

BOARD OF ZONING APPEAL FOR THE
CITY OF CAMBRIDGE

GENERAL HEARING

September 10, 2009

7:00 p.m.

in

Senior Center, 806 Massachusetts Ave.
Cambridge, Massachusetts 02139

Constantine Alexander, Chair

Tim Hughes, Vice Chair

Brendan Sullivan, Member

Slater Anderson, Member

Tad Heuer, Member

Sean O'Grady, Zoning Specialist

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I N D E X

<u>CASE</u>		<u>PAGE</u>
9810	--	3
9790	--	5
9815	--	24
9642	--	50
9563	--	96
9651	--	96
9828	--	100
9829	--	180
9830	--	209
9831	--	236

P R O C E E D I N G S

(7:00 p.m.)

(Sitting Members: Constantine Alexander, Timothy Hughes, Brendan Sullivan, Slater Anderson, Tad Heuer.)

CONSTANTINE ALEXANDER: The Chair will call the meeting to order. And as is our custom, we're going to start first with the continued cases. And the first case on our agenda is case No. 9810, 2472-2482 Massachusetts Avenue.

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

(No response.)

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

The Chair is also in receipt of a letter from a Vincent Leo, L-e-o addressed to the Board and Miss Pacheco.

Can you please withdraw our petition to amend our variance at 2472-2482 Mass. Ave. in Cambridge. Thank you in advance

for your time.

And Nicholas Leo is identified as the manager of Brandon B-r-a-n-d-o-n Woolkalis W-o-o-l-k-a-l-i-s. Oh, no, it's Nicholas Leo and Brandon Woolkalis and they're both of VLW Realty, Inc. I'm sorry, VLW Realty, LLC, which is the petitioner in this matter.

I will make a motion to accept the request to withdraw of this petition. All those in favor say, "Aye".

(Aye.)

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 The case is withdrawn.

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

(Whereupon, a discussion was held off the record.)

(7:02 p.m.)

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

CONSTANTINE ALEXANDER: The Chair will call case No. 9790, One Brattle Square.

Is there anyone here wishing to be heard on that matter? Our practice is to give your name and address to the stenographer.

ATTORNEY BRIAN GROSSMAN: Good evening, Mr. Chairman, Members of the Board. Brian P. Grossman with Prince Lobel. I represent the applicant Metro PCS, Massachusetts, LLC.

You have my card. Do you want me to repeat?

THE STENOGRAPHER: No, that's fine.

PETER COOK: My name is Peter

Cook. I'm a project consultant to Metro PCS. We're at 285 Billerica Road, Chelmsford, Mass.

CONSTANTINE ALEXANDER: And you're looking for a Special Permit to add some antennas and equipment to the middle of Harvard Square.

ATTORNEY BRIAN GROSSMAN: We are.

As you know, there was a design change from the original application. The original application included some equipment cabinet -- that still includes the equipment cabinet. But the equipment cabinets were supposed to be located on the roof. There's a screen wall associated with that. There was some concerns with regard to that design, and so the amended design has been submitted, additional revised photographic simulations have been provided as well as --

CONSTANTINE ALEXANDER: And those

concerns have been expressed by the Planning Board not by our Board?

ATTORNEY BRIAN GROSSMAN: That's correct.

CONSTANTINE ALEXANDER: This is a case not heard I just want to make it clear for the record.

ATTORNEY BRIAN GROSSMAN: Sure.

It's a non-residential zoning district. The building itself is currently utilized for wires communications purposes by other carriers. The Planning Board has now given a positive recommendation to the site as redesigned. Also Historic Commission approval was obtained in June I think. And it's been approved by the Historic Commission as well. The new design still includes six panel antennas. Those will be as -- it's really best shown on the photographic simulations. Facade mounted to the existing penthouse very similar to

what's there currently with regard to the other carriers' existing installation. The proposed facade mounted antennas would not exceed the height of the existing penthouse. There will be one GPS antenna associated with the facility for one compliant, and I know this Board certainly knows what that is.

Coaxial cables connect the antennas to the radio communications equipment cabinets. The coaxial cables will be covered by cable trays running along the roof and on the penthouse. Coaxial cable will then run as shown on the plans within the building to a 10-by-16 leased area. The leased area will be located on the first floor which would allow us to alleviate the design concern raised by the Planning Board. That equipment will now be located inside. And the equipment cabinets are similar to all the other Metro PCS applications you've seen. Two

battery cabinets, two ETS cabinets and there will be power and electrical --

CONSTANTINE ALEXANDER: For the record, your client is a duly licensed carrier with the FCC?

ATTORNEY BRIAN GROSSMAN: Yes, they are. The license should have been submitted.

CONSTANTINE ALEXANDER: It's in the file, but I wanted it on the record for transcript as well.

ATTORNEY BRIAN GROSSMAN: They are.

The application also included the Affidavit of the radio frequency engineers. Of course you're familiar with that Affidavit. It sets forth that Metro PCS without the site does have a significant gap in coverage in this area. And this site would be designed to alleviate that gap. It's really focussed obviously on that square, Mount Auburn

Street, Memorial Drive providing coverages to the campuses and businesses in the area as well.

CONSTANTINE ALEXANDER: Letters in the Planning Board support your petition which I will read into the record. Refers to your revised plans of June 5, 2009. But what I see in our file are plans dated June 9, 2009. Are they one in the same?

ATTORNEY BRIAN GROSSMAN: Those are photographic simulations.

CONSTANTINE ALEXANDER: Okay. Oh, I see.

ATTORNEY BRIAN GROSSMAN: The plans are June 5th.

CONSTANTINE ALEXANDER: Did you give the Planning Board the photo simulations?

ATTORNEY BRIAN GROSSMAN: Yes, they had those as well.

PETER COOK: Yes.

CONSTANTINE ALEXANDER: And

there's reference in the file of applying to the Cambridge Historical Commission. That hadn't been done yet. What's the status of that?

ATTORNEY BRIAN GROSSMAN: We received -- that was the approval we received in June.

PETER COOK: Yes.

CONSTANTINE ALEXANDER: Cambridge Historical? The last thing I saw in the file said you're going to apply. You hadn't done it. We got communication from Historical if you've gone before them and if they've approved it.

ATTORNEY BRIAN GROSSMAN: It was done on their consent agenda.

CONSTANTINE ALEXANDER: May 28, 2009 letter or memo from the Historical Commission, it says, for reference your property -- the Cambridge Historical Commission will review an application at a public hearing but no application has been

received to date.

This is May, May 28th. So what's the story?

PETER COOK: We were reviewed and heard the first week in July was the meeting.

CONSTANTINE ALEXANDER: And they approved?

PETER COOK: Yes.

CONSTANTINE ALEXANDER: No conditions?

ATTORNEY BRIAN GROSSMAN: No, it was consented.

CONSTANTINE ALEXANDER: Okay. We didn't get any communication from them that's why I was asking.

PETER COOK: I think we can get that.

CONSTANTINE ALEXANDER: The Chair will read into the record a letter addressed to our Board from the Planning Board dated June 25th. It says, regarding

this matter: The Planning Board reviewed the revised June 5, 2009 Special Permit application for the telecommunication installation of One Brattle Square. The applicant has been able to move the mechanical equipment box to inside of the building. The Planning Board does not object to the antenna installations if they are arranged on the facades of the existing rooftop structures in a neat and orderly way as close to the facade as possible to minimize the shadows and to not protrude above the roof line. The antenna should be finished to match the existing roof features and associated cables and connections and should also be neat, orderly and compact as possible. This roof is very visible from many vantage points all over Harvard Square.

That's the sum and substance of the correspondence in our file.

Is there anyone here wishing to be

heard on this matter?

(No response.)

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

Why don't you just if you would again for the record address the comments to the Planning Board. They've said they want -- they have no objection if the antenna installations are arranged on the facades of the existing rooftop, structured in a neat and orderly way as close to the facade as nearly as possible to minimize the shadows, and not to protrude above the roof line. I'm making reference to your photo simulations. How do you comment to that?

ATTORNEY BRIAN GROSSMAN: As shown on the plans and the photographic simulations the antennas certainly won't protrude above the top of the penthouse. With regard to the mounting to the facade itself, obviously we take care to address

those concerns expressed by the Planning Board with regard to the pipe mount and the facade mount and obviously minimize to the extent we can.

CONSTANTINE ALEXANDER: Are you going to finish the antennas to match the roof features?

ATTORNEY BRIAN GROSSMAN: Yes. The antennas will be painted to match the existing facade to which they be mounted as well as well as the equipment mounting hardware. Certainly in terms of, you know, connections and things, we take care to make sure that any of the wires and jumpers are utilized to connect the antenna to the full run of coaxial cable would done in the manner that minimizes visibility and what's needed. As you can see the existing antennas on the facade as well, and the final finished product in terms of the mount, the mounting and really the same set-up would be used. So

it would look very similar to the existing antennas that are up there.

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

BRENDAN SULLIVAN: Obviously the antenna is on the mounting bracket?

ATTORNEY BRIAN GROSSMAN: Yes.

BRENDAN SULLIVAN: So the mounting bracket is attached to the face of the penthouse?

ATTORNEY BRIAN GROSSMAN: Yes.

BRENDAN SULLIVAN: How far out are the two arms, the two pivot points, so that how far out the antenna -- is there a cross section there or not?

ATTORNEY BRIAN GROSSMAN: The antenna is -- I mean the -- from the facade of the building to the front of the panel -- so probably about just about 12 inches. It's an approximate range. From the facade of the building --

BRENDAN SULLIVAN: Yes.

ATTORNEY BRIAN GROSSMAN: -- to the front of the panel antenna.

BRENDAN SULLIVAN: So the back of the panel is pretty close to the building anyhow. So there is some depth obviously.

ATTORNEY BRIAN GROSSMAN: Yes.

BRENDAN SULLIVAN: And the connect from underneath? Does it -- as opposed to in the back? I guess the point is that they're being mounted as close as physically possible --

ATTORNEY BRIAN GROSSMAN: Yes.

PETER COOK: Yes.

BRENDAN SULLIVAN: -- to the facade? That's all.

PETER COOK: They are tight. They are -- the antennas turn slightly which is why the bracket is really the way it is.

BRENDAN SULLIVAN: Yes, right. It just pivots on it somehow. Again, this is just a point of information. Do they reposition those at some point at all?

PETER COOK: They -- it's at this point most of the -- most of the antennas being deployed now are the up and down. Is within the antenna. It actually remote antenna, the phone lines. But Metro's a little bit different than most carriers, in that most carriers as you probably are aware, you have three azimuths that they're trying to, trying to point to. And they would use up to say 12 antennas. It's similar to -- the installation that's already there with Nextel. Metro actually does six azimuths. It has a narrower beam width on their antennas. So instead of 120 degrees azimuths, they've got 60 degree azimuths. Once they're installed, because there's that kind of array, there's less of a chance they're going to peak in the future. Because more than likely wherever they're going to go is already where one of the six goes.

BRENDAN SULLIVAN: So they're

pointed in a direction and that's where they stay.

PETER COOK: Yeah. They mount to each, each azimuth. And I suspect especially in this building environment, because there's not a lot of change going on. For example, there's not gonna be another new building, you know, next-door that might possibly change it. I think you'll see. I don't see any change there.

ATTORNEY BRIAN GROSSMAN: And any change would be minor. Once again you're in a narrow window for what that antenna is trying to cover for.

PETER COOK: It would be literally two or three degrees.

TAD HEUER: You're not expecting to add additional antennas in the future?

ATTORNEY BRIAN GROSSMAN: No.

PETER COOK: We have not leased for that and we have not needed to do -- this -- where our capacity would be as

would be within the -- within the equipment room, we may add additional radio cabinets at some point. But given the response that Metro's had in the marketplace, they're actually building the site out pretty close to max it at the current time. There are some cases where they may only build three of the six, but this one we anticipate they'll build all six at the beginning.

CONSTANTINE ALEXANDER: Other questions? Comments from members of the Board? Ready for a motion?

Okay. The Chair will move to grant the petitioner a Special Permit to construct the additional antennas and equipment as set forth in plans submitted to the Board.

The Special Permit would be granted on the basis that you cannot meet the requirements of the ordinance with regard to the plans that you need to do to

provide effective service.

That the traffic that would be generated or the patterns of access or egress would not cause congestion, hazard or substantial change in established neighborhood character. In fact, I think you, except for one or two service calls a month, there is no other going to and from the antenna installations. So there would be really little traffic. No hazard, the structures will be located near the top of the building. And no change in established neighborhood character.

That the continued operation or development of adjacent uses would not be adversely affected by the nature of the proposed use. As I've said, the antenna are rather not very visible. They're high up on the building and otherwise don't impact the retail environment of Harvard Square.

There would be no nuisance or hazard

to be created to the detriment of the health, safety and/or welfare of the occupant or the citizens of the city. We are talking about telecommunications antenna which have an established safety profile, and that the use would not impair the integrity of the district or adjoining district and derogate from the purposes of this ordinance.

I think I covered the reasons why that would be the case. We're talking about a small antenna on top of the building, relatively large building, very -- not visible to the public view, and to be colored to match the facade of the building to which they're going to be attached.

This Special Permit would be granted on the condition that work proceed in accordance with plans submitted by the petitioner prepared by Hudson Design Group, LLC, dated June 5, 2009, and they

are entitled, T-1, C-1 Z-1, Z-2 and Z-3. And also in accordance or consistent with the photo simulations submitted by the petitioner, prepared by -- it would appear to be Metro PCS, dated June 9, 2009. The first page of which has been initialed by the Chair.

The Special Permit will be granted on the further condition that the antenna would be painted or colored in a fashion to minimize the disparity between the antenna and the facade to which they're located. In other words, to try to be as non-evident as possible.

And on the last condition that to the extent that you cease to use these antenna or withdraw from the building or don't use them for a period of six months or greater, that the antenna be promptly removed and that any -- and the building be restored to its previous condition and color to the maximum extent possible.

All those in granting the Special Permit on the basis so moved, say "Aye".

(Aye).

CONSTANTINE ALEXANDER: Five in favor. Special Permit granted.

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

ATTORNEY BRIAN GROSSMAN: Thank you.

(Whereupon, a discussion was held off the record.)

(7:20 p.m.)

(Sitting members: Constantine Alexander, Timothy Hughes, Brendan Sullivan, Slater Anderson, Tad Heuer.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9815, 100 Cambridge Side Place.

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

KEVIN DUGAN: My name is Kevin Dugan. I'm with Metro Sign and Awning. And here is a rendition of the sign that we're looking to get the variance on.

CONSTANTINE ALEXANDER: And your name, sir?

SCOTT POLLACK: Scott Pollack.

I'm a principal at Arrow Street with the architects for Cambridge Side. I'm here representing not the applicant but the owner of the mall, as well as the Building Commissioner asked me to be here to answer any questions the Board may have since I've been working for Cambridge Side for over 20 years. I was involved with the original permitting.

CONSTANTINE ALEXANDER: Now, we didn't hear the case the last time because there was a failure of notice.

KEVIN DUGAN: Failure to notice.

CONSTANTINE ALEXANDER: That's been corrected. The Chair will note for the record that he went by, I guess Monday and the sign was prominently displayed this time.

KEVIN DUGAN: Thank you.

CONSTANTINE ALEXANDER: We're all set there.

KEVIN DUGAN: Okay.

CONSTANTINE ALEXANDER: And the other issue we had last time -- not an issue, a question. There was some confusion about the number of signs you're seeking relief for.

KEVIN DUGAN: One.

CONSTANTINE ALEXANDER: That's what I want to get clear. There's one, and the issue here is internal illumination as to why you don't comply with the to Zoning By-Law.

KEVIN DUGAN: Because it's overhanging on the public way.

CONSTANTINE ALEXANDER: It's a projecting sign.

KEVIN DUGAN: Projecting sign.

SCOTT POLLACK: Projecting sign.

CONSTANTINE ALEXANDER: Is there any issue about illumination? How is the sign going to be illuminated?

KEVIN DUGAN: Here's the illumination here. It should be right

there on the other end. I think you have all the --

CONSTANTINE ALEXANDER: Well, I have a lot. That's what I'm saying, it's not clear from the record because there were some signs in here that apparently are not going to be put forward?

KEVIN DUGAN: They've already been taken care of one way or another.

CONSTANTINE ALEXANDER: Okay.

KEVIN DUGAN: I want to point out something first. The original design, there's one slight change and it's only because we're -- we originally were going to use two supports, but there are three existing so we decided to use all three. I just wanted to point that out so it will be exactly the same. Okay?

CONSTANTINE ALEXANDER: Okay.

KEVIN DUGAN: And I also here. I brought these out for you guys. I wanted to point out for you guys just to give you

an idea. There's three different views of that corner. Sean, you want one?

SEAN O'GRADY: I'm all set.

KEVIN DUGAN: I took the pictures so that you can see from the Galleria side and straight at it, and then the third one from the boulevard side.

TAD HEUER: This is the sign?

KEVIN DUGAN: Yeah, that's one of the two. There's actually two there. The infamous sign.

CONSTANTINE ALEXANDER: Okay. I still don't understand why -- in what respect do you not comply with the Zoning By-Law? What will your sign provide and what does the Zoning By-Law require? What's the disparity?

KEVIN DUGAN: Well, there was a number --

BRENDAN SULLIVAN: We have an existing. Do we have a proposal?

KEVIN DUGAN: 7.16.223.

SCOTT POLLACK: Do you have additional copies of the proposals?

KEVIN DUGAN: Yes, here's....

SEAN O'GRADY: Do you have the --

KEVIN DUGAN: By-law itself? I don't have it with me.

SEAN O'GRADY: I know. From Les Barber, his sheet where he breaks down your --

MR. LEFT: Yes.

CONSTANTINE ALEXANDER: We have several sheets from Les Barber that's why.

SEAN O'GRADY: Oh, there's several of them?

CONSTANTINE ALEXANDER: Yes.

SEAN O'GRADY: I haven't looked at the file in a while.

(Whereupon, a discussion was held off the record.)

CONSTANTINE ALEXANDER: Some refer to internal illumination and some refer to projection.

KEVIN DUGAN: Sign conforms to all sign illumination except for 15-inch projection. Violation size limits and it's for a projected sign.

CONSTANTINE ALEXANDER: I saw something referring to the internal illumination. In fact the notice of continuance says that you want a variance to install internally terminated projection sign.

KEVIN DUGAN: Yeah. According to Les here it says, the sign conforms to all sign's illumination except for 15-inch projection.

CONSTANTINE ALEXANDER: Okay.

KEVIN DUGAN: Sign limits as --

SCOTT POLLACK: I can read Les's handwriting. I've been reading it for a long time. Sign conforms to wall sign limitation except for 15-inch projection.

CONSTANTINE ALEXANDER: Okay.

SCOTT POLLACK: Violates

illumination.

CONSTANTINE ALEXANDER: It does violate illumination?

SCOTT POLLACK: Yes.

KEVIN DUGAN: Because it is projected?

SCOTT POLLACK: Because it is a projecting sign. So, yes, there are two items which require a variance for this sign. One is illumination, one is a projecting. The illumination is because it is a projecting sign.

