit down and you, too, you being the neighbors, to sit down and talk these things through. And to the extent that there are deals to be made, agreements to be made, you reach them and put

them in writing, because it's not going to be part of our conditions. Not all of them. Mr. Heuer's point is right on. And for you as well -- the kind of conditions we can and should impose to granting a Variance are not that broad. We can't get into policing or Inspectional Services can't get into policing the smoking on the back stoop. So work out things, make your deal. If you want to reach a contract, fine. But come back before us with what you can agree to in terms of Zoning conditions and what you can't. And also you have to address why you're entitled to a use variance. If you haven't done that tonight, you'll have another chance. In my judgment, you haven't done it tonight. You'll have another chance when we continue the case and I think the case will be continued April 14th.

SLATER ANDERSON: Sorry to continue this. I guess my perspective on this is the

use variance, if the use is detrimental to the neighborhood, then I'm not voting for the use. So even though we're not voting, maybe we can't put conditions in that are going to be policed by Sean O'Grady, I'm not going to vote for the use if there aren't any conditions. So that's my perspective on it because I would consider the use to be detrimental to --

CONSTANTINE ALEXANDER: I think the notion would be, though, if appropriate conditions that we determine are placed in a variance, that it wouldn't be detrimental to the neighborhood. In other words, a use variance without any conditions is detrimental. We're going to turn it down. If you can persuade us that with certain conditions it's no longer detrimental we might, might grant.

SEAN O'GRADY: Gus.

ATTORNEY DONATOS LALLOS: Mr.

Chairman, may I ask for a copy of that letter?

CONSTANTINE ALEXANDER: Of course.

ATTORNEY DONATOS LALLOS: And also is there a contact person? Is there one person I should deal with regarding this?

CONSTANTINE ALEXANDER: Yes, that's a good question.

BUTEPASH PATEL: I'll just give you my contact --

CONSTANTINE ALEXANDER: I suggest you talk after we finish up. Get whatever copies -- we've gotten three letters tonight. You should have all of those.

SEAN O'GRADY: You'll actually have to get a duplicate -- these have to go in the file. You can come and get the copy.

CONSTANTINE ALEXANDER: Yes.

DIANE MABARDI: What about dealing with the actual abutters? We are physically attached to this building.

CONSTANTINE ALEXANDER: Well,

you're either part of the discussions for conditions that may satisfy you or not or you come back before us when we hear the case again and reiterate your argument that you made tonight very effectively that the case doesn't meet the standard for a use variance.

SEAN O'GRADY: Gus, may I make a brief comment?

Just so I don't sandbag anybody on the issue of which conditions, the Department will support and which ones they won't be able to support. Things that you can call us up on and say, during business hours come down and look at it. Like, where the mechanical was placed. We'd be glad to do that. That's our bread and butter. Things like smoking, anything that's behavior or transient or happens at night, people going through the doors, we just can't help you with that. The Board has the power to put any condition, but just understand that I will be resisting

those conditions.

DIANE MABARDI: Who do you represent?

SEAN O'GRADY: Inspectional Services. I want to be clear, because I don't want to sandbag it.

SLATER ANDERSON: But, Sean, there are other city.

SEAN O'GRADY: The Licensing Commission has hearings about behavior and things like that and.

DIANE MABARDI: Do you have Andrea Boyer --

SEAN O'GRADY: Andrea Boyer is actually with the Licensing Commission.

DIANE MABARDI: Licensing not Inspectional Services?

SEAN O'GRADY: Right. So we understand what -- and I'm not speaking for the Board, what the Department would support for conditions. It has to be something to do

with the building.

CONSTANTINE ALEXANDER: And just further to Sean's comment. These conditions, you want to impose or hopefully you want to -- not hopefully, we ask that you submit them to the Petitioner, sit down, negotiate, work them out, but to the extent that you have conditions you want imposed, I want them in the file in writing, by no later than five p.m. than the Monday before the hearing. I don't want to have another case when we hear this case again with people walking in with new conditions. I mean I can't preclude people who are not here tonight from coming in.

UNIDENTIFIED MALE: Mr. Chairman, is that part of the notice that goes out? I think it's been about two and a half weeks that we've had notice of this of this hearing. Is that requirement of submitting by a certain deadline --

CONSTANTINE ALEXANDER: No.
That's part of our rules. And when we
continue cases, we make it clear --

UNIDENTIFIED MALE: It might be
helpful if that kind of notice gets mailed to
the abutters.

CONSTANTINE ALEXANDER: I know.
Unfortunately there will be no further notice
being mailed to the abutters.

UNIDENTIFIED MALE: Your general
procedure, it would be helpful to the public
if we were notified of your procedure is
different from, for example, the Licensing
Commission which operates by very different
rules.

CONSTANTINE ALEXANDER: Didn't we
have something in the notice now?

SEAN O'GRADY: We have not
considered this issue of the reverse of it.
We've now decided that we need to tell -- I
understand the sentiment, yes.

CONSTANTINE ALEXANDER: What you're asking, Mr. O' Reilly, is that what notice you want sent to abutters, that the case is being continued until --

TAD HEUER: No. No.

UNIDENTIFIED MALE: Not just for a specific. This group was only aware of this request to move Harvard House of Pizza approximately 15 to 20 days ago that came through postal mail to abutters. It would be -- it would behoove the Commission to include in the notice that's mailed, the requirement that you have regarding timing of submissions and petitions, because in other city hearings, the expectation is that it's a town meeting approach. The License Commission, for example, that we've all been to, the expectation is you come and you submit your issue for the first time verbally.

CONSTANTINE ALEXANDER: I understand that. That's something that --

SEAN O'GRADY: I think that's reasonable.

CONSTANTINE ALEXANDER: It's a good suggestion.

DIANE MABARDI: We actually never got notice. We only saw the sign on the building and we're next-door.

SEAN O'GRADY: You should definitely have been noticed.

CONSTANTINE ALEXANDER: Ready for a motion.

The Chair moves that this case be continued to April 14th?

SEAN O'GRADY: You've already filled 14th. You're on the 28th now.

CONSTANTINE ALEXANDER: April 28th. Unless you're -- I mean it's up to you of course.

I don't think we don't have any choice. I know that's a little longer than perhaps what you would like, but that's what it would

have to be. Can everyone make the 28th by the way?

The Chair moves that this case be continued as a case heard until seven p.m. on August 28 -- I'm sorry, April 28th on the condition that the Petitioner sign a waiver of time for a decision.

On the condition that the sign that you have in the window now, you have to keep it up, but with a magic marker change the date to April 28th and the time to seven p.m.

And on the -- I guess it's not a condition to you, but on the view that reiterate to the neighborhood in general, those who are here tonight, that to the extent that the conditions that you want to imposed, we ask that you try to get agreement with the Petitioner on these, because absent that agreement those conditions you still wasn't to impose must be in writing in our files no later than five p.m on the Monday before April

28th.

All those in favor of granting the motion to continue on this basis say "Aye."

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. Case continued.

(Alexander, Heuer, Scott, Anderson, Meyers.)

(Meeting adjourned at 11:20 p.m.)

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 8th day of February 2011.

Catherine L. Zelinski
Notary Public
Certified Shorthand Reporter
License No. 147703

My Commission Expires:
April 23, 2015

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