CONSTANTINE ALEXANDER: Projecting signs under 7.16.22B you cannot -- only natural or external lighting for projecting the sign.

SCOTT POLLACK: That's correct.

CONSTANTINE ALEXANDER: And the projection -- and it -- putting aside illumination, the sign also has got a problem because why? It's too big?

KEVIN DUGAN: It's more than

15-inch projection.

SCOTT POLLACK: It projects more than 15 inches off the face of the wall. So in terms of size limitation it's compliant, but it projects more than 15 inches.

TAD HEUER: So there's no square footage problem?

SCOTT POLLACK: Not a square footage problem. Not according to how Les --

SEAN O'GRADY: What is the square footage?

KEVIN DUGAN: The square footage is 57.93.

SEAN O'GRADY: You're limited to 13 square feet. Projection of more than 15 inches means it is a projecting sign.

CONSTANTINE ALEXANDER: Okay.

SEAN O'GRADY: So by definition --

CONSTANTINE ALEXANDER: I didn't see anything here that talks about it.

SEAN O'GRADY: It appears to me you have an area of sign violation and you've got an illumination problem. Height's I assume not over 20 feet?

SCOTT POLLACK: No.

SEAN O'GRADY: From the top?

KEVIN DUGAN: No. It's --

SLATER ANDERSON: It's 14 feet overall. The height of the sign itself? It says 14 feet. It sticks out over four feet.

SEAN O'GRADY: That would be at least -- otherwise you're banging your head.

KEVIN DUGAN: I mean, it's off the ground.

SLATER ANDERSON: From the ground, yes. It's got to be....

SEAN O'GRADY: So you're in violation here.

SLATER ANDERSON: And just so I'm clear, it's in this location, right? On

the east?

KEVIN DUGAN: You can see it right there. On that picture.

SLATER ANDERSON: The yellow thing's gone.

KEVIN DUGAN: It is essentially replacing the existing blade that was in the location that was part of the original sign package. Which were, even though they are no longer, historically they were illuminated. Those were -- there's electricity there. They were all lighted originally as part of the original sign package. As years have gone on, the illumination has sort of gone away. But they were all designed to be illuminated originally.

SLATER ANDERSON: These ones going to remain, the ones that are shown in these photos? Are they still there? These things that match the one that's now been removed?

SCOTT POLLACK: No, I believe they're all gone. After 20 years wind and other things have taken their toll.

SLATER ANDERSON: Well, this is a recent photo.

KEVIN DUGAN: Well, that's a month and a half ago.

SCOTT POLLACK: We have been doing repair work.

CONSTANTINE ALEXANDER: We're talking about one sign on that building?

SCOTT POLLACK: One sign.

CONSTANTINE ALEXANDER: Only one sign?

SCOTT POLLACK: One sign.

CONSTANTINE ALEXANDER: Not three signs?

SCOTT POLLACK: One sign.

BRENDAN SULLIVAN: On this month old photo simulation or current, there is a yellow --

SCOTT POLLACK: Yep.

BRENDAN SULLIVAN: -- sail for lack of a better word. A blue one and a yellow one.

KEVIN DUGAN: That is correct.

BRENDAN SULLIVAN: What we're saying is that in lieu of this blue one, in the middle you want to put up another yellow.

SCOTT POLLACK: No, it's the yellow.

BRENDAN SULLIVAN: Just the one on the end?

SCOTT POLLACK: Just the one on the end.

BRENDAN SULLIVAN: The other two are going away?

KEVIN DUGAN: Uh-huh.

BRENDAN SULLIVAN: All right. You want to put up a sign that is 4 by 14 feet?

KEVIN DUGAN: Right.

BRENDAN SULLIVAN: That is

massive.

CONSTANTINE ALEXANDER: How does that compare with the size of the sign that was for the old restaurant? It can't be much bigger than the other one.

BRENDAN SULLIVAN: Apparently it was there before.

CONSTANTINE ALEXANDER: Yeah, Paparazzi. Their sign wasn't that big.

SCOTT POLLACK: Paparazzi didn't have a sign in that location.

CONSTANTINE ALEXANDER: Okay. Did they have any sign on their structure, projecting sign the size --

SCOTT POLLACK: They had no projecting sign.

CONSTANTINE ALEXANDER: No projecting sign at all?

SCOTT POLLACK: That's correct.

CONSTANTINE ALEXANDER: And why pray tell does PFJ need a massive projecting sign?

SCOTT POLLACK: Well, I can't speak to the size, but having actually talk to both Les and the landlord and having been drawn into this in the circumstance, one of the issues that this location has historically had is it's the only place that's not actually connected internally to the mall. It's the only retail tenant in the mall. And the reason that there's a retail tenant on this corner is because appropriately the Boards at the time that we were doing the PUD process felt that having pedestrian life and a street front use on the corner was important, which we agreed to. The issue is that if you're coming from the O'Brian Highway side, because of where the storefront is on the corner, you cannot know that there is a tenant on this corner until you've actually turned the corner. And if you placed a sign flat to the building, you would not be able to read

that sign because you would be coming at it along the edge of the building. And that was actually always an issue for Paparazzi. But being who they were, they were not interested --

BRENDAN SULLIVAN: This sign is akin to the Citgo sign in Kenmore Square.

CONSTANTINE ALEXANDER: Yes, I mean your arguments -- I'm persuaded except as to why do you need a sign this big. You need a sign there, I'll grant you that. But the size?

SCOTT POLLACK: I am giving you context. He has to -- as the applicant has the -- I was just asked to provide context.

KEVIN DUGAN: Well, I was under the impression -- of course, I don't know the history of it. At one time there was a sign like that there. For the restaurant prior to that, what was --

CONSTANTINE ALEXANDER: Paparazzi.

KEVIN DUGAN: And even prior to that maybe?

SCOTT POLLACK: Paparazzi was the original tenant in the space.

CONSTANTINE ALEXANDER: It was California Pizza Kitchen there at some point.

SCOTT POLLACK: California Kitchen was down. And then there was Ray's is what you're remembering, and they were cheesecake.

CONSTANTINE ALEXANDER: That's right, that's right.

SCOTT POLLACK: See, I've really been working on this for a long time.

TAD HEUER: So we have a sign as I'm counting here, must have a height violation?

CONSTANTINE ALEXANDER: Apparently not.

TAD HEUER: How can it not?

KEVIN DUGAN: No.

SLATER ANDERSON: It says 20 feet, right? It's got to be over 20 feet.

TAD HEUER: It's a 14-foot sign.

TIM HUGHES: It's got to be more than six feet off the ground.

KEVIN DUGAN: Oh, it is.

BRENDAN SULLIVAN: So it's going above the first level?

KEVIN DUGAN: Yes.

TAD HEUER: So there has to be, regardless what it says, there must be a height violation for it appears to be common sense reasons. There's a square footage question because there's a 13 square foot allowance and it's a 50 some odd square foot sign. There's a projection issue and there's an illumination issue.

TIM HUGHES: So basically all of the issues. You've got them on this sign.

TAD HEUER: Right.

CONSTANTINE ALEXANDER: And we

have yet to hear why we should address all of these issues in favor of your sign. Not to say there shouldn't be a sign, but do you need a sign of this massive to degree of projection. I'm a little sympathetic personally to the illumination issue for the reasons you point out, but do we need Citgo in Cambridge?

KEVIN DUGAN: I don't think -- don't make it like Citgo in Cambridge.

CONSTANTINE ALEXANDER: Obviously we're trying to make a -- it's a figure of speech. We're exaggerating trying to make the point, but the sign is very big.

KEVIN DUGAN: Well, in proportion to the size of that building it isn't. No, I mean really when you think about it, I mean when you're coming down the highway in the side there, that is really not that large of a sign.

TAD HEUER: Do you have anything that shows -- I mean, so we have the

picture of the sign itself and then we have the picture of the bracket, the close-up picture of the bracket, and then we have the picture of what the building looks like now. But do we have anything that shows what that sign looks like in that location on this building?

CONSTANTINE ALEXANDER: A photo simulation.

KEVIN DUGAN: Well, I guess you can photo simulate -- when you come to the third page.

SCOTT POLLACK: They're saying that sign design --

KEVIN POLLACK: I understand. But I mean, what I'm trying to say it's not going to project -- if you look at those brackets compared to these brackets, it's not that much larger than what was up there.

BRENDAN SULLIVAN: Those are not 14 feet.

KEVIN DUGAN: No, but I mean, it is taller. But it's not, you know.

BRENDAN SULLIVAN: It's really stretching it.

CONSTANTINE ALEXANDER: Yeah.

KEVIN DUGAN: I mean, it's....

BRENDAN SULLIVAN: It will dominate.

CONSTANTINE ALEXANDER: I would suggest, speaking for myself, subject to views of the other members of the Board. You come back to us with a professionally prepared, third-party prepared photo simulation showing exactly what this building -- this sign is going to look like on this building.

KEVIN DUGAN: Okay.

CONSTANTINE ALEXANDER: A big -- you know, exactly where it is where we can take a look at it and say -- maybe agree with your point, given the size of the building, the nature, it's okay or we may

not say that. I personally can't make a judgment based upon the information I have right now.

Brendan?

BRENDAN SULLIVAN: No, we're being asked to take two pieces and put them together.

CONSTANTINE ALEXANDER: Right.

BRENDAN SULLIVAN: And just looking at the one piece, that plan, a 4 foot by 14 foot sign is a monster.

CONSTANTINE ALEXANDER: I agree.

SLATER ANDERSON: I sort of have a -- somewhat of a design question about -- this was designed to have the pattern of what, with the sails there, the signs or something that gave some uniformity to the facade. Two questions: What has happened with the other three that went around this corner that helped to unify that facade? Now you're going to hang this one big, huge sign on one corner. Are the little

flags still there? Are the flags gone? I mean, it looks like the flags were there when Paparazzi was there. I mean, there should be some consideration of how that whole facade sits together versus hanging a big sign on the end. And I sympathize with that. I've driven down that and I understand, like, you're by it before you might know what's there. So, I'm not opposed to something being there, but it's sort of a -- it is disproportionate.

CONSTANTINE ALEXANDER: Perhaps you can be a Good Samaritan, you can be of some help to this gentleman and help him come up with a design. You hear us.

SCOTT POLLACK: I understand what you're saying.

TAD HEUER: I think in terms of the photo simulation it would also be valuable to get views from coming from the O'Brian Highway side.

KEVIN DUGAN: Yeah.

TAD HEUER: I mean, I notice that there are trees there so that may help your case, you need a larger sign to get around the trees that are currently along that sidewalk. But without being able to see what it might look like on the building and why those kinds of excess, the excesses that you're asking for are necessary because of the unique conditions of that space. It's difficult to determine why you would want to grant all four issues all at once.

BRENDAN SULLIVAN: Yes, you've got some issue that the hotel is probably running a little interference on O'Brian Highway. But again I think that this is big.

CONSTANTINE ALEXANDER: So, not so fast. This is what we call a case heard. So the next time you come before us, we have to have the same five of us appearing. So first of all what date?

SEAN O'GRADY: November 5th.

CONSTANTINE ALEXANDER: November 5th?

SEAN O'GRADY: Yes.

CONSTANTINE ALEXANDER: All five of us be available November 5th?

TIM HUGHES: Let me check my schedule. So far.

CONSTANTINE ALEXANDER: Okay. The Chair moves that this case be continued --

TIM HUGHES: Can I say one more thing?

CONSTANTINE ALEXANDER: Go ahead.

TIM HUGHES: I think when you talk about redesigning this, I think you want to take into consideration the architectural detail. This sign goes up and it kind of just masks everything that's going on above it, you know, in terms of this joint where the facia, you know, comes across and creates a detail on the side of the building. And I think you

might want to take that into consideration when you're looking at scaling this down.

Go ahead, sorry.

CONSTANTINE ALEXANDER: And before I make the motion, the photo simulations we're requesting, they have to be in the file, in the file at the Zoning office no later than five p.m. of the Monday before the Thursday hearing. All right? Don't bring them down the night of the hearing or drop them off the morning of the hearing. Okay? It gives us time to look at them and ask you more tough questions.

KEVIN DUGAN: Sounds fine.

SCOTT POLLACK: They'll be perfect next time. He'll be fine.

SLATER ANDERSON: That's what we like.

CONSTANTINE ALEXANDER: Okay. The Chair moves that this case be continued as a case heard until seven p.m. on November 5th on the condition that the petitioner

sign a waiver of notice for the time to reach a decision. And on the further condition that the sign that you so insidiously put in the window be modified to -- cross out today's date and put in November 5th.

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

(Aye).

CONSTANTINE ALEXANDER: Five in favor. Case is continued.

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

KEVIN DUGAN: Thank you.

SCOTT POLLACK: Thank you.

(Whereupon, a discussion was held off the record.)

(7:40 P.M.)

(Sitting members: Constantine Alexander, Timothy Hughes, Brendan Sullivan, Slater Anderson, Tad Heuer.)

CONSTANTINE ALEXANDER: We'll now turn to our regular agenda, and the Chair will call case No. 9642, 7-11 Temple Street and 136-152 Bishop Allen Drive.

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

ATTORNEY PETER FREEMAN: Thank you, Mr. Chairman, members of the Board. For the record, I'm Peter Freeman. Freeman Law Group, attorney for the applicant, and I have several folks with us before. Terry Dumas who is the director, and also we have the property owner, as you know, who is the YWCA and Mark Blythe is here as well as I believe several Board members and staff members and George Metzker I think out of interest, the architect, is here tonight. This does not relate to architecture, but thank you for coming, George.

In a nutshell as you will recall we had sent in a request in July for approval of two minor modifications. One being a shifting of the building which was approved under the regulations of 40-B as a minor or insubstantial change back at a hearing in July, the end of July. And the Board voted on the second request, which

was a request to incorporate into the record to correct what was an oversight on the applicant the fact that the project eligibility letter from the State Department of Housing and Community Development under the so-called low income housing -- low income housing tax credit program had inadvertently absent from the state, not yours, had not been submitted. And I thought that was worthy of being an insubstantial change. No problem with the fact that the Board voted that there should be a public hearing, which is fine, that's why we are here. So I would just say a few words and submit a couple of things. The way we submitted the request after the discussion by some of the members at the hearing was maybe it could be a change in the financing program. I don't really think it is a change, but we figured it could be in the alternative. I really think it's adding something that

was in existence at the time and correcting an oversight by the applicant. So, if you're wondering why we did both, we just figured that when I passed out the regulations, somebody, somebody mentioned that the regulations show that a change in a financing program is one of the things that can be treated as an insubstantial change.

CONSTANTINE ALEXANDER: Let me just stop you for a second. Someone just raided their hand.

FEMALE AUDIENCE MEMBER: I'm having trouble hearing.

ATTORNEY PETER FREEMAN: I apologize.

CONSTANTINE ALEXANDER: Any trouble hearing, we'll do the best we can under these conditions.

ATTORNEY JAMES FREEMAN: Thank you for letting me know. I'm sorry.

So in a nutshell, and I passed them

out last time, but I'll just hand in one copy again. The CMR -- 760-CMR talks about the changes being substantial or insubstantial at Section D-5. It says a change in the financing program under which the applicant plans to receive a subsidy if the change affects no other aspect of the proposal.

So, it's clearly within the power, especially power of the Board especially with a full public hearing to make such a change even if it were a change. But now I'll tell you why we don't think it's a change.

The initial hearing on this matter back in 2008 was at a hearing on June 12th of 2008. And at that time they had not submitted the project eligibility letter. What was submitted subsequently for the next hearing on July 24, 2008 -- and I brought a copy to submit -- although it's part of the existing record in this case,

but it was granted by my client. And it says YWCA Pool Site. Table of contents, new material since the 6/12/2008 BZA meeting. And there are 16 enumerated items, but the one that's relevant, No. 14 Department of Housing and Community Development Determination of Project Eligibility. And so they thought that they were submitting it. I'll give you the copy of that cover letter. What in fact they submitted by mistake was a letter from DHCD dated March 25, 2008 which was actually to the Mayor of Cambridge acknowledging and informing the city that DHCD had received an application for project eligibility. That's the notice that's also required under the regulations. So this was submitted. And you went on to approve the comprehensive permit which we appreciate. But inadvertently you folks didn't focus on it, no reason you should have, because my

clients, human error, they made a mistake. The fact is that before the hearings were completed, in fact, even before the June 12th hearings, the project eligibility letter under the low income housing tax program did exist. It's unfortunate it wasn't submitted, but it did exist. And it's dated May 14th. And it is part of what I submitted with this application both in July of this formal hearing. So you do have all of the necessary pieces.

So I would really just rest on that and submit that you're really just correcting the record, which as you know, if the Zoning Board through inadvertence on its own misses something, they can make a change, they have an inherent power to change a decision as long as it doesn't change the substance and affect the people's rights. This is a little bit different because it wasn't your mistake, it wasn't a clerical error, it was just --

we just submitted the wrong letter. But it really is similar in a way because you're not doing it without a public hearing. You know, maybe that was the better part of you chose to have a public hearing, and again I have no problem with that. But you're having a public hearing, the public will have a right to -- an opportunity to comment. So, I will end with that. But our request was to incorporate by reference into the comprehensive permit decision the project eligibility letter that was issued on May 18, 2008.

CONSTANTINE ALEXANDER: 14th.

ATTORNEY PETER FREEMAN: May -- oh, sorry. There's a typo in your --

CONSTANTINE ALEXANDER: 14th.

ATTORNEY PETER FREEMAN: Sorry, okay. Yeah, I got the letter here. Yeah, so, May 14th. It's probably my eyes. I should put my glasses on. May 14, 2008 to

incorporate this letter that did exist. It existed. I will end there. I don't think it -- I'm happy to answer questions and obviously anybody here has any comment if they want to, but I'm going to rest there and answer questions.

CONSTANTINE ALEXANDER: I do have a question.

ATTORNEY PETER FREEMAN: Sure.

CONSTANTINE ALEXANDER: In your notice for the hearing you have a No. 2, which you touched on, to approve a change in the financing program under which the applicant -- blah, blah, blah.

Is this presented to us that's in the alternative or is this a second piece of relief you're looking for?

ATTORNEY PETER FREEMAN: It is in the alternative. It might be expedient to approve both only in the following sense. Even though I just submitted the evidence that showed you that we thought we

submitted the proper evidence at the time, you didn't have that evidence before you, so it could be deemed that when you granted the comprehensive permit, you couldn't have done it under the low income housing tax credit program because you didn't have a project eligibility letter. So, therefore, I would say -- caution would say if you feel it's appropriate, which I think it is to do both, to do both. That's the way I would answer.

CONSTANTINE ALEXANDER: Okay.

ATTORNEY PETER FREEMAN: Thanks.

CONSTANTINE ALEXANDER: At this point questions from members of the Board?

TAD HEUER: There's a letter -- with the question as to whether the letter is still valid, the letter that was issued by.

MALE AUDIENCE MEMBER: Excuse me.

CONSTANTINE ALEXANDER: Yes, sir.

MALE AUDIENCE MEMBER: Could the

representatives at the table please identify themselves when they speak? As they have no name tags which is required -- as was required when I served on the Newton Board of Appeals. So identify themselves so we can associate remarks with the individual.

CONSTANTINE ALEXANDER: All right. Let me -- that's fine. To the far right is Brendan Sullivan. To my right is Slater.

SLATER ANDERSON: Anderson.

CONSTANTINE ALEXANDER: Slater Anderson. I'm sorry. I'm the Chairman, Constantine Alexander. Tad Heuer. Tim Hughes.

MALE AUDIENCE MEMBER: Thank you.

TAD HEUER: The question was posed whether the letter is still valid. Can you address that question or that point?

ATTORNEY PETER FREEMAN: Sure, absolutely. If you turn to the May 14th

letter in question, it says right at the end: This letter shall expire two years from this date on September 4, 2010 unless a comprehensive permit has been issued. So, yes, we're before December 10th. This says September 4, 2010.

CONSTANTINE ALEXANDER: Any other questions at this point?

I will open this up to public testimony. I suspect almost everyone in the audience is here for this case. We have a long night ahead of us so I would ask one, your remarks be brief. And two, if someone has made the point you wish to make already, please don't stand up and make the point a second time. We're not as stupid as we look. And we get the point the first time it's been made. And please also stay to the point. As you've heard, and it's a case -- we're talking about a relatively narrow piece of relief that's being sought here. We're not going

to reopen the whole case of whether the comprehensive permit should have been granted in the first place. That decision has been already made and I gather in appeal to the Court. So, with that preamble, who wishes to speak? Sir.

ATTORNEY JOHN WHITTEN: Thank you, Mr. Chairman. Members of the Board, good evening. My name is John Whitten. I had the pleasure of speaking before the Board this past July. I'm an attorney with the law firm of Daly and Whitten. And I'm here this evening as I was this past summer representing the trustees of Brink Realty Trust.

Mr. Chairman, I appreciate your comments. I recognize that it is a narrow issue and I will limit my comments just to that narrow issue. As the Board knows, the comprehensive permit process requires three things: Site control, a proper applicant and proof of fundability as

jurisdictional prerequisites to issuing the permit. There's no question, because my brother Attorney Freeman just stated it to the Board, that the Board did not have before it when it issued its comprehensive permit in 2008, one of those jurisdictional prerequisites. It's not relevant that that piece of paper might have existed at DHCD. It might have existed at the YMCA or somewhere else in the Commonwealth. It needed to be here before this Board, because part of your due diligence requirements was to ensure compliance with those three limited narrow prerequisites. By admission of seeing HC's attorney you didn't have it. It would be improper, and I would respectfully suggest it would be unlawful, to now open the record and stick into the record a jurisdictional requirement that had to be in the record last year when the permit was issued. This may seem like

form over substance, but respectfully for my clients they had the right to rely that the Board of Appeals had a proper application before it; that that application had been embedded by the Board, by your counsel, by your agents, and by admission by Attorney Freeman, and as we know because we've done discovery, this was not before the Board of Appeals when you issued the permit. This was a mistake, mistakes happen. And here's how it has to be corrected.

It cannot respectfully be corrected by opening the record and throwing in this piece of paper. It can only be corrected by starting the process from the beginning as it has to be done. This isn't form over substance. This isn't something that's just a silly little perquisite. It's a requirement of the statute. And it's relevant to my clients, and I suspect to others in the room, because these are

the minimum criteria that the Board had the right to rely on. So, again, I would respectfully suggest that the regulations provide you no choice. It's 760-CMR-56041B. Jurisdictional prerequisite not post-requisite. It would make a mockery of the system, again respectfully to the Board, if you would allow an applicant to fail to meet these bare basic requirements. And in a year and a half later said, "My bad, please open the record and put it in." That's not how the law works. And the other important part, Mr. Chairman --

CONSTANTINE ALEXANDER: Let me stop you at that point.

ATTORNEY JOHN WHITTEN: Of course.

CONSTANTINE ALEXANDER: Isn't there a difference though. If there's a difference between they had the necessary documentation to satisfy the jurisdictional requirement, they just

didn't give it to us. As opposed to they didn't have it at the time, they got it after we granted the relief and now they want us to go back, as you put it, and stick it in the record. I'm very sympathetic to the second point. I'm not personally not yet convinced on the first one which are the facts before us.

ATTORNEY JOHN WHITTEN: I understand the distinction, Mr. Chairman and I appreciate that. No, I don't think it's a great distinction as far as the law is concerned, and I'll tell you why. The abutters, my clients and anybody else in this room or anybody that was here last year, had the right to rely on the record before the Board of Appeals. And the Board of Appeals record did not contain this project eligibility requirement. The fact that it existed somewhere else is not relevant. And an example would be, and the Board deals with this twice a month.

You render a decision, you failed to file your decision with the City Clerk. That's a defect that is a appealable automatically to the Court. An abutter fails to file an appeal within 20 days, the Court loses jurisdiction. There's no subject matter jurisdiction. I'm suggesting to the Board that you never had jurisdiction over this matter in 2008. And the reason why I think it's particularly relevant to this case, Mr. Chairman, is that there are now two appeals in this case. And the two appeals are the initial appeal of the ZBA's determination granting a comprehensive permit. The appeal from your decision this July granting a comprehensive permit modification. I would say this case is going to continue to get litigated. And I think it's important that the record be clear that it be fair to my clients and anybody else in the room, that the Board

had a proper application before it, that you vented that application most importantly with respect to fundability. Without that letter there is no assurance of fundability.

The second part very quickly, Mr. Chairman, and then I'll stop. When the Board voted in July to allow the building to be moved four feet, it arguably changed whatever DHCD was willing to approve. Now, again, semantics, four feet, well, in the city of Cambridge four feet is not so semantic, it's substantial. DHCD has not issued a new project eligibility letter upon information and belief they haven't been asked to amend their project eligibility letter and upon information and belief the Board is not in possession of any knowledge that DHCD has that Board voted the way it did and DHCD approves the revision. And that, Mr. Chairman, I think is substantive as

well. Because DHCD is the only entity that this applicant seems to have gone to to seek project eligibility funding. You didn't have the letter in 2008. You don't have the new letter in 2009. And for those reasons, Mr. Chairman, I would urge the Board to deny the request and order the hearing to start a new proper application and maybe this time it will work out so the neighbors and the other abutters can be satisfied.

Mr. Chairman, with me are the three trustees of Brink Realty Trust, my clients. And with the Board's permission I asked the Board to recognize Mr. Ginsberg who would like to address the Board briefly if that's acceptable.

CONSTANTINE ALEXANDER: Oh, sure.

TAD HEUER: I have a question before that possibly. When you discussed just now the question of DHCD approval and non-approval for fee question, certainly

if there is the authority for us to grant -- to deem a change insubstantial, there's not simultaneously a requirement for that change to be sent to DHCD for their approval because it's an insubstantial change, it would seem to make redundant the need for us to -- them make a determination if we can determine something is substantial. It would seem the statute would be saying two things when it only can really be saying one. Can you explain?

ATTORNEY JOHN WHITTEN: I sure can. That's an excellent question. And here's the problem: The ZBA can determine changes are insubstantial and they could be the demarcation of a parking space or a sign, no one's going to object to that. But you authorized the movements of the building. DHCD as far as I know, never authorized or reviewed the project economics of that moving of the building.

What impact that might have on where the garage goes or on vehicular traffic, or things that none of us have thought about. You have no idea, again, respectfully to the Board, whether DHCD will issue final approval for this project. We're in litigation. Everyone's spending a lot of time and money in angst. And yet nobody here tonight is going to be able to testify to this Board that DHCD will issue the low income housing tax credits for this project. So, it's up to the applicant to get DHCD to approve it so you have some assurance that that minor modification that you called a minor modification would ultimately be approved by them. Do they have to approve it? Yeah, they do. They have to issue final approval. Would it be smart to get them to issue it now before people spend more time in more angst? Respectfully I would say yes.

TAD HEUER: So under that rationality that's given us if they were, say, the moving of a parking space you would say that that would have to go to DHCD for their approval.

ATTORNEY JOHN WHITTEN: Well, everything -- let me say this: Under the regulations -- under the statute and the regulations, DHCD must, underscore must, issue final approval of this project. And that will be for the whole project in total.

Does DHCD have to approve every microchange? No. But would a movement of the building four feet that changes the construction site that alters the impacts, would that maybe affect DHCD's ultimate approval? Sure.

TAD HEUER: But that's your determination. I mean we're really talking about whether we would agree with DHCD, the Board would have the same

definitions of insubstantial or substantial. And I guess my question is isn't that just a subjective judgment as to what your client believes is substantial and we believe is insubstantial and where DHCD falls on which side of that line?

ATTORNEY JOHN WHITTEN: Yes, absolutely. And we'll argue that in superior court. Yes, I think you're right. But I guess where I'm disagreeing with you just a bit is DHCD must approve the project in total. The macroproject, when it's all said and done. So even it's a minor adjustment or a major adjustment, that's not the issue. The issue is there must be approval. Shouldn't the applicant, the city, obtain approval from DHCD now before we all spend a lot more time and energy? That's what I'm saying.

CONSTANTINE ALEXANDER: I have a question. It's really a question to you,

sir. If we were to grant -- deny your relief, sorry. If we were to deny relief and you would have to start all over again, what does that mean in terms of timing? Right now you have two issues on appeal right here. The second of the two being the relief we granted or residually made a month or so ago. If we were to grant you the relief, you would have three. Because you know this is going to get appealed to the court. You can eliminate two of those three items simply by just restarting the process all over again. Why not? I want to hear the other side of the story on starting the process.

ATTORNEY PETER FREEMAN: I can respond to that and I do have a rebuttal to --

CONSTANTINE ALEXANDER: You'll have an opportunity for your rebuttal later on.

ATTORNEY PETER FREEMAN: It's

time. Aside from the fact that I think that the merits are very strong in our favor. Several practical factors, okay?

First is the time. There's just no need to go through the whole process again and theoretically frankly take the risk that somebody else might appeal. Who knows? But any appeal now is limited to the narrow issue, be it that change a month ago, of the site plan or this adding of the letter to in my opinion to correct the record. So very narrow issues. In terms of the rights --

CONSTANTINE ALEXANDER: How much time?

ATTORNEY PETER FREEMAN: Oh, it could delay things easily six, six to -- I don't know how long. Six months or so. You give us a quick hearing but in terms of starting and the new appeal and the hearing and all that, and let me speak to those points, because I work with

Mr. Whitten a lot and we are very collegial even though we're on the opposite sides. And I respect what he's saying, but I must take exception to it in the following sense. They are not prejudiced at all. By either change, but all we really have to talk about is the change for tonight.

I showed prior counsel, because Mr. Whitten is second counsel, when the first appeal was filed probably in September if I recall within 20 days of your decision, it was September or October, I showed counsel right then the project eligibility letter. You know, he said I can probably agree, and I'm not trying to say he agreed because that's not fair. He withdrew this counsel and there's new counsel. And then I alerted Mr. Whitten way back. At this point it's almost a year ago. Maybe he came in in November, but it's almost a year ago.

They had not been prejudiced one iota by the knowledge that this project eligibility existed at the time and that it was, as we're claiming tonight, I told him almost a year ago. All right? And I also told him when we discussed in the hall, you may recall, about the date, because in my opinion and now I wish I hadn't with all of the appeals that he's filing, frankly, but I agreed as a courtesy because we do work together a lot, because of his vacation schedule, to not have this hearing -- this hearing to not have it in August which we could have had, you folks were available. But I agreed to put it off to tonight. And then we spoke privately in the back that night, I said, I will stipulate -- you don't have to worry about the formalities of appeals, I will stipulate that as part of the appeal that's scheduled to be heard October 14th, that this letter can be part

of the record. I can -- I'll stipulate that you have a right to appeal as part of this appeal that you already have, the change of the four feet. And whatever discovery or whatever, that was, you know, that's the Court process is pretrial things. Back in August they had all this information, and the project eligibility letter a full year before. So I said I'll do whatever you need. You want discovery. You want to do whatever you do so. There's no reason for them to delay the trial. I think I have a -- I don't want to sound presumptuous, but I think I have a very good shot with the counter motions that I will file to not delay our trial. And that's the biggest reason, because whether it's three or four months that we can get it in and notice and the hearing and the decision and all of that, whatever time I lose is precious to the developer. They're non-profit, they're able to go

forward and they really want to and need to. So -- and I'll stop there. That's my answer.

CONSTANTINE ALEXANDER: You said you wish you -- one of the trustees --

ATTORNEY JOHN WHITTEN: If I could, Mr. Chairman, Mr. Ginsberg.

CONSTANTINE ALEXANDER: Please come forward and give your name. Spell your name. Give your name, spell it, and address to the stenographer.

ARNOLD GINSBERG: My name is Arnold Ginsberg. I live in Post Office Box 73, Golconda, Nevada. 853 -- I'm sorry. 86414. Gentleman --

CONSTANTINE ALEXANDER: Sir, I want you to address the merits of this narrow issue. I don't want you to --

ARNOLD GINSBERG: I'll respect the question that you just stated to respect the merits of the now issue, and I -- suffice it to say I would like to ask

permission respecting that my lawyer has obtained very well to ask you one question that would be considered off the merits. May I do that?

CONSTANTINE ALEXANDER: Ask the question. I may choose not to answer it.

ARNOLD GINSBERG: I want to know if this Board was aware that they issued a permit based on the plans that George Metsker submitted to you that would create a trespass on my property and resulted in --

CONSTANTINE ALEXANDER: I'm not answering that question. That question is out of order.

ARNOLD GINSBERG: That's why I asked you. You said --

CONSTANTINE ALEXANDER: Do you have any other comment?

ARNOLD GINSBERG: I want to know if you were aware that you issued a permit that resulted in trespass?

CONSTANTINE ALEXANDER: I'm not going to address the issue of trespass.

ARNOLD GINSBERG: According to go George Metsker.

CONSTANTINE ALEXANDER: Sir.

ARNOLD GINSBERG: Thank you, sir.

CONSTANTINE ALEXANDER: Anyone else wishing to be heard?

(No response.)

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

Your time for rebuttal, sir.

ATTORNEY PETER FREEMAN: Thank you. And it is rebuttal like a legal argument in front of a judge, and you are the esteemed Zoning Board members. So let me again respectfully make my arguments contrary to what Mr. Whitten stated.

First on his last points -- and if there's a little bit of apples and oranges. The business about DHCD doesn't know about the four foot change and all of

that. That might have been an argument to not approve the four foot change without DHCD approving it. But that's not germane tonight.

CONSTANTINE ALEXANDER:

Absolutely.

ATTORNEY PETER FREEMAN: Secondly. Secondly the process as was just discussed in acknowledgement by Mr. Whitten involves the final approval where exactly these types of changes, which you already deem insubstantial, are vetted and reviewed by subsidizing agency DHCD, after all the final -- after all of the final -- and the permit and in this case and appeal, and then it goes back to DHCD. Nobody's rights are being deprived. They're not compromised. Whatever rights they're complaining about in terms of process and time, as I said, I would -- I extended myself in the court process. And if the court feels as though there should be a

continuance, there will be a continuance. So be it. You know. And I don't think that's per se relevant here.

So, as to that final point I just think it's not relevant that DHCD has not yet seen the four foot change. You already found it insubstantial and I'll rest on that.

Interestingly I anticipated the arguments -- first argument as to it's not proper. It might have been a mistake by us. The letter existed at the time. I think that's terribly germane and justifies your giving the relief that we're requesting. But in argument against what Mr. Whitten on said that we need to start over with a new application, well, the housing appeals committee has ruled on that in the case of John Owens versus Belmont Zoning Board, 1992 decision. I only printed a very small part. The HAC Housing Appeals Committee said some of the

conditions do not raise factual questions of consistency with local liens, but rather legal issues under the statute. For instance, condition 19 of a decision that was being appealed requires submission of a new application. The Zoning Board required submission of a new application if the applicant proceeds under a different subsidy program. This is right on point as we say in the law.

AJC said our reading of the regulation, which was 31 instead of 56 at the time, the same relevant regulations, is that this is unnecessary. All we do is we modify the condition to conform to our interpretation of the law in which -- you know, they go on to talk about the final -- it wasn't called final approval back then, but the subsidizing agency requirements and all of that. So there's a case in point that says, no. You simply do not need to have a new application.

Another case which I can cite to you virtually verbatim, and I apologize that I didn't print it -- maybe it was too close to home. It was probably the first 40D I did. The case of Crossroads Housing Partnership versus Barnstable ZBA. Happens to be where I live. It was the first 40B I did back in 1986. That case in a way goes even further to show you that in now way do you need to start a new application. That not you we, we do not need to submit a new application for you to make the correction that I'm requesting or my client is requesting. In that case, and I have to confess I don't know if I was aware of this as much at the time when it was my first case, but we simply did not have a project eligibility when we were in front of the Barnstable Zoning Board of appeals. It was a rental project that was also with the housing authority as the subsidizing at that time. And it

was called the Teller Program for rental housing, and we knew that we were getting that from the housing authority. But we did not have the market eligibility when we were in front of the ZBA. And they denied us. In the time period between the appeal that we made and the decision of the ZBA then being in front of HAC at trial, and that case, and again I apologize I don't have it here in front of me. But what that case said is it's a trial de novo at the housing appeals committee. It is of no consequence, even though it's a jurisdictional requirement, no question he was right about that. It's a jurisdictional requirement. But the applicant can correct the record even when it's on appeal after the housing appeals committee. So the housing appeals committee didn't make the applicant go back for a whole new application. They simply accepted the letter that had been

submitted after the Zoning Board hearing. Your facts or my facts I guess are much, much, much better. It was an oversight. It was simply that the letter existed and they even attempted to give it -- and there's no point in placing blame, whoever it was that put the package together. But I think that the facts -- the case law --

CONSTANTINE ALEXANDER: Let me ask a question. Why these two cases that you cited to us, why are you bringing them up before us tonight for the first time without giving us a copy of the full decision? I didn't see anything in the materials in our file that deal with the point you're making now, which is a powerful one perhaps. But I'm saying I feel a little bit out of seed, because I don't have -- I'm hearing it for the first time. Mr. Whitten is hearing it perhaps for the first time, and we have nothing to back it up.

ATTORNEY PETER FREEMAN: Well, again, I didn't print the whole case.

CONSTANTINE ALEXANDER: No, no. Why didn't you submit it in advance of the hearing? You've had letters in the file supporting your case, arguing your case --

ATTORNEY PETER FREEMAN: Right.

CONSTANTINE ALEXANDER: None of this was given to us before.

ATTORNEY PETER FREEMAN: I'm not going to make an excuse. I apologize. I didn't think it was necessary because I thought it was --

CONSTANTINE ALEXANDER: You thought it was necessary to bring up at the public hearing.

ATTORNEY PETER FREEMAN: No, appropriate. But we often make arguments at, you know, at the public hearing. And when it -- and again I apologize. I thought it was a fairly focussed and narrow issue. And my being familiar with

it led me to my assertions in terms of making this request and all of that. And I can't say anything other than I apologize. I didn't mean to put you at a disadvantage. It's case law so you don't need to continue a hearing. I can certainly -- if you're not able to decide tonight, which we hope you will, but I can certainly send you -- I can certainly send you the case. Point well taken. Certainly no offense made. Thank you.

And I think also -- although it is repetitive, but it relates to both of Mr. Whitten's arguments. If the regulations contemplate that a change in financing program can be an insubstantial change, then it follows that it has to be within your power before a public hearings to accept both step 1, which is agreeing to add this project eligibility letter to the decision. And step 2, to the extent it didn't exist at the time, to treat it

as a change. And so from where I -- I would rest with that and I think our arguments are strong. And it is in the public interest. You don't ignore the law just because I think you clearly support this project. I'm not saying that you can brush the law under the rug if we're not doing something proper and they're asking you to do something improper. Given the fact that I think the law is strong that the fact that you do support the project and the time is important to us and that that is one of the merits of why we're here today. Thank you.

CONSTANTINE ALEXANDER:

Mr. Whitten, I did close public comment. Unless you think you heard an inaccurate statement and you want to correct it --

ATTORNEY JOHN WHITTEN: I did, Mr. Chairman, and I'll be very brief.

CONSTANTINE ALEXANDER: No new argument.

ATTORNEY JOHN WHITTEN: No new argument.

CONSTANTINE ALEXANDER: Okay.

ATTORNEY JOHN WHITTEN: And I'll respond only to my brother's introduction of the Housing Appeals Committee cases. The city of Cambridge has worked long and hard to stay out of the jurisdiction of the Housing Appeals Committee. The Housing Appeals Committee has no jurisdiction before this board. First of all, the phrase "case" or "law" relative to Housing Appeals Committee is an oxymoron in the city of Cambridge. The city of Cambridge abides by the statute and by the regulations, not HAC decisions. 76-CMR-56041: To be eligible to submit an application to the Board or to file and maintain an appeal before the committee, only the first half is relevant, the applicant shall fulfill at a minimum the following: A, B and C. That's my whole

point, Mr. Chairman. And the matter is before the Court. I would respectfully suggest to the Board not to open the record to put something in that is now not before the Court. Because what the Board would be doing, and your counsel is not here tonight, but what the Board would be doing would essentially be changing the record that is now before the Middlesex Superior Court.

Thank you very much, Mr. Chairman.

CONSTANTINE ALEXANDER: Anyone wishing to make comments?

TAD HEUER: Do we have a copy of 76-CMR? I did didn't see one in file. Either counsel have one copy?

ATTORNEY JOHN WHITTEN: I'll be happy to give you mine.

ATTORNEY PETER FREEMAN: The entire set of 76 -- this is the one related to substantial and insubstantial changes.

TAD HEUER: I'm just looking for the jurisdictional requirements.

CONSTANTINE ALEXANDER: While you're looking at it, Tad, does the statute -- the regulations require that the application contain the eligibility letter or is it a representation that they have the eligibility letter?

TAD HEUER: That's -- are we closed now on public comment?

CONSTANTINE ALEXANDER: Yes.

TAD HEUER: That was my question is why I wanted to look at it. When I -- and I admit this is the first time I'm looking at this. My inclination was that this shall fulfill does not necessarily mean nor should it be taken to mean, shall have submitted in the same file. For an entity to fulfill the requirements, it must be a public agency not for profit organization to be fundable and the applicant of the control of the site. It

would seem to me that when it says compliance with the project eligibility requirement shall be established by issuing the written recommendation by the subsidizing agency, that's all that needs to be done. It doesn't necessarily reflect anything in this statute in my reading that it needs to be physically attached or stapled.

CONSTANTINE ALEXANDER: That was the point I was about to make. I mean, it seems to me that if this eligibility letter existed at the time of our hearing, and it was represented to us that it existed, and I think the file of your application did contain that representation. I think the jurisdictional requirements have been satisfied. We're not changing the record. All they're asking to do is to put in the file something that supports the representation they made to the Board when

the application was filed. And I find that a very inconsequential request on their part. Obviously you're free to take an appeal on the court on that. For us to overturn the decision when there is a representation that was made at the time, it was accurate at the time it was made, and continues to be made -- to be accurate, I just want to just correct a clerical error on behalf of the applicant, I see no, no merit in starting this process all over again. I -- time is important. I asked -- it might sound like a dumb question, I thought I would get a more specific answer as to how much time, but I didn't get it. But nevertheless, time is important. And I see all the people in audience who are here on this case. It's a controversial case. We've made our decision. To start all over again because of something that existed at the time of the application, just wasn't

the paper proving it existed, it's not given to us. I don't see why we should do that. I am in favor of granting the relief being proposed by the petitioner. Others?

TIM HUGHES: I virtually wrote down the same comment here. I said at the original hearing it was represented to us by testimony that the Cambridge Affordable Housing Corporation met all the criteria yeah for the project to be permitted. And the fact that the letter was not physically in the file doesn't seem relevant to me either.

CONSTANTINE ALEXANDER: Anyone else wishing to be comment or not, we go to a vote.

BRENDAN SULLIVAN: Yes, I agree with Tim. It's right on point.

CONSTANTINE ALEXANDER: Are we ready for a vote?

TIM HUGHES: Sure.

CONSTANTINE ALEXANDER: The Chair moves to permit the requested modification of the comprehensive permit to put into the record the comprehensive project eligibility letter to the petitioner dated May 14, 2008 from the Commonwealth of Massachusetts Department of Housing and Community Development under the low income housing tax program.

We would grant that modification on the basis that it was represented to us at the time of the hearing that such letter existed. In fact, the letter did exist. In fact, the letter was not submitted with the application, and though it was represented to us that it was in existence, the petitioner now seeks to just have it in the record as well. We find this not to be -- and the letter itself by the way, is basically a standard form letter. It doesn't change or comment on the merits of the program any more than

was said at the public hearing. So we're not distorting the record for the courts when they consider this appeal on its merits.

So on the basis of all of the foregoing, I would move that we do grant the petitioner the relief that's being sought as I previously described.

All those in favor, please say "Aye".

(Aye).

CONSTANTINE ALEXANDER: Five in favor.

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

CONSTANTINE ALEXANDER: Anybody wish to poll their condition? I don't know whether it's necessary. You also asked for a change -- to approve a change in the financing program. I think that was completed as a matter of safety. I don't think you need that for the purposes

of the relief.

ATTORNEY PETER FREEMAN: With the findings that you dictated if they can be written up with the decision, I would agree with that.

CONSTANTINE ALEXANDER: Okay. All set.

(Whereupon, a discussion was held off the record.)

(8:20 P.M.)

(Sitting members: Constantine Alexander, Timothy Hughes, Brendan Sullivan, Slater Anderson, Tad Heuer.)

CONSTANTINE ALEXANDER: The Chair will call two cases because they both involve the same parties, case No. 9563 and 9651. Both involve 12 Shady Hill Square.

Is there anyone here wishing to be

heard on that matter?

(No response.)

CONSTANTINE ALEXANDER: I can just read your letter into the record. I don't want to take away your thunder.

MALE AUDIENCE MEMBER: Go ahead, Mr. Chairman.

CONSTANTINE ALEXANDER: Okay. The Chair will read into the record a letter addressed to the Chair or to the Board on the letterhead of law firm of my Miyares M-i-y-a-r-e-s and Harrington, LLP. It references the two cases that are before us.

And it says: Enclosed is the party's joint request for continuance of these two matters which are presently scheduled for hearing next Thursday, September 10th. And it's signed by Christopher H. Heep H-e-e-p.

And then attached to the letter is a joint request for continuance that's

signed by Mr. Foster on behalf of Rockland, Sawyer, and Brewster. And also by Mr. Harrington, the firm as I mentioned Miyares and Harrington.

So, is there any reason not to continue this case? What date do we have, Sean?

SEAN O'GRADY: Any of four in November or December.

CONSTANTINE ALEXANDER: Let me ask the petitioner since you're here.

Off the record.

(Whereupon, a discussion was held off the record.)

CONSTANTINE ALEXANDER: What's the latest date?

SEAN O'GRADY: December 17th.

CONSTANTINE ALEXANDER: This is a case not heard.

TIM HUGHES: A case not heard, right?

CONSTANTINE ALEXANDER: The Chair

moves that these two cases be continued until seven p.m. on December 17th on the condition that the parties -- or I'm sorry, the petitioner sign a waiver of the time for a decision. And on the further condition -- I guess there's no notice required in this. It's an appeal from -- there's no posting of notice. It's not a variance or a Special Permit case.

SEAN O'GRADY: That's correct.

CONSTANTINE ALEXANDER: Just sign the waiver.

All those in favor of granting the continuance, say "Aye".

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. The case is continued.

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

(Whereupon, a discussion was held off the record.)

(8:25 P.M.)

(Sitting members: Constantine Alexander, Timothy Hughes, Brendan Sullivan, Slater Anderson, Tad Heuer.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9828, 100 Hammond

Street.

Is there anyone here wishing to be heard on that one? Please come forward.

Based upon the letters in the file I suspect people in the audience are interested in this case. If you have trouble hearing because of the way the configuration is, we can't do anything about it. Feel free to come around to the sides or the like. Just don't threaten us physically that's all.

For the record.

ATTORNEY SEAN HOPE: Good evening, Mr. Chair, members of the Board. My name is Attorney Sean Hope on behalf of Adams and Rafferty. And I'm here with petitioner Victoria Hsu.

Do you want to spell it?

VICTORIA HSU: Yes. Last name H-s-u.

CONSTANTINE ALEXANDER: Mr. Hope, before we get into the merits of this

case, I must say I have to raise a jurisdictional issue. Frankly, a notice issue. The case as advertised says it's a variance to seek a curb cut to access driveway. And it cites certain sections of our Zoning By-Law.

ATTORNEY SEAN HOPE: Yes.

CONSTANTINE ALEXANDER: When I look at the file, I see the relief that's being sought. It's substantial. It's a variance from the front yard parking requirements, front yard setback. You want to park in the front yard. I see also you want to build a -- your client wants to construct a driveway that's non-conforming. It doesn't meet the requirements for width for our Zoning By-Law. None of this is picked up in the notice on the paper. No one would know that reading the notice or seeing the sign that's posted. I have a question whether this case should be re-advertised to be

more specific about the relief being sought so that the community at large understands what's involved in this case. Certainly the neighbors understand because some are opposed and some are in support. We'll get into that.

But I, my view is this case should not proceed tonight personally. It's a personal view. I'd also add a further point is that again based on my reading of the files, this is a controversial case. If, and I underscore the word "if." If we were to grant the relief tonight, and a neighbor wanted to challenge or a person with standing wanted to challenge our decision, they have the grounds to challenge the case not only on the merits but also on the jurisdictional. I would be as a member of this Board embarrassed if our case were overturned on the basis that there was insufficient notice. And it would mean also from an economy point

of view you would have to start the case all over again. Would not make sense to re-advertise this case being much more specific about the relief being sought and ending, at least in my mind, any questions about improper notice in this case?

ATTORNEY SEAN HOPE: I would defer to the wisdom of the Board in that, but not in terms of form but in terms of substance. The way this started was about seven months ago we actually went forward trying to get a curb cut. So there was notice to the abutters in terms of, you know, the people you see here in the neighborhood. And also there was conversations, you know, about the actual parking. So I feel like in terms of substance, and I can't speak to the larger community, someone who drove by and looked at this, but I do feel that there is representation on both sides of the issue tonight. But what I wouldn't want to

happen for us to be granted relief or not -- especially be granted relief and then have that overturned, and I guess elongate the process. I do respect the time of the Board and I -- we are prepared tonight. We do think we have a strong case, but I can't disagree with you in terms of form. The notice would not necessarily let the passer-by know. But I do want to say the abutters and the people in the area are very familiar with this case. As you can see from letters in the file on both sides that they know the nature of the relief that we are seeking. But to your point, you know, I would not want to waste the Board's time and then have it overturned basically by lack of clarity on the notice itself.

CONSTANTINE ALEXANDER: Well, I ask other members of the Board to express their views. I've expressed mine. We'll go forward tonight if that's the wish of

the Board. But I have a concern.

BRENDAN SULLIVAN: I think that the point is well taken in that we really -- the crux of this whole thing is to create a parking space not to access it. The accessing is minor to the creating of one. So that wording might be not proper.

CONSTANTINE ALEXANDER: Anyone else wish to express a view?

TIM HUGHES: I defer to you.

CONSTANTINE ALEXANDER: I'll make a motion.

ATTORNEY SEAN HOPE: Can I just say one point?

CONSTANTINE ALEXANDER: Sure.

ATTORNEY SEAN HOPE: I mean, if anyone who would have standing, if all the immediate abutters are here, just in terms of the legal implications but if everyone who would have standing would be able to appeal is actually present or able to being heard, would that --

CONSTANTINE ALEXANDER: I don't -- I don't know the answer as a matter of law, but I suspect the answer is not sufficient. I suspect notice, not just to abutters, certain notice goes, but the purpose of the sign postings is to notify the community at large. And there may be people who have standing who are not abutters. It's unusual but it's possible. So I suspect your you're still open to attack.

ATTORNEY SEAN HOPE: I want the case to be heard by its merits and be completed when we do spend the time.

CONSTANTINE ALEXANDER: Well, do you wish to continue the case or do you want me to put it -- I can -- we can -- I can take a vote. Have the Board take a vote as to whether to require you to re-advertise or do you just want to voluntarily request a continuance so you have a time to re-advertise?

BRENDAN SULLIVAN: And the re-advertising basically would say what?

CONSTANTINE ALEXANDER: I think be specific as to the variances that are being sought. As I see the file, I may be wrong, that you're really desire curb cut access you referred to in here. You're looking to allow parking in the front yard setback which is front yard parking.

ATTORNEY SEAN HOPE: No, we're not actually. That's part of what we were going to clarify today. But I don't think that changes the --

CONSTANTINE ALEXANDER: Well, if you're not seeking that relief, we're not wrong. But the other thing is the width of the parking.

ATTORNEY SEAN HOPE: That's still there. The width of the parking and the width of the driveway are the two issues. But there is not parking in the front yard setback.

CONSTANTINE ALEXANDER: I don't want to ask you because I don't want to get into the merits. Because when you continue it's a case heard and I don't want to get into it.

BRENDAN SULLIVAN: I guess my thought is if you're not wondering if maybe spinning our wheels needlessly by re-advertising. I think the point that Mr. Hope raised in that I think that the people who are most interested are present I guess. And whether or not we could go forward. The relief that they're asking is a variance under Article 6.40 which is the design and maintenance of an off street parking facility. And so under 6.40 it encompasses all of those dimensions.

CONSTANTINE ALEXANDER: No question about that. But I think you have to be a zoning official or a member of this Board to understand that when we see

a reference of 6.4 that it covers much more than what the words cover, which is access to a parking space. That's my problem.

SLATER ANDERSON: I would say that the fact that it references the section of the Zoning Ordinance to me is sufficient enough to direct people to know the issue at hand. I'm less concerned about the notice issue.

TAD HEUER: I think I'm less concerned as well largely because I can't imagine someone wanting to have a curb cut to access clearly evident nothing space. I think it would be -- no one would ask for a curb cut for access to a driveway that physically did not exist. So I think it's implied that there's a driveway that needs to be created. And I think 6.40 encompasses that to the extent that it's necessary for an advertisement.

I think I would also tend to agree

with Mr. Sullivan that it's my recollection of the law of standing that actual notice, if a party has actual notice, they cannot rely upon failure of advertised notice to gain standing or to challenge a decision on that basis. So, if the petitioner is fairly confident that those who would be challenging had actual notice, and that the abutters had accurate notice, I think there is not necessarily going ahead on that basis.

BRENDAN SULLIVAN: Sufficient notice and knowledge of in the relief being requested.

CONSTANTINE ALEXANDER: Well, there are 12 parties that were entitled -- no, 15. 15 parties that received -- abutters or abutters of abutters that received notice. Now, I don't know how many of those 15, it's your call not mine, actually know all of the issues that are being raised in your petition. Because

all they would have gotten was a copy of what was advertised was to have the reference to 6.4.

ATTORNEY SEAN HOPE: I do think it's, you know, a close-knit street in terms of you know the parking and also the houses on it. I do feel that the letters in the file for those who are not here tonight do reflect opinions of the majority of the people who would have interest. I would confer in terms of....

CONSTANTINE ALEXANDER: Well, I think -- I guess the sentiment from other members of the Board, that they are prepared to allow you to go forward tonight. I don't agree but I'm not the majority. So, now that the burden is on you, do you want to go forward knowing the risks that are entailed?

ATTORNEY SEAN HOPE: I would like to go forward. I think there is adequate notice. In the fact that actual notice --

the fact that they may not have received that may not be enough to grant the standing. I think from the feedback we've gotten, there are sufficient notice for people who would be interested.

CONSTANTINE ALEXANDER: We can proceed on the merits.

ATTORNEY SEAN HOPE: Sure. I would just like to pass out a highlighted type plan that's also in the file, just for some clarity.

CONSTANTINE ALEXANDER: This is the same site plan from the file?

ATTORNEY SEAN HOPE: Yes.

Mrs. Hsu and her family live in a single-family home in residency one at 100 Hammond Street which was purchased in late 2006. Tonight we are seeking a variance in order to create a driveway and a one car parking on the lot. The dimensional issues for both the driveway and the parking concern the width of each -- the

parking and for the driveway. The code requires for a driveway that the width be ten feet wide and ten feet long. Our proposed driveway's width is two feet less than the ten feet for the last 16 inches of the driveway. And you can see that highlighted in yellow.

For the parking, though the code requires eight and a half feet wide by 18 feet long, our proposed parking space is six inches less than the eight and a half feet required for the two -- for the first two feet of the parking space. The remaining 16 feet of the parking space is eight and a half or greater. And that can be reflected also on the plot plan.

Before we get into the hardship, I'd like to -- I'd like the Board to recognize a few points.

CONSTANTINE ALEXANDER: What about the front yard, parking in the front yard? You said you're going to correct the

impression that you needed relief from that as well.

ATTORNEY SEAN HOPE: Yes. And part of that was -- I will take some responsibility for. So, according to the equation under the dimensional table, the front yard setback is at 17 feet, but that's taken from the center line of the street. The street itself is 40 feet wide. So that the actual front yard -- the 17 feet would actually put you on the sidewalk. There is a provision for off-street parking facilities but they can be no closer to the property line than ten feet. So ten feet from the property line creates our front yard setback and we're not seeking to park within that ten feet.

So that the first point I'd like to make --

CONSTANTINE ALEXANDER: I'm sorry. Mr. O'Grady, do you have any disagreement with that?

SEAN O'GRADY: I'm just saying the reason that you're confused is that the plans have changed.

CONSTANTINE ALEXANDER: Oh, okay. Thank you.

ATTORNEY SEAN HOPE: And I apologize for that as well. We were getting some things together.

Also the first thing I'd like to state is that there's is not going to be parking in the front yard setback. I feel like that was an issue that does comes up in many of these cases, and we wouldn't be parking in the front yard setback.

You may also hear -- you may also hear testimony that specifically on this lot, that a parking space is just too narrow or it doesn't fit. That may be true for some of the residents in the area, but from a Zoning perspective, I think that's not the case. There are a few reasons why I'd like to highlight.

First, there is the code specific exception for one, two and three-family dwellings where there's waiver of the ten yard buffer that's created from the foundation walls to the beginning of the parking space. So, if you're not a one-, two- or three-family dwelling. There has to be a ten foot buffer from the foundation wall. I think the specific wording is habitable with window on that first floor to the parking space. So the code allows for the parking space to actually abut the foundation wall if you're a one, two or three-family dwelling.

Similarly the code creates an exception for that five yard -- five feet, excuse me from the property line that allows for one, two and three-family dwellings to be within five feet of that actual property line. So in a sense if you're a one, two and three- family

dwelling, you can be -- you can almost abut the foundation wall, and you can also come abut the property line. That's exactly the case we have here. So I'm bringing those issues up to refute the fact that somehow this lot is just too narrow to have a parking space where the code specifically designed exceptions for the one, two and three-family dwellings which we fall into to allow for this type of parking.

I think the third reason I think that's most important is the fact that the code allows for parking -- with a parking with a seven and a half feet. The narrowest point on -- for our parking space is eight feet. So the code would already allow if Mrs. Hsu drove a different style car or a compact car, the code would allow us to park a car -- to have a parking space with the width seven and a half feet. I bring that up to say

that the code has already for certain types of cars would allow us to have a parking space and we would only be dealing with the issue of the driveway width. We wouldn't be dealing with the issue of the parking space at all. If Mrs. Hsu chose to she could also, you know, buy a Fit or a Beetle, some other smaller car and we would be talking about driveway width and nothing about parking space. From the letters in the file and from the comments we've heard from abutters, it's really this parking is aesthetic or just because of space that somehow parking doesn't work in this area. And I feel from the zoning perspective and from the code, I feel that's not the case and I wanted to bring that up.

And in summary in terms of the dimensional issues I just wanted to bring up the fact that I feel like the code has carved out parking issues or parking space

dimensional requirement specifically for our case. Like I mentioned earlier, for the first, for the first portion of our driveway, we don't meet the dimensional requirements by six inches. If Mrs. Hsu -- just to give you her perspective. If Mrs. Hsu shaved off two and a half feet from the corner of her house, we wouldn't be here at all. We would be doing this as of right. So it's really -- and I'm getting to the hardship now. It really has to do, our hardship there's three main concerns, but the first one is the size and the shape of the lot and where the house is cited thereon. So if you look at the lot from the rear lot, the property line on the left-hand side where we're choosing to park is actually wider in the rear and it pinches as it comes toward the front of the house. If this house was built at the same angle of the property line or the property line didn't actually

slant, we wouldn't have this issue. We'd have nine feet all the way. We still may be dealing with the driveway issue because of where the house sits in proximity to the front of the street. But the main hardship has to do with the shape of the, the shape of the lot where the house sits on it.

The second issue has to do with the curb in front of the house. And there's a picture there of the curb. So, the curb on Hammond Street there, if you, just by eyeballing it, they're actually higher than most. Specifically from the Hsu's house to the corner which is being close to 60 feet, the curb at some point and in front of the Hsu's house is actually over a foot or 13 inches.

TAD HEUER: I have a question about that.

ATTORNEY SEAN HOPE: Sure.

TAD HEUER: I went last night in

front of the Hsu's with my own measuring tape and measured the distance from what I believe is the corner property line on the left of the house, where the fence is, down to where I believe there is a walkway that's situated in the rear. There appeared to me to be 13 different paving curbstones varying in width for approximately a foot and a half to six and a half seven feet. I measured each of them to the height of the curb down to the street level, and none of them appeared to be more than ten, perhaps ten and a half inches high. Can you explain the discrepancy between what I saw and what the record reflects?

ATTORNEY SEAN HOPE: So just to be clear you went to the actual sidewalk in front of the house?

TAD HEUER: Yes.

ATTORNEY SEAM HOPE: So, you were saying paving stones? And I actually --

TAD HEUER: Yes, the curb stones. Yes. This -- can you tell me where this picture was taken and it reflects 12 and a half inch curb and I'm just confused as to where that --

VICTORIA HSU: My husband took. I think that is from where our driveway was proposed to be. That's kind of where we took that picture.

TAD HEUER: I have to say I'm not sure how that is possible given what my measurement was. But if that's the representation you're making, that's the representation you're making.

SLATER ANDERSON: Has the street been repaved?

ATTORNEY SEAN HOPE: No. I mean -- no. Not since that picture.

VICTORIA HSU: Not since that picture. You know, I don't know precisely exactly where, but I believe that is a picture that was taken at the spot where

we would like to put the driveway.

ATTORNEY SEAN HOPE: So it was in the front of the house. And I notice --

VICTORIA HSU: But it's not even, you know, the front of the house. Some parts a little lower, some parts a little higher.

TAD HEUER: Right.

VICTORIA HSU: We're talking about an inch. It could be just where you hit it.

TAD HEUER: Right.

VICTORIA HSU: Did you measure the whole front each --

TAD HEUER: Yes. I measured the 13 stones on their left most and right most portions as well as the middle most portions. I didn't find any segment that was in excess of eleven inches and most were not next to ten inches. So I was kind of confused when I saw this photograph of 13 inches as to where that

could have been taken in front of a structure where -- that we have before us tonight.

ATTORNEY SEAN HOPE: I can't speak to the differing measurements. You know, the picture was submitted by the petitioner. And as I went out there, I didn't measure, but from just being a resident and knowing what the average curb height, it almost is the actual sidewalk curbs get steeper as you go towards the end of the street by the Hsu's house, and it seems like they may seem lower. They may be ten and a half. I'm not speaking toward your measurements but just in general. But that hardship whether it's 10, 11, or 13, and I think those numbers are somewhat significant. They're higher than most but to my, to Mrs. Hsu's issue is that when you -- and maybe some of the other neighbors can attest to it, maybe not, but when you park close, normally

close to that actual curb, when you get out, there's a high risk of scraping the car or not being able to fully open the door. So that when the Hsu's park there, there's often times that they have to either park a little further away so they can open the door to get out or exit on the street side to be able to avoid that inconvenience. It would be an inconvenience to most folks, but as we'll explain later Mrs. Hsu's daughter has a neurological disorder, autism and so that's really the nature of -- that's one of the main reasons why we're here for hardship.

I want to let and ask the Board to allow Mrs. Hsu to kind of explain in more detail. But generally this, you know, in January 2008 their daughter was diagnosed with autism. This has significantly changed their life. You know, generally speaking she suffers from impulse control,

tunnel vision and also lack of spatial awareness. So there's this issue when exiting the vehicle, and Ms. Hsu will explain in more detail, there is -- you know, if the daughter sees something in the street that catches her eye, unlike most five year olds there may be some fascination, but because of the lack of impulse control, she will run and dart out. So, part of this need for a driveway in a parking space has really to do with safety. Their own safety but also the safety of others driving on that street. I will just allow, want to allow Mrs. Hsu if the Board will allow just to kind of explain the behavioral aspects on how that relates to hardship.

VICTORIA HSU: Okay. I don't know how familiar you are with what autistic spectrum disorder is. And we lived and breathed it for a couple years now. So if I -- just stop me if I talk shop.

Basically, essentially it's a biological disorder where you're born -- the left side of the brain and the right side of the brain don't work together as the typical person does. So if the left side of the brain issues an impulse, usually the right side of the brain has a mechanism that checks it to sort of think about consequence. If you were to do this, what would this mean? In my daughter's case that doesn't happen. It only happens with a great deal of delay, such that essentially it doesn't do its job. So what that means, translates to in a sort of daily living circumstance, is that she thinks of something, she acts. She -- a thought comes to her mind, she voice it. There is no barrier.

So some of the things she likes to do -- for security purposes she holds stuff from home. Like a toy, a rock, a pebble. Whatever it is that give her a

sense of security. It could be very weird stuff. I mean, it's just incomprehensible what it is that will fascinate her. And it's right now it is seeds. She will see a seed and she must have it in her hand. But because she doesn't have particularly good muscle control, which is also another issue with spectrum disorder, she drops them all. Of course she drops them, all she can think about is getting it back. So, she doesn't always know she dropped it. So we will be walking along, she'll drop it and then she'll pull away and run back and grab it. And she will -- also she has very strange vision.

On the one hand she can see extraordinarily well. She can see things far away with incredible detail. At the same time she doesn't have depth perception. She doesn't know how far she is from someone. She can't judge the distance of an oncoming car. She can't

judge noise as well either. She can't tell that a noise, a loud noise means that something is close to her. She just doesn't have that -- they call it body awareness. She doesn't have the proper body awareness of distance and all the sensations inputs, visual as well as auditory. So what that means is she -- she's not aware. So if she wants -- some of the things she does in school, for example. She sees a crayon, a pen that you've got, and she wants it. She doesn't see any of these people. All she see is that pen. And she doesn't see the obstacles. So what she does is she leaps across the table to get that pen.

So, when she was little, we just thought she was very difficult. When she was -- she was non-responsive. She has no emotion. She was very difficult. You can't leave her. Prone to melt downs. Screaming. She doesn't know what the heck

is going on in the world.

As she grows older, as she got diagnosed, we started to understand what is bothering her. And we still don't know what's going to trigger an impulse action. We just know what the result will be. So, we can't really fix some of her issues, but we attempt to do is control her environment. One of the things that we talked to her psychiatrist about was moving. And her psychiatrist very, very strongly discouraged this. She said that believes that responding to therapy and these kids with spectrum disorders basically need consistency because they basically -- the way they function or the way they learn to function is to memorize everything. They memorize every thing so that they can function. For example, when we took her on vacation once -- this is the first time I actually saw very clearly what all the therapists has been telling

me. We took her on vacation, it's a resort, it's enclosed, so we didn't hold her hand. We just let her go. She ran into every fence post, every lawn chair. She doesn't know where they are. So the way she functions, she memorizes her environment and where things are so she doesn't kill herself. So that's why she said don't move her because you can really set her back. So we are working with what we've got. And one of the -- what we're thinking what we can do in terms of controlling her because she's now too big for me to physically control. And when she was two, she's small. She's 20 pounds. I can pick her up, it's pretty easy. She's now five and a half, she's 40 pounds. I can't really control her as well as I could before. What we wanted to do is, we wanted off street parking. We could back the car in, open the door, and that basically locks her. She can't run

off into the street and we can just take her in.

That's what we would like to do. It was a -- when we -- when we first learned that she had an issue was when she started preschool. Her school called us up and said we have a problem. And that was in October of '07. We did everything we could to try to get her an evaluation. It took a few months. As you probably all know, autism is just exploding and the good doctors are all booked up months in advance. So we got to see someone in January. They verbally told us we got a problem. We got -- that was when we started seriously talking to our neighbors.

I mean, when we first moved into the house, we bought the house in '06 and we moved in Christmas of '06. And, you know, we took a two-family house and we gutted it and we convert it to a single-family.

We want to build a home for my child, for my family. My mom -- my mom and dad live nearby. And we, we wanted her to grow up near her grandparents, so we moved to Cambridge. We bought the house. We convert it to a single-family. My husband started to travel extensively, was traveling three weeks out of four. I was home alone with her. She was very difficult. We went through a very hard winter. There was a lot of snow. I couldn't leave her to shovel. And come spring we decided to talk to our neighbors about off-street parking. And I told them that my husband was traveling a lot and it will help us a lot to have off-street parking so I don't have to worry about the snow. Kurt's response was well, get your mother to shovel. My mom is an elderly woman with osteoporosis. She helped -- she knows I'm struggling so she's trying to help. I'm trying not to let her to

help because it's dangerous for her. If she were to fall, it's bad news. So she -- she tried to help and that's what Kurt saw. Kurt saw her trying to clear a walkway for me on the sidewalk because she didn't want me to get into trouble. And Kurt used that to see that my mother should shovel my car out in the winter. I, I was frankly quite stunned by this comment. And Kurt followed up by saying, you don't need off-street parking, there's plenty of parking in the neighborhood. I myself don't park on my driveway. I prefer to park on the street. Given those comments I was at a loss for words. By the time I recovered, I scrambled to think of something to say. That would appeal to this self -- you know, to his benefit. And the thing I came up to say is that we are immediate abutters, that if we had a driveway, it could possibly increase our property value and that would be a benefit

to you because we have almost identical houses, and we're next-door to each other. If we improve our property, it may improve your value. He has taken that out of context and beat me up with, you're just trying to make a quick buck. If I want to make a quick buck, I will keep the house as a two-family, slap a coat of paint on it and flip it in '06 when the market is good. I didn't do that. I spent three years painting and picking out fixtures. Paint. Every single plant to make this house a beautiful home, a single-family home for my family. And to have him -- and then we had that conversation. I said, okay, the neighbors are difficult. Forget the driveway. I went to my husband and I asked him to please speak to his company so that he wouldn't have to travel anymore because I couldn't do it. So he did. He spoke to his company and asked them if they could stop him from having to

travel so much. And they were kind enough to let that happen. So we let the driveway thing go. Nothing happened. We didn't pursue it. And then '08 happened. 2008, and our daughter was diagnosed with autism. And I start reaching out to my neighbors again to explain what has happened and to explain about the impulse control, to explain about the inability of her to be aware of her surroundings. And that was when Kurt here made a comment about my trying to make money on my child's disability. Which is not only wrong but I find personally offensive. But we really, really just want to keep her safe. We need to work with the situation we've got because we don't want to move her. She has -- all of her doctors are in Cambridge. All of them. They're all residents of Cambridge. We've selected a school where the doctors go see her in the school, and it is -- we're

committed to this community and we're tied to it and I, I just want to make her safe. That's all.

CONSTANTINE ALEXANDER: Thank you. Anything else?

ATTORNEY SEAN HOPE: No. I have a letter from one of her teachers here. And I believe you have all the other correspondence.

CONSTANTINE ALEXANDER: I'll read it at the appropriate time.

Questions from members of the Board at this point?

We'll open it up to public testimony. I will just say at the outset that we have a number of letters in our files from I presume the neighbors. And as I recall, some are in favor and some are opposed. I will read all of them into the record. So if someone here wishes to speak, but they've already expressed their views in writing and they're not going to

add anything that's not in the letters, I ask that your comments be brief. And maybe you just want to emphasize what's in your letters that you want the Board to focus on. So with that preamble, let me start, is there anyone here who wishes to speak in favor of the -- I'm sorry, Ma'am. Wishes to speak in favor or in support of the petition?

(No response.)

CONSTANTINE ALEXANDER: The Chair notes no one has raised their hand. Is there anyone here who wishes to speak in opposition of the petition?

PENELOPE KLEESPIES: Yes.

CONSTANTINE ALEXANDER: Name and address.

PENELOPE KLEESPIES: Penelope Kleespies, 105 --

THE STENOGRAPHER: Last name again, please.

PENELOPE KLEESPIES: Kleespies,

K-l-e-e-s-p-i-e-s, 105 Hammond Street.

CONSTANTINE ALEXANDER: You're diagonally across the street.

PENELOPE KLEESPIES: Yes.

We were approached by Victoria in March. Actually I wrote this original letter in March --

THE STENOGRAPHER: You're going to have to speak up, please.

BRENDAN SULLIVAN: You'll have to speak up.

PENELOPE KLEESPIES: We are writing, my husband and I, to express our disapproval of this action. Our primary concern has to do with the fact that this action permanently removes a parking space from the common pool. At the moment parking is possible on the street. Having previously lived in places where parking has been very difficult, we appreciate the situation very much and we wish to protect it. We know that this balance between

cars and available spaces can change quickly. Now, for instance -- well, I'll skip that part. That's about a number of cars and the number of people.

We have been fortunate on Hammond Street. We have been good neighbors to each other. During the winters it's not uncommon for residents to help shovel each other's walks, and we have helped each other with the arduous task of shoveling cars out of snow banks. In fact, we've often shoveled an extra car space or two and that makes a big difference, because you don't have to put trash cans in the street, you don't have to put chairs in the street. Since everybody has helped clear the space, everybody can use the space.

One of the arguments that Mr. and Mrs. Hsu have put forward in their request of the curb cut is a safety issue. They have mentioned that because of their

little girl's disability, they feel that they will be safer for her to exit the car from the driveway rather than the curb side. Although we sympathize with her situation -- we certainly do sympathize -- we don't understand that as an argument. If it were possible for them to park their car farther back so that they could get out and go to a back door, then that might make some sense. But where the car is going to be parked is so close to the street anyway, it's not -- at the moment the Hsu's park their car across the street because they're trying to avoid that high curb. Actually, it's not that high. We can park our car and open the door. You have to do it carefully, but you can. But they tend to park across the street so that they don't have to deal with the curb I suspect. So in a sense -- it's not as if you're driving around to the back of the house in a perfectly safe place and

you can open the door. It doesn't, that doesn't fit. But, because of the extremely tight space issues, the driveway they proposed is still very close to the street. And therefore their little daughter, as with any five year old, needs close supervision. And the good thing in their favor Hammond Street is generally a quiet and safe street.

And we can also make a point about -- I don't know exactly how you call this front or side yard, but it is to us, to us it is a front yard. And aesthetically we think if they have a beautiful garden, it would be nice to not have a car parked in it. But since I wrote that letter in March, I'm -- just this last end of August, September, the usual turnaround in Cambridge, already, you know, there are more cars in the street than there were when I wrote the letter in March. So I guess our primary

concern that it's always a loss to residents to permanently lose community held space that's been given over to private use, and we're very grateful for this chance to express our feelings for this issue.

CONSTANTINE ALEXANDER: Thank you.
Sir.

KURT MCMULLEN: Yes. My name is Kurt McMullen, 104 Hammond Street.

THE STENOGRAPHER: Spell your last name, please.

KURT MCMULLEN: M-c-M-u-l-l-e-n.

And I am -- I'd like to respectfully oppose the petition. I spent almost 20 years of my life in Cambridge. Five of them as a homeowner at 104 Hammond. I have an eight-year-old son of my own that also faces some developmental challenges, and I'm very sympathetic with Ms. Hsu and her challenges she faces with the daughter. I've put my sympathy in writing

in this issue. Ms. Hsu first indeed raised the issue of putting in a driveway at her home between our houses on the first day we met which is the summer of 2006, and I said I would prefer not to have a driveway in the small space between our houses because right now it's very congenial, there are four back yards meeting. And she did indeed respond that a driveway would raise the value of our property. She did not indicate that she thought it would raise the value of mine. And I must say I'm a little hurt to hear the way she has recounted our interactions since then. I did notice, for example, during the first winter that they were there that their walk was unshoveled, and without any prompting I shoveled it for them. I live on the corner. I have a much longer walk to shovel than they do, and it was almost no effort. I didn't even really think anything of it, I just

connected it to the two shovel blocks that were there. And they kindly responded by giving me a gift when her husband was back in town and thanked me. And I thought we were off to a good start as neighbors. I never suggested that her mother should shovel the walk. I did suggest -- she told me that one of the problems was that with her husband traveling that it was -- there was some difficulty with the car and street cleaning, and I suggested that since she had family the in the area, they might move the car to the other side of the street in his absence. I never suggested anything about shoveling.

I'm still convinced that this narrow space is not a suitable space for a driveway. I think I furnished you with some photographs but I've brought some more. So Hammond Street is one of the few areas in Cambridge where there is ample on-street parking. There is an

uncongested residential atmosphere, and the space in question is too narrow for a driveway. The imposition for a curb cut and driveway and a presence of a car wedged between our houses would be permanently detrimental to the atmosphere of the neighborhood and the quality of my own house and backyard. And all this construction would raise the value of 100 Hammond Street, it would substantially decrease the value of my own property. And I believe, as I wrote in my letter, that the Zoning regulations make quite reasonable requirements for an absolute minimum size of the driveway and they deserve to be upheld.

I'd also like to point out that Ms. Hsu also has some possible remedies for her safety concerns. For example, one of her concerns as she expressed in her letter is that her daughter may have to exit on the street side of -- rather than

on the passenger side next to the sidewalk because of a high curbs. This is a problem we all face on Hammond Street. It's possible to get a car which rides high enough off the road that you can easily exit on the passenger side. This would be one solution. Or rather than authorizing a curb cut and a driveway, the Board can simply authorize her to lower the curbs in front of her house.

Certainly lowering the curbs a few inches would be a less substantial impact on the neighborhood than creating a curb cut. Or the city can create a reserved parking space in front of her house specifically for the needs of her daughter. I would be completely supportive of any of those resolutions. And I hope the Board will endorse a solution to this problem that resolves her needs and that is beneficial to all. But I hope you do not endorse a variance that is beneficial to some and

detrimental to others.

CONSTANTINE ALEXANDER: Thank you.

Is there anyone else wishes to be heard on this case? Yes, Ma'am.

PATRICIA SINGER: My name is Patricia Singer. I live at 45-A Museum Street which is roughly around the corner. And I came this evening not to comment specifically on 100 Hammond but more to comment seeing many curb cut requests coming through the Zoning Board of Appeals so -- more generically. And to that end what I would like to point out is that the granting or -- is that the granting of a curb cut variance is based upon hardship. And I think that the reason that that is so is because the curb cut flies in the face of two stated City Council purposes, and those are our elected officials. The first one is that the City Council is actively seeking to discourage ownership and operation of cars in the city of

Cambridge. As we all know, traffic is a real issue here. And secondly, the City Council is seeking to protect and preserve limited open space. The curb cut in addition, but I think secondarily presents some traffic considerations. And so to that end I would like to suggest that on occasion generally, again, not specifically in this case, that when the ZBA's hearing about curb cuts, they consider recommending or deferring to Traffic and Parking and creating the reserved spaces.

CONSTANTINE ALEXANDER: Am I not correct, and either Mr. Hope or Mr. O'Grady, in fact, we can't grant the variance to allow the curb cut to be there. The Traffic Department makes that decision. We just grant the Zoning relief that would -- if there was a curb cut access given, that they could otherwise use the space.

PATRICIA SINGER: And I apologize if I'm not as versed in the technicality as you are.

CONSTANTINE ALEXANDER: I'm not sure I'm correct on that.

SEAN O'GRADY: Yes, there are provisions of the ordinance that actually deal with the curb cut. Nothing here. But the curb cuts can't be closer than 25 feet to intersections. So in some very limited sense the Board can actually address a curb cut itself.

CONSTANTINE ALEXANDER: But we had a case in East Cambridge a couple months ago where we allowed someone to park in an area, gave Zoning variance for a parking relief and the Traffic Department refused to give the curb cut access. And so the relief was denied and it couldn't go forward.

SLATER ANDERSON: There's a parallel where we're part of an

application process; is that correct?
There are other stops along the way in
this approval?

BRENDAN SULLIVAN: A number of
sign offs, but ultimately the City Council
approves.

SLATER ANDERSON: I've been
through this. I'm just -- we're
addressing one piece of the puzzle here.

SEAN O'GRADY: I just don't want
to go on the record to say that those --
that this Board isn't sufficient. That is
the issue that we had discussed before
whether or not Traffic and Parking had had
the ability to overrule the BZA. And that
still seems to be an open question to me.

SLATER ANDERSON: But there's
still City Council approval as sort of a
final hurdle, correct?

SEAN O'GRADY: And, again, I'm --
an open question for me whether or not
there is the legal ability to again

override the BZA on that issue.

CONSTANTINE ALEXANDER: In short, if we were to grant relief tonight, it doesn't mean the case is over?

SEAN O'GRADY: No.

CONSTANTINE ALEXANDER: I just want to point that out to you and to all others who interested in this case. This is not -- we're not the Supreme Court on this one. Anyway.

Anyone else wish to be heard? Sir?

PATRICIA SINGER: I'm sorry, I wasn't finished.

CONSTANTINE ALEXANDER: I'm sorry, I didn't mean to cut you off.

PATRICIA SINGER: The point that I was trying to make was really the same as this gentleman made, generically or generally that there are other options that are less disruptive to the neighborhood and to the community than a curb cut. But, again, I'm not speaking

specifically to 100 Hammond.

Thank you very much for your time and your attention.

CONSTANTINE ALEXANDER: Thank you. I'm sorry I interrupted you.

Go ahead.

PHILLIP KLEESPIES: I'm Phillip Kleespies. It's with two L's, and I live at 105 Hammond Street. And I just wanted to add that I don't -- again, with all due respect to the Hsus and to the difficulties that they face with their daughter, but I have not heard yet, and maybe there are letters to this effect, any real expert testimony as to the needs of her daughter. There are degrees of impulsivity and degrees of perceptive ability. And personally I would like to hear more objective evidence from something like neuropsychological testing. Thank you.

CONSTANTINE ALEXANDER: Thank you.

Anyone -- let me -- I'll give you an opportunity but not yet. Let me read into the record the letters we got and I'll give you and Mr. Hope an opportunity to rebut. Okay?

And I'm going to read them in the order they were given to me. I'm not going to try to stack them one way or another.

The first letter I'm going to read is from Stewart and Judith Solomon who reside at 109 Hammond Street addressed to our Board.

"We are writing regarding the petition by Ms. Vickie Hsu to grant a variance for a curb cut at 100 Hammond Street. We reside at 109 Hammond Street, and are not in favor of granting the variance. For the past 11 years we have lived on Hammond Street. We have two cars and as we have no driveway, park on the street. The availability of parking spaces varies with

the number of occupants in the homes and apartments on the street. Although parking spaces are generally open now, at times in the past parking has been more difficult. We have two concerns: One, curb cut. The proposed curb cut will interrupt the normal spacing of cars between 100 Hammond and the corner of Hammond and Carver Streets with a resulting loss of one to one and a half car spaces. Two, off-street parking space. While Ms. Hsu feels that the proposed undersized parking space is adequate for her car needs, a future owner may find the space too small and be compelled to park on the street rendering the curb cut useless. While the proposed curb cut and driveway may remove one car from the street at this time, it may mean a loss of two parking spaces in the future. We value the Hsus as neighbors and appreciate the care they've taken to

beautify their house exterior and landscaping. Regrettably we cannot support their petition."

Next letter I will read is from Kurtis T. McMullen, M-C-m-u-l-l-e-n who resides at 104 Hammond Street.

KURT MCMULLEN: It's essentially what I read into the record.

CONSTANTINE ALEXANDER: Do I need to read it or no?

KURT MCMULLEN: No, not necessary.

CONSTANTINE ALEXANDER: Okay, thank you. And the second letter from you with photographs.

KURT MCMULLEN: Yes.

CONSTANTINE ALEXANDER: We have a letter from Frances, c-e-s, Keutmann K-e-u-t-m-a-n-n. I apologize if I'm mispronouncing the name if the person's here in the audience. 99 Hammond Street.

I'm writing this letter in support of Vickie Hsu's request to create a curb

cut to access a driveway on her property because, one, the curb in front of her house is too high to permit opening passenger side doors. She is forced to park across the street. Because her child suffers from Asperger's Syndrome, she is on constant fear that her child might impulsively jump out of the car, run across the street and be hit by an oncoming car.

Two, the curb cut should not create a great impact on parking spaces since the driveway will create a new one and free up space for residents across the street.

Three, since the neighbor two doors down was recently granted a curb cut variance to access both a driveway and a new garage because of her unique situation, I think she should also be granted a variance for a driveway.

Four, Vickie and her family have not only been a friendly and positive addition

to the neighborhood, but have beautifully fixed up and landscaped their property. I'm sure the driveway they create will be very attractive and tastefully done.

We have a letter -- a lot of them. A letter dated September 7, 2009 from Martin Cafasso C-a-f-a-s-s-o with no address given so I don't know --

VICTORIA HSU: He's next-door at 98.

CONSTANTINE ALEXANDER: Okay, thank you.

I'm writing to you to register my support with Ms. Hsu's request for a curb cut at 100 Hammond Street. I'm the third generation in my family living at 98 Hammond Street, and I don't see how the addition of a driveway at 100 Hammond Street could in any way adversely affect the community. The parking spot lost on the street will be made up for them by parking in the new driveway. It is, as I

see it, a zero sum alteration. I would like to say in addition that the Hsus have been great neighbors and are a welcome addition to the neighborhood. I endorse their petition without reservation.

We have a letter from Doctor and Mrs. Tom Delbanco D-e-l-b-a-n-c-o at 94 Hammond Street. Addressed to the Board dated August 24.

"Dear Members of the Board: Our home is two doors away from 100 Hammond Street. We write in support of the appeal for a variance. As a primary care physician, public safety means a lot to me, and the fact that the petitioners have a young child who may exhibit unusually impulsive behavior, should make it safer for the child if they have off-street parking. We do not believe that the curb cut requested will damage our street aesthetically."

I have a letter from Alexandra

Murray Harrison, MD, 183 Brattle Street, addressed to the Board dated September 2, 2009. "I am child psychiatrist treating Felicia Hsu who is suffering from autism, and I am writing in support of the Hsu's petition for a curb cut that would allow them to build a driveway next to their house. Because of the height of the curb on the street in front of the Hsu home, her parents cannot let Felicia out of the car on the sidewalk adjacent to the house. This creates a dangerous situation since Felicia can exhibit poor impulse control and often can attend only to what is directly in front of her. I am sure you will agree that a driveway is a safe solution to this dilemma."

There's a letter from Andrew J. Wang and Chiyung C-h-i-y-u-n-g Jenny Wang who reside at 84 Hammond Street.

"Our names are Jenny and Andrew Wang and we live at 84 Hammond Street -- by the

way, the letter is dated August 31st.
"The Hsu family has been good neighbors and we support their application for a curb cut to allow for off street parking. The curb around the Hsu's house is too high to allow passengers to get out of the car onto the sidewalk. This creates a hazard for the family as they are required to either put their young child into the car from the middle of the street or to cross the road and park on the odd side of the street where the curb is of normal height. We do not believe a curb cut for the Hsus would detract from the aesthetics of the street."

We have a letter from Wei Liu, W-e-i L-i-u and Zilan Qin. I apologize if I'm butchering these names. Zilan is Z-i-l-a-n. The last name is Q-i-n. I may have mentioned they live on 59 Sacramento Street. The letter is dated September 4.

"Our names are Wei Liu and Zilan

Qin. We live at 59 Sacramento Street. We've known the Hsu family for over eight years. They worked hard to turn an unliveable two-family house into a beautiful single-family home. Their efforts have decreased the density of the neighborhood and increased the aesthetics of the area. We support this application for a curb cut."

And lastly we have a letter from -- that you delivered to us -- I have two letters. Same letter twice. From the teacher of your daughter, Germaine G-e-r-m-a-i-n-e D.A. Cook-Wright. She teaches at the Cambridge Ellis School.

"My name is Germaine Cook-Wright -- the letter is dated September 9. "My name is Germaine Cook-Wright and I was Felicia Hsu's teacher at Cambridge Ellis School where she attended from 2007 to 2009. I'm writing in support of the Hsu's petition of a curb cut in order to access a

driveway. As Felicia's teacher, I have noted that Felicia can exhibit poor impulse control and awareness of her surroundings that is unusual for her age. I believe keeping her away from the street and putting her into a car from an off-street parking spot will improve her safety and that of other pedestrians and cars in the neighborhood."

That's all I see in the public file. One second. I'll ask -- I'll allow you to make a comments and then I'm going to close public testimony, and I'm going to allow Mr. Hope and Ms. Hsu to rebut.

PENELOPE KLEESPIES: You don't seem to have my letter in there.

CONSTANTINE ALEXANDER: I guess I don't. Do you want to give it to me, please, and I'll put it in the file?

PENELOPE KLEESPIES: I wrote this back in March, and my understanding you had it.

CONSTANTINE ALEXANDER: I don't know, for some reason I must have missed it. Do you want me to read the letter into the record?

PENELOPE KLEESPIES: No, I had the understanding that you had it in the file.

CONSTANTINE ALEXANDER: Okay. Public testimony is now closed. Any rebuttal?

ATTORNEY SEAN HOPE: I'd like to let Mrs. Hsu explain or rebut the idea of not understanding how parking off-street would increase the safety, and I think maybe some of the specifics of her plan will make that clear, and I also have a few comments afterwards.

VICTORIA HSU: Our plan -- we thought about this a lot. Our plan is to back our car into the driveway in the parking spot. Once you get into that spot, you open the door. It blocks off all her access to the street. So we'll

take her off -- out of the car and directly through to the backyard where it's fenced.

CONSTANTINE ALEXANDER: I have a question, and I don't really want to get into the -- but if you parked on the street, you have to open the door to let your daughter out. Don't you take her by the hand? How does she run? Why is there a risk that she'll impulsively run into the street?

VICTORIA HSU: You hold a little kid's hand as tight as you can, but what she does is she sees something, she just pulls right out and she's very, very quick. And you, you turn around to try to grab her and she's already gone. And that's the problem that we have with her on walks and other stuff. So I tend to take her to parks where she can't -- I can get her so that's what happens.

ATTORNEY SEAN HOPE: I'd like to

add, too, I mean her daughter is five and a half, turning six. But this is not a condition that necessarily is going to improve as she gets older and stronger. So part of the idea of staying in Cambridge and making this a liveable situation has less to do with -- has to do with her strength right now, but it also has to do with going forward and this hardship, that was a piece of the hardship will only continue to exist if not become more dangerous.

I'd also just like to make a couple of comments. First, I respect the neighbors and I think they thought long and hard about their comments and their objections. But what I haven't heard is it seems like they have issue with the code and the fact that the code would allow a parking space even narrower, in a narrower situation than we're asking for. And some of the comments about the City

Council and about dissuading off-street parking. I mean, it's in the zoning code and it's allowed for a reason. So, I just want to bring up the fact that while some may think that curb cuts are an evil to neighborhood and it may promote car ownership, there is a method with the City Council and there's also provisions in the zoning code that allow for this.

Third, to the direct abutters, it does also sound like there's an idea, not to point out specific neighbor, but, you know, direct abutter Kurt, he has an off-street parking space. And he also has, I'm not sure if it's six feet or higher, a stockade fence between his property and where the Hsus will be parking. So, it's not like all of a sudden there's going to be an issue with, you know, sight, air, quality or any of that. He has a right to not want a neighbor to do something he doesn't want

them to do. I don't think it's a valid argument in light of the hardship one, dealing with the dimensional aspects. And, two, with their personal hardship that I feel has become evident.

And the third I just want to reiterate the point that this is really a course of last resort. I mean, the Hsus had talked about potentially moving and selling a house they converted into a single-family, that is a real legitimate idea that they tried to propose. Now the idea that the city of Cambridge spending, I don't know how many thousands or hundreds of thousands dollar to go and level the street, talking to the city engineer, and I'm not sure if this is fact, but there was an idea that there was a drainage issue. That's why you have high sidewalks and it actually even goes higher as you go down the street and it goes lower not at a perfect slant. So I

think that these solutions that we all can think of are also not necessarily grounded in reality. I don't know if the City Council would. I don't know if the city engineers would. But I do know that there is a remedy that when you prove a hardship, which I think we have established, that there is a method within the zoning code that would allow for them to have a parking space and a driveway. And I also think it's significant that the relief they're looking for to I believe is de minimus. It's six inches in one case and two feet for 16 -- it's six inches in terms of the width of the parking space, and 16 in terms of the two feet needed for the driveway. I don't feel like we're creating a driveway or a parking space in an area that couldn't already be if Mrs. Hsu had a different type of car. So I would ask you to consider those factors in making your decision.

CONSTANTINE ALEXANDER: Okay.

Any discussion by members of the Board? Any additional comments, thoughts?

TAD HEUER: Is there a reason not to purchase a different kind of car to raise some -- it may sound obvious. We've had suggestions that you buy a larger car so you can park at the curb that makes exit from that car easier. We've had suggestions from you that you could buy a smaller car and therefore reduce the amount of relief that you're asking for in front of the Board. And there is substantial neighbor opposition. Why -- I understand that hardships are involved all around, but that seems to be one way to mitigate without having to come before us and ask us for relief.

ATTORNEY SEAN HOPE: One, even with a smaller car we would still be before you on the issue of the driveway. So that even though the parking space

would be -- it wouldn't be an issue, it would still have to come before the Board because of the driveway and the fact where the house sits.

Second of all, I also think it's, you know, you could -- I don't have a family, but you could find the smallest car you want and, you know, but if you're planning -- a car is not a one-time purchase. It's about family planning. And so the idea that -- I don't know if the Hsus plan on having more children, but it doesn't necessarily seem practical. Maybe neither does moving seem practical, but why we're here, why we went to the curb cut and now the Board we're trying to use the methods that are provided by the city to remedy this hardship. I don't know if the smaller car is a long-term solution or even a larger car is a long-term solution as Felicia gets older and those situations.

CONSTANTINE ALEXANDER: I would like to offer some observations. First observation is cases like these make me wonder why I don't spend my time somewhere else on Thursday night. These are hard cases and I sympathize with your plight. But I also am sympathetic for the neighbors. A curb cut is forever, that's my dilemma here. If we allow this curb cut, some day you're going to be gone from that house and some other person's going to be living there without a hardship that you're suffering now, but the city will have lost a non-street parking space. You will have effectively appropriated through your driveway and the curb cut a space on the street that's now available to the whole community, and now it's only available to you via your driveway. And I think there's also something to the point that it's not really a zero sum gain. I think the impact of a curb cut really is

more than one car parking loss on the street. I'm concerned about that.

I have to say I'm not entirely convinced that there's not other solutions to your problem. Lowering the sidewalk. There are really two arguments you made for it. One is the sidewalk's too high, and the other is a safety issue for your daughter. The safety issues for your daughter requires you every time to back into the parking space and as she gets older, the fact that you backed in and she has impulse control, she could still dart out in the street, push the door aside and take off. So, I don't want to get into parenting or medical issues, but I'm a little troubled by that, and I've got to balance those concerns against the real impact on the city. We do have -- as this woman pointed out, we do have these curb conditions a lot, and they're troublesome. Usually they come up in the context of

seeking a variance to park in the front yard which is not your case now. It wasn't a case until I saw this. But it's still, there are issues for the city about creating off-street parking and curb cuts where there are none before. Long story short, I'm troubled. I don't know how I'm going to come out yet. But I don't see this as an easy case despite the very, very legitimate personal issues that you raise and I don't want to in any way minimize them. But we have to make proper decisions here on the Board. We have to look at the person who happens to be living in the house at this particular time.

I've said my piece. Any others want to comment or shall we go to a vote?

TIM HUGHES: I'd like to comment. I feel like the conversion from a two-family to a one-family saved the parking in this neighborhood. I also feel

that the hardship is obvious because of the property lines situated to the side of the house. I do believe what Sean said about the relief being dominimous and I can sympathize with having spent six years as a companion for autistic people, I can sympathize with the kind of control issues and the problem that she's going to have. And I'm -- and given the neighborhood opposition, I'm still in favor of granting the relief.

SLATER ANDERSON: I would just, you know, I think my -- I thought of the same thing about the two-family to a single and that that does contribute to the reduction of density of the neighborhood. But I am also concerned about the common benefit being lost of that on-street parking space to the neighborhood. So I'm -- I'm torn by this. You know, obviously there's division in the neighborhood as far as resolution of

this issue. It is an appealable decision. So our approval of this doesn't necessarily going to guarantee that you will get this. And there may be other hurdles beyond here if the Board grants relief for you. My, you know, my hope would be and I think our hope in general as a Board is to see resolution between neighbors. And I think there's been some thought, you know, in trying to come to a resolution. I'm not convinced that the plan backing in here into such a narrow space and being able to open the doors and get the child out is that workable. But I, you know, haven't seen the specifics of the car and how it would lay out, but it seems a little tight to me. It seems that you're going to end up close to the street to begin with, and I don't see a fence in the front of your house and maybe there's a plan to put in a fence. I'm not sure. There are a lot of unknowns. But, there

is, you know, this permanence issue of a curb cut. And it seems to me that you're going to be adjusting the curb to put in a curb cut. Lowering the curb to deal with this one issue which is the curb's too high. That's going to have to happen if there's a curb cut. If you can lower the curb cut and, you know, with a doctor's note she can get a handicap space put in right in front of the house. Right in front of this very location, it seems to me that that's a potential course of action. That being said, I'm, you know, I'm very -- I'm torn. I mean, I'm sensitive to your situation. I think it's a legitimate hardship that didn't exist when you bought the house, and it's a new circumstance. And I know you're trying to accommodate. So, I'd be -- I'd welcome some additional thoughts.

BRENDAN SULLIVAN: I concur with your and Gus's dilemma and -- however, I

could not support putting a driveway in there.

CONSTANTINE ALEXANDER: You could not?

BRENDAN SULLIVAN: Could not.

CONSTANTINE ALEXANDER: Do you want to comment, Tad? If not, we'll go to a vote. No pressure.

TAD HEUER: I think I have similar concerns to those raised by Slater. Just a procedural matter, I'm troubled and I understand that difference between a 10-inch curb and a 13-inch curb has probably materialized with opening the door. I am troubled with the fact we have in our record a photograph representing something that at least based on my measurements of it is not representative of the situation we have before us. That's very troubling to me on a procedural level because we expect that what we have in front of us is all the

information that we need to make an accurate and informed decision. And this may be a curb from another part of the street and elsewhere, but at least in terms of the structure that we have in front of us that we're adjudicating upon, I do not believe that this photograph corresponds to it, and that troubles me because the representations I expect when I look through the file.

In looking at the other houses on the street, very few of them have driveways that are cut to the curb, at least in my examination of the street between that length of Hammond Street. It seems that many people have large houses on very small lots, that's how parts of Cambridge is built up. I am troubled by the fact that you're losing a space there. I think the idea is to get more people to have that space more in use rather than less in use. Again, that being said, I

have the same concerns as Slater. There seems to be a very compelling hardship type situation in which it didn't exist when the house was built. It exists now. Maybe getting worse. I have the same questions about the feasibility of the backing in and opening doors in a space that we've all kind of acknowledge is just the bare minimum necessary for parking space, much less one bounded by a six foot fence on one side and a two and a half story house on the other. Most of the time we're dealing with parking spaces at least some space obviously you can get around once you exit your car. I mean, it's a very difficult case but I'm leaning more toward Brendan at this point.

SLATER ANDERSON: Is there a possibility of conditioning this on when they're gone, it goes away or anything like that?

CONSTANTINE ALEXANDER: No, you

can't. It's a matter of law. A variance runs the land. So you can't do it to the petitioner.

Well, let's see, should we vote or do you want time to think about it?

BRENDAN SULLIVAN: We'll due for a vote.

CONSTANTINE ALEXANDER: Okay.

The Chair moves to grant the petitioner a variance as requested on the ground -- based on the findings of this Board that a literal enforcement of the provisions of the ordinance would involve a substantial hardship to the petitioner. Such hardship being the peculiar medical needs of the petitioner's daughter.

That in the view of the petitioner and supported by some evidence submitted by the petitioner as a result, that if we grant the relief, it would mitigate certain safety risks to the petitioner's daughter.

That the hardship is owing to circumstances -- we make a further finding that the hardship is owing to the circumstances relating to the soil conditions, shape or topography of the land and structures, and especially affecting the land and structures but not affecting generally the zoning district in which it is located. And this hardship would make this finding of hardship would be on the basis of the shape of the lot, the size of the house on the lot which results in a narrowing of the front yard setback and causing the zoning issues that we're addressing.

And further, we make a finding that desirable relief may be granted without substantial detriment to the public good or nullifying or substantially derogating from the intent or purpose of this ordinance.

There's no detriment to the public

good because the relief being sought in terms of just sheer size is minor in nature. It does result in a loss of an off-street parking space, arguably balanced by a removing one car from the street by use of the driveway.

And that granting this relief will not -- we find that it will not negatively affect the health, safety or welfare of adjacent parking facilities or neighbors. I think the facts speak for themselves as to whether this would affect the health, safety or welfare of the neighborhood.

I think the objections we've heard have been mostly with regard to aesthetics, and just general concerns about the impact of creating one more -- an off-street parking space on the property.

The variance that -- based on these findings we grant the variance on the basis that the work would proceed in

accordance with the plan submitted by the petitioners. One page. I guess it's been prepared by 2C Designs Studio, Inc. and initialed by the Chair.

All those in favor of granting a variance so moved, please say "Aye".

(Aye.)

CONSTANTINE ALEXANDER: Raise your hands so I can get a count.

(Show of hands.)

CONSTANTINE ALEXANDER: One, two. Two in favor.

(Hughes and Anderson.)

CONSTANTINE ALEXANDER: Those opposed to granting relief.

(Show of hands.)

CONSTANTINE ALEXANDER: One, two, three opposed. Relief is not granted.

(Alexander, Sullivan, Heuer.)

(Whereupon, a discussion was held off the record.)

(9:45 p.m.)

(Sitting Members: Constantine Alexander, Timothy Hughes, Brendan Sullivan, Slater Anderson, Tad Heuer.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9829, 94 Lakeview Avenue. Please come forward.

ATTORNEY SHIPPEN PAGE: Good evening, Mr. Chairman. My name is Shippen Page and I represent the petitioner Koby Kempel who's seeking a variance for the property at 94 Lakeview Avenue.

THE STENOGRAPHER: Can you spell your name, please.

ATTORNEY SHIPPEN PAGE: My first name is Shippen S-h-i-p-p-e-n. And my last name is Page P-a-g-e.

DARIN MARDOCK: Thank you. And I'm representing the petitioner as the architect. My name is Darin Mardock. It's D-a-r-i-n. Last name is Mardock M-a-r-d-o-c-k and I'm with Design Associates, Incorporated.

ATTORNEY SHIPPEN PAGE: Thank you, Mr. Chairman. What we're seeking this evening is a variance for a 1870s Victorian located at 94 Lakeview Avenue which the petitioner bought in June. It was owned by Lorna Cooke Devaron and her late husband Jose and it was built in the 1870s. During the course of her ownership Mrs. Devaron added various aspects to the house. Added a carport and she added a handicap ramp and the back a deck, and Mr. Mardock here has indicated the areas where Mrs. Devaron had included embellishments over the past three to five years.

CONSTANTINE ALEXANDER: She was architecturally challenged.

ATTORNEY SHIPPEN PAGE: She was very fine musically, Mr. Chairman.

In any event, Mr. Kempel bought the property has worked with Mr. Sullivan at the Historical Commission and with members

of the staff of the Zoning Board and has submitted a proposal to restore the house to its original Victorian style along with there's an expansion as of right to the rear. There is a tower with a spire on the top of it as you can see in this photograph. One of the purposes of applying for a variance is to seek an exception to the otherwise requirements of Section 8 of the Zoning Code which would require as soon as any new building goes, one, the building has to comply in all respects with the Zoning Code. And the staff of the Building Department of the Zoning Board of Appeals takes the position that there is -- because this tower is 28 -- is 34.2 feet below -- above grade, it's therefore below the 35 foot. But the spire is 17 feet higher, and they take the position because there is a five-by-seven room inside this tower, that's habitable space and therefore that the stairs have

to be blocked and the ceiling has to be lowered so it can't be used for living space. It's been part of this house since 1877 give or take. So we're seeking to have -- to side step that issue by simply saying we hope that Section 8 will not apply so that we don't have to --

CONSTANTINE ALEXANDER: You want a variance because it does apply.

ATTORNEY SHIPPEN PAGE: It does apply.

CONSTANTINE ALEXANDER: No question about that.

ATTORNEY SHIPPEN PAGE: We want a variance for that.

And then the second part of the proposal is to create a wrap-around porch on the front. You can see from this photograph that there's a small foyer entrance. The setback is 19 feet from the sidewalk, and they want to take that out. They've already taken it off subject to a

demolition permit properly granted, and they're going to put a wrap-around porch on the east and north sides. There's plenty of room on the north side. It's way back from the side setback. On the north it's going to vary I believe from three, six to four feet.

CONSTANTINE ALEXANDER: Do you have elevations showing what it would look like?

DARIN MARDOCK: Yes, I do. To give you the dimensions, on the south side what we're asking for in terms of a variance is three foot nine inches. That it would step beyond the 25-foot setback from the street. And then along the north edge we're asking for a four foot two inch.

CONSTANTINE ALEXANDER: So just side yard variance other than the tower, the height issue, the only other variances are small variances from setbacks?

DARIN MARDOCK: Front yard setback only. The side of the wrap-around porch would be within the side yard setback. So that would not be an issue.

CONSTANTINE ALEXANDER: No FAR issues? You're well within the FAR?

DARIN MARDOCK: Well within the FAR. I can show you a site plan here just to give you an idea of how large. It's a double lot if you will. And this helps to reinforce sort of the original, you know, say anything built in the last 50 years incumbrances. This was the carport and this was that front entry vestibule which are now eliminated as well. It's all of the other contemporary components, those have been removed as well. And in yellow that would describe where we'd like to do the wrap-around porch.

Shippen, if I may, I just wanted to direct you to this. This image and this image both are from the Cambridge

Historical Commission (indicating). This one was an engineer's survey done in 1877. And it indicates evidence of a wrap-around porch at that time. We also found some information where there were estimating the construction of the house be 1875 plus or minus. So, you know, back when the house was built, the assumption is there was indeed a wrap-around porch. And there are some dimensions here. This one appears to be a six. In my mind. You're welcome to look at it. And this one is a little bit wider to the wrap-around porch. And then the reason for showing this image here, I wanted to show you a historic photograph of the house, but at some point the wrap-around porch was removed and then there was an addition of a vestibule. And it looks, it appears as though the original Victorian paired doors were pulled forward to create an interior vestibule. And our intent is to

essentially recreate these doors and drive them back to where we think their original home was which was in plane with this tower element here. And the reason for the wrap-around porch -- I've got elevations here -- it's sort of a classic second empire treatment if you will. And what it does is it helps to create a base for this tower, this relatively tall element. It scales it down by doing a porch across the front and then across the north side. It's an anchor, scale it down, that's the whole intent behind the wrap-around porch.

CONSTANTINE ALEXANDER: So it's fair to say the wrap-around porch that you're proposing is period appropriate, but it is not exactly what was there before.

DARIN MARDOCK: Well, we don't have data on what was there originally. What we're doing is we're taking our cues

from the fairly simple second empire details that exist on the house. And you can see in, you know, evidence of that in these photographs. So, the attempt for the porch if it's granted is to keep the details very simple. One or next to the abutting house, the next house over, they've done some renovation work, too. I believe it's 104. And they have a wrap-around porch as well. They used a square baluster. And we're suggesting square columns and then just really simple bracketing. So not high style second empire. I'm going to call it more Plain Jane second empire keeping with the original style of the house. And then this is the south elevation of what you would see of that covered porch.

CONSTANTINE ALEXANDER: Can you all see?

DARIN MARDOCK: I'll pass these around.

TAD HEUER: Is it correct that the covered portion that you're proposing doesn't extend any further in the front yard setback than the vestibule that you've now removed?

DARIN MARDOCK: It's actually --

TAD HEUER: They're very similar.

DARIN MARDOCK: -- this diagram here indicates that was the original covering of, if you look at this element right here (indicating).

TAD HEUER: Yes.

DARIN MARDOCK: This covered element here (indicated) projected a little bit further beyond the wrap-around porch that we're proposing in that yellow color there.

We're architects that are preservationists so that's really the intent behind the whole project. Obviously the homeowner isn't creating this wrap-around porch to make -- to save

money. It's really an intent to further embellish the architecture and reinforce, you know, what the original was.

CONSTANTINE ALEXANDER: Can we turn to the spire or tower?

ATTORNEY SHIPPEN PAGE: No, Mr. Chairman, turn to the spire, please.

CONSTANTINE ALEXANDER: My question on that is simply is this: I mean opposed to what's a binary decision, either we grant you the variance or we don't you would have to tear it off and that would be a tragedy. In my judgment. Just seal off the -- make it uninhabitable. In other words, seal off wherever the stairwell is to that tower. If you did that, you would not need a variance and the house seems quite ample in terms of its living space. I mention this not because I'm not trying to be an amateur architect. You've got to, as you know, establish the hardship. And on the

height issue if you have this solution, why is a hardship, why do you have a hardship? You don't need that space, it's not essential to the occupation of the structure and it's sort of, you know, a relatively minor thing to do and end of story from a zoning point of view as to the height.

ATTORNEY SHIPPEN PAGE: Good question, good observation. Then my response to that, Mr. Chairman, would be that we've had discussions with the staff of the Board of Zoning Appeals and there is the Section 523B which simply provides and doesn't apply where there's a tower or spire, and I take the position that because that phrase isn't disjunctive to a dome, a tower or a spire that goes above, that the section doesn't apply. So you don't have to worry about that being habitable space.

CONSTANTINE ALEXANDER: You should

have taken the appeal for determination. You're asking for a variance. We got to assume that the determination that they made you haven't challenged it is correct. Now the question is okay, that is correct, please give us a variance. That's the issue before us tonight. Not whether you agree with their construction of the code.

ATTORNEY SHIPPEN PAGE:

Mr. Chairman, one tries to be somewhat discrete in dealing with the staff, and I respect their position although I disagree with it in this instance. If you were to take, this has been part of this building since 1877. It is sheerly -- it is a somewhat of a whimsey. It is 5 by 7. It's got semicircular windows on all four sides. It's got a staircase that's less, it does not conform to presents building codes. It's too -- slightly narrow, Darin, as I recall.

DARIN MARDOCK: It is.

CONSTANTINE ALEXANDER: You're making the case for sealing it off.

ATTORNEY SHIPPEN PAGE: No, I understand. I don't think there's any particular harm to leaving this open. I mean, the hardship is that this is an historically appropriate gesture of this building.

CONSTANTINE ALEXANDER: I'm sorry, I'm going to stop after this. The impact to the community is the visual impact, the aesthetics. You go down that street and you see this lovely tower on this what's going to be a lovely restored building. Whether you're able to go up these non-code compliant stairs to get there for on occasion to look out the window, is not the hardship. I mean, you can solve the problem simply by not -- by just closing the staircase.

BRENDAN SULLIVAN: But, Gus, you know I think taking that statement as you

just made, you know, as far as visual to -- it's going to be absolutely positively no impact whether they seal it or don't seal it off. And, again, I think as Mr. Page says it is an integral part of that structure from its early beginnings. I'm not one -- you can go through that exercise, seal it off and say okay, we've satisfied something. But it has absolutely no practical benefit.

CONSTANTINE ALEXANDER: Except that it would have to comply with the law. We have to find a substantial hardship. And I have trouble finding substantial hardship when they have this solution. If they had not this solution, I think I would agree with you.

SLATER ANDERSON: Can I ask a question? What does the spire have to do with the porch? I'm confused.

ATTORNEY SHIPPEN PAGE: Two different things.

CONSTANTINE ALEXANDER: Two different things.

SLATER ANDERSON: But you're not doing anything to the spire, are you? I don't understand why the spire is before us.

ATTORNEY SHIPPEN PAGE: From the way I understand it, once you alter a non-conforming structure, then you have to bring that structure to compliance with the balance of the Zoning Code. And so because we are making modifications, wholesale modifications to this building, we intend to restore it, then one looks at the tower slash spire and says it is habitable space, it doesn't have the proper characteristics. So you have to bring those into compliance. And the problem the petitioner has is this is a building that is making tremendous efforts to bring back the historical integrity, but the thing about this building that's

the most -- has the greatest integrity is this quirky tower.

SLATER ANDERSON: No, I understand. Don't we have cases in front of us all the time with non-conformance? I don't understand why --

CONSTANTINE ALEXANDER: By reason of -- because they need to get a variance for porches, the tower becomes an issue from a zoning point of view. If they didn't need a variance from the porches, they would not need any relief from us --

ATTORNEY SHIPPEN PAGE: It's an as of right.

CONSTANTINE ALEXANDER: Sort of a domino effect.

TIM HUGHES: The tower is the hardship for the porches. The tower is its own hardship, and there's nothing to be gained by closing it off.

TAD HEUER: That was what my suggestion was going to be. The hardship

is really if nothing -- they could have left the carport and left the vestibule and they would have continued access to the tower. The hardship would seem to me to be that having desired to make an extraordinary, I would imagine, expense to go through what we would like to see done to the property which is to remove these extraneous elements, these elements that don't really fit with the character of the neighborhood which are eye sores. They're now being asked to do something with the tower whereas if they decide to leave all the eye sores and make it a less pleasant building for the neighbors, they could do exactly what they want with the tower. The hardship would require them to do something with the tower and decide they are going to make all these appropriate fixes with the vast majority of the construction.

CONSTANTINE ALEXANDER: There's

some people who want to speak, but I'll let you finish your remarks.

ATTORNEY SHIPPEN PAGE: Let me just -- one parenthetical note which I forgot to mention at the top of the case. And that is the petitioner Koby Kempel who I wish dearly were here. He's been called to a family get together in France and he couldn't notify the staff -- it's a very unfortunate because I'd like to consult with him about the Board's deliberations, but I'll have to allow my own and my colleague's wisdom here. I'm sorry, that's all I wanted to say.

SLATER ANDERSON: Sean wanted to add something?

SEAN O'GRADY: Yes. Just to clear this up. The tower and the porches are a wholly unrelated. The tower issue is simply this: The petitioner at that point applicant for a building permit wanted to do construction to the rear of the

building, something that we're not talking about now. And were the building conforming, then all the proposed construction would be as of right. Because the building was non-conforming to this one detail, they would have to abide additionally to article five. They'd also have to abide by Article 8 which has some fairly heavy restrictions that would prevent that addition from being as of right. So the dilemma was how to make the building conforming. So they're currently under a building permit that requires them to close off the tower thereby making the building conforming, thereby allowing that whole permit of the addition which we're not talking about, to march forward as of right. And so the request now is simply let us off the hook for that piece so that we don't have to close it.

SLATER ANDERSON: So there's a part of this that's substantial, a

substantial alteration issue to the rest of the house that's triggering the spire issue?

SEAN O'GRADY: Yes.

TAD HEUER: Would there have been an alternative I'll defer to Mr. Anderson or Mr. O'Grady to work in the rear that would not have required a variance for the tower.

SEAN O'GRADY: Yes.

ATTORNEY SHIPPEN PAGE: I'm not entirely sure I follow.

TIM HUGHES: Nor do I.

SEAN O'GRADY: Tad is saying could you done the reverse? Could you have said we are required to meet the elements of Article 8 and we would like a variance from Article 8 to build the addition in the rear and not talk about the tower. And the answer to that is yes, you can go that way.

ATTORNEY SHIPPEN PAGE: Okay. The

question that I'm faced with now is whether or not I should seek a continuance to reframe this, come back before the Board on another theory, but I'm -- I think we're moving the pace along tonight that the hardship, Mr. Chairman, I think in part has to do with the fact that this, this tower has an appeal to someone who is living there. The fact that you might want to have a -- some sort of a, what do you call it, a gazebo of a quirky nature, and it's peculiar to that property. It doesn't have any detrimental effect of the neighbors or anything else. The fact that it doesn't comply with the building code that they didn't foresee in 1877 gives it some merit to let sleeping dogs lie. And I certainly understand Mr. O'Grady's point. You know, we want to cut small corners here. I want to discuss this with Darin for a moment if I may, because he's pointed out an item here that I can't read

and talk at the same time.

CONSTANTINE ALEXANDER: The gentleman who wishes to speak, do you want to -- he can speak while you confer.

HENRY SIEGLER, JR: I'm Henry Siegler, Junior. I have an interest in 102 Lakeview. And I will tell you that as a young child, a trip up that spire was really cool. And it would be -- my grandmother lived there before my parents, and when I was a young child, I got to go up there and it was cool and it would be a shame to shut that down.

CONSTANTINE ALEXANDER: Thank you.

PETER SIEGLER: Hi. My name is Peter Siegler. I represent the third generation of my family to live at 102 Lakeview, and I agree with my brother on this. And to be honest, I find it rather ironic that the majority of the house has been torn down and we're debating whether or not to allow this to live. So, you

know, I would -- I hope my neighbors invite me to go walk up into the tower once it's redone. But I think it's -- from a historic perspective, I think it has a great deal of importance to our neighborhood. As I said, you know, a much of the house has been torn down and that's been a centerpiece of the house. And I know from an architectural perspective you'll break the hearts of the students of the GSD who enjoy sitting in front of the house and sketching it. From a next-door neighbor's perspective, I'm all for it.

SARAH KAFATOU: If I can say essentially the same thing.

CONSTANTINE ALEXANDER: Give your name.

SARAH KAFATOU: Sarah Kafatou, K-a-f-a-t-o-u. I'm also a next-door neighbor at 88 Lakeview Avenue. And that tower is a very attractive thing. And as you say it's as though they're being

punished for doing good to have to close it off. And in order to enjoy this other architectural feature the wrap-around porches.

CONSTANTINE ALEXANDER: Thank you.

Mr. Page, we can take the next case and we can recess. I don't want to pressure you. What do you want to do?

ATTORNEY SHIPPEN PAGE:

Mr. Chairman, I think I can do two things at once if you'll indulge me. I'd like to introduce if I may a memorandum from Charles Sullivan dated September 9, 2009 in support of the tower and the porch.

CONSTANTINE ALEXANDER: We have a copy of this in our file.

ATTORNEY SHIPPEN PAGE: Excellent. Thank you. And I'd like to introduce three letters of support from the immediate abutters.

CONSTANTINE ALEXANDER: Would you like me to read them into the record?

ATTORNEY SHIPPEN PAGE: They say exactly the same thing, it's just the identity of those signing.

CONSTANTINE ALEXANDER: I'll read the letters.

ATTORNEY SHIPPEN PAGE: Thank you.

CONSTANTINE ALEXANDER: The letter it says: I am the immediate abutter to 94 Lakeview Avenue. Koby Kempel has provided me with his plans to add a wrap-around porch to the front of the house. I fully support this plan and have no objections. It is signed by Jane Brooks Beer, Samuel H. Beer and I don't have an address for the Beers. There it is. 87 Lakeview Avenue.

The next signature is hard to read. One is Les Markov M-a-r-k-o-v. I can't read the other signature. And they apparently reside at 117 Lexington Avenue.

And the third letter is from F.C. de Kafatos K-a-f-a-t-o-s and Sarah -- and

Samuel Kafatos.

SARAH KAFATOS: Sarah.

CONSTANTINE ALEXANDER: I'm sorry, Sarah. And they reside at 88 Lakeview Avenue as you mentioned.

Mr. Page, what's your pleasure or take more time if you need.

ATTORNEY SHIPPEN PAGE: No, thank you, Mr. Chairman, for that. I think we have stated our case. You've seen the materials. You've seen the photographs. The issue of the hardship, of course, goes from -- it's both subjective and objective. And I will -- I think it's up to the Zoning Board to -- and the determination of whether or not we have --

CONSTANTINE ALEXANDER: We ready for a motion?

We do have a letter or a memo from the Cambridge Historical Commission dated September 9th and it references several properties. But 94 Lakeview Avenue states

simply: Portions of the building are more than 50 years old. Staff has signed off on demolition permit applications and the petitioner has consulted extensively on the restoration of the house. Removal of the tower and elimination of the porch would seriously compromise the house.

As I make the motion, we always make a motion to, if we do grant the variance, to proceed in accordance with certain plans. The plans I would believe are these four pages here. Once we do that, you can't change them later on once we grant the relief. Are these the plans that you're going to live and die by?

DARIN MARDOCK: Yes, these are the ones.

CONSTANTINE ALEXANDER: Okay.

The Chair moves to grant a variance to the petitioner to proceed with the work as set forth in the petition on the basis of the following findings:

That a substantial -- a literal enforcement of the provisions of the ordinance would involve a substantial hardship. Such hardship would be with regard to the work being done that the inability to create a period appropriate set of porches on the property and to continue an aesthetically pleasing and useful to the occupants of the building tower and spire.

Further finding that the hardship is owing to circumstances relating basically to the shape of the structure itself. We're talking about a structure built in 1877, I believe. It's certainly before our Zoning By-Law. And given the nature of that structure, particularly with regard to the height of the tower, there's no way to comply with the Zoning By-Law short of taking a tower down.

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.

The relief being sought both as to the maintenance of the tower and the construction of the porches would certainly -- would greatly improve the aesthetics of the city of Cambridge which is one of -- I think one of the goals of the Zoning By-law and certainly would have no impact on the neighbors or the citizens of the city as witnessed by the support without controversy, without contradiction of neighbors to the property.

The variance be granted on the condition that work proceed in accordance with plans submitted by the petitioner prepared by Design Associates, Inc. They are four pages A1.1, A2.1, A2.2 and A2.4. The first page in which has been initialed by the Chair.

All those in favor of granting the

variance as proposed, say "Aye".

(Aye.)

CONSTANTINE ALEXANDER: Five in favor. Variance granted.

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

(Whereupon, a discussion was held off the record.)

(10:10 p.m.)

(Sitting members: Constantine Alexander, Timothy Hughes, Brendan Sullivan, Slater Anderson, Tad Heuer.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9830, 21 Irving Street.

Is there anyone here?

MICHAEL SZALAJI: Yes, we are.

CONSTANTINE ALEXANDER: Please give your name and address for the record.

MICHAEL SZALAJI: Michael Szalaji, 20 Chestnut Street. S-z-a-l-a-j-i. I'm an architect.

JULIE PETERS: And I'm Julie Peters and I'm the owner and I think my address is 21 Irving Street.

CONSTANTINE ALEXANDER: Proceed.

MICHAEL SZALAJI: So, we're here today asking for some relief from FAR requirements as well as setback issues. The top image here is the site plan. The grey area shows the required setbacks. The large black line is the actual footprint of the house. The majority of the house falls within the rear and the front yard setback. The homeowners petitioning asking for a variance to allow for an open deck to be placed on the rear of the house, and to add a second floor bay that actually sits on top of an

existing first floor bay off the front of the house.

CONSTANTINE ALEXANDER: So really in terms of the overall footprint of the house I mean you're not changing setbacks at all?

MICHAEL SZALAJI: Correct. We're not encroaching any closer.

CONSTANTINE ALEXANDER: You're non-conforming now, and you're going to do some work and you're going to be the same as you were before.

MICHAEL SZALAJI: Exactly. The FAR issue comes into play because the lot is smaller than the minimum required for the district. Currently the house is a three-family house. The homeowner's converting it back to a single-family residence. So the square footage is well above what is allowed for this size property. But as you mentioned, we're not actually increasing the footprint anymore.

CONSTANTINE ALEXANDER: The FAR issue just to be precise is you're currently at .783. And if we allow you the relief you're seeking, you go to .84 and the district is maximum .85.

MICHAEL SZALAJI: Correct.

CONSTANTINE ALEXANDER: And we're talking about a less than ten percent increase in a non-conforming FAR.

MICHAEL SZALAJI: The majority of that area actually falls with space below this open deck. This is an open second floor deck. So the area of the deck is actually not coming into FAR play. It's the space underneath. There's no doors, existing doors that lead out into that space. The homeowner's going to use it for storage and for landscaping. So, it's really just a technicality that has to be included in FAR.

JULIE PETERS: The landscaping, it will be green.

MICHAEL SZALAJI: The last thing is that on the north side which is the side here which falls entirely -- the house falls entirely within the side yard setback. There are two windows that the homeowner is looking to modify their locations to work with the new floor plan. So it's closing off some windows and then relocating the windows.

CONSTANTINE ALEXANDER: Speaking for myself, I'm architecturally challenged. I think the window relocations are a great improvement.

MICHAEL SZALAJI: And we tried to make that, as well as with the front bay, we tried to keep with the character of the house with all these modifications trying to make sure that we're keeping with the set-up of the house.

SLATER ANDERSON: This is recently purchased?

JULIE PETERS: Yes. We actually

closed back in April, but, you know, it's taken sometime to really -- we wanted to be sure before we actually took your time.

SLATER ANDERSON: That's recent for the age of this house.

JULIE PETERS: Okay.

CONSTANTINE ALEXANDER: Any other comments you want to make at this point?

MICHAEL SZALAJI: That's basically what we're asking for here.

CONSTANTINE ALEXANDER: The Chair would note for the record that we received a memorandum from the Cambridge Historical Commission with regard to this property. "The property is located in the Mid-Cambridge Neighborhood Conservation District and is therefore subject to the review of exterior alterations. The Mid-Cambridge NCD Commission reviewed and approved the project at public hearings. See attached certificate and amended certificate."

And we have a Certificate of Appropriateness. And certain changes are strongly recommended. Are the plans before us, do they comply with these recommendations?

MICHAEL SZALAJI: They do, yes.

CONSTANTINE ALEXANDER: So the plans that you're representing to us, the plans, which I assume these are the plans?

MICHAEL SZALAJI: They are the plans, right. The reason there's two certificates, there was a previous reiteration of plans that were also approved. There were changes made actually to reduce the scope of work in keeping with the style of the house, so we had to go back to Historics.

CONSTANTINE ALEXANDER: But right now what you're seeking is pre-approval of the Historical Commission?

MICHAEL SZALAJI: Yes.

CONSTANTINE ALEXANDER: In terms

of it satisfies everything that's --

MICHAEL SZALAJI: Correct.

CONSTANTINE ALEXANDER: Anyone wishes to be heard on this petition?

(No response.)

CONSTANTINE ALEXANDER: The Chair notes that no one wishes to be heard. I didn't -- I don't see any letters in the file one way or the other besides the certificate from the Cambridge Historical Commission.

Comments, questions from members of the Board?

TAD HEUER: Can you just go over how the lot is undersized?

MICHAEL SZALAJI: Sure. I believe the District B has a 5,000 square foot lot minimum requirement. This lot is 50 feet wide but it's only 78 feet deep as opposed to the typical 100 foot depth. And which in actuality if we had that extra 25 feet, the whole rear of the house would be as of

right.

TAD HEUER: And how much of the additional FAR is in the bay window and how much is the deck?

MICHAEL SZALAJI: The bay window is I believe only 24 square feet. The remainder is 200 or so square feet which is under, under the deck.

CONSTANTINE ALEXANDER: And it only becomes FAR because you put the deck in? Under the Zoning Code --

MICHAEL SZALAJI: Correct.

CONSTANTINE ALEXANDER: Creating the roof over that open space.

MICHAEL SZALAJI: So then that open space technically then becomes calculable FAR, right.

CONSTANTINE ALEXANDER: And I'm sorry, the reason -- we have to deal with the hardship, maybe I should read your application. What is the hardship that requires you to seek the relief?

JULIE PETERS: Well, the lot is not only undersized, but it's very strongly over shadowed by this building that was approximately 1972 -- I unfortunately forget the address. But right on Cambridge Street there's a very large apartment building. So, the orientation of life in the rear of the house is now -- it's very dark in the rear of the house. And we felt that, you know, for my daughter and the children that I want to have over, and the, you know, Shakespeare productions and everything else, that to -- the primary light now comes in through that east, through the east side. So I felt it was very important to open up the house on the east side to let in sunlight because of the -- not only the shadow of that building, but there are there are people now on those balconies in that modern building talking loudly on their cell phones and smoking

cigarettes. And I just wanted to keep life in the --

CONSTANTINE ALEXANDER: The hardship is to make your property more inhabitable for yourself and others who use the structure?

JULIE PETERS: Yes.

CONSTANTINE ALEXANDER: And the special circumstances that we have to make is the shape of the lot and the long and narrow shape.

JULIE PETERS: That's right.

MICHAEL SZALAJI: Yes.

JULIE PETERS: And I think maybe the fact that that building compromised the original character of the house.

BRENDAN SULLIVAN: What drove the idea of putting the living space on the second level?

MICHAEL SZALAJI: That was homeowner driven. Partially from a -- from a lifestyle point of view, but also

to get the living areas a little higher up to create more natural light coming in. So that's also the reason for the second floor bays, is to really bring as much natural light to the formal areas of the house which are now on the second floor.

BRENDAN SULLIVAN: The deck may be more usable at that level to bring in the inside living space to flow to the outside at that level more so than at the ground level.

JULIE PETERS: Yes, because at the ground level, first of all, it's very, very dark because of the surrounding buildings and the size of the lot. And it's also the neighborhood which was once very much a single-family neighborhood, the building to the -- I'm just trying to orient myself here. To the south of it is a multi-family. The building to the west is a multiple, multiple multi -- this large building. The building to the north

is also now a multi-family, and especially on the, the south and the west there, it's quite a transient population. It's people smoking out on their balconies. And I, you know, for a single-family home we really -- with children, a child and child's friends --

BRENDAN SULLIVAN: So having the living space where you would spend most of your time obviously, just allows more light, air -- I mean, that's the whole feeling.

JULIE PETERS: It's light, it's air. It's not looking at the kids swearing at each other and smoking.

MICHAEL SZALAJI: Creates distance from the public area.

BRENDAN SULLIVAN: Okay.

MICHAEL SZALAJI: And the bedrooms on the first floor are towards the back of the house so there isn't that issue.

BRENDAN SULLIVAN: Yes, okay.

CONSTANTINE ALEXANDER: Questions comments are we ready for a vote?

TAD HEUER: I'm going to raise a question. And this is more technical for the Board than it is for the petitioners. We're being asked to approve a variance to allow additions or renovations to a non-conforming structure that require front and rear yard setbacks. I would just point out as I have in the past, and I think it would cause me to vote against the petition on a technical grounds that the windows being moved around and additional skylight that is in the rear setback that's supposed to be added I think are in no way reflected in the variance that we're being asked to grant. I would strongly recommend to the Board those be brought in under a Special Permit. If they are not and they are approved as part of this plan I would intend to vote against it.

CONSTANTINE ALEXANDER: Okay.

BRENDAN SULLIVAN: I mean, it's -- I picked up on that same point. It's shown on the drawings, but yet the relief is not requested for because the relief is actually a Special Permit and not a variance. But now does the department --

SEAN O'GRADY: The Legal Department has told us specifically to do what Tad's suggesting. The Commissioner --

BRENDAN SULLIVAN: That should be a two tiered?

SEAN O'GRADY: Yes. The Commissioner has taken the position that we've always allowed the inclusion of Special Permits under variance applications and that it's too burdensome to ask the public to do otherwise.

BRENDAN SULLIVAN: Because it's the lesser of the two evils to allow it.

SEAN O'GRADY: Yes. So we've

continued to allow this practice.

TAD HEUER: Of course in this situation I point out that the advertised relief requested has absolutely no bearing either on the front -- either on the facade that is implicated by the --

BRENDAN SULLIVAN: I mean, I think you're a hundred percent correct in your observation and I think -- I think it was deficient in the request.

TAD HEUER: Yes.

MICHAEL SZALAJI: So it's not that it would not be approved, it's just the technicality of how it was presented that we went for a variance for the majority of the work but windows are a Special Permit issue?

TAD HEUER: Exactly.

MICHAEL SZALAJI: So, we could come back with the Special Permit application in the future to have that.

JULIE PETERS: Is it relevant to

the conversation --

CONSTANTINE ALEXANDER: I mean, why -- someone has a right to seek a Special Permit as you point out correctly, and they choose to go a harder route, the variance route, and we find that they meet the requirements for a variance, what's wrong with that?

TAD HEUER: I don't think we can grant a variance for the window. That's the wrong type of relief.

CONSTANTINE ALEXANDER: No, if --

TAD HEUER: If we had a variance request to move a window, we would say that it's an inappropriate type of relief to request for what you want. We would say bring a Special Permit. And the fact that it's advertised as something that is on different -- front and rear yard setback issues, and we are we're looking at a side yard issue, anyone who is looking at the advertisement thinks all

they were looking at is front and rear yard concerns. Whereas in actuality there is relief being requested not in either of those places. I can see it in situations, although I still wouldn't agree with it. That perhaps the north facade in addition of moving the window on the front side would be wrapped into this as A, as being compliant. But I don't think there's any grounds for saying that on the north side we would put windows wrapped into a variance at all in the advertisement.

MICHAEL SZALAJI: Right. Now the skylights fall within the rear yard so that -- so now we're really just talking about the movement of that one window.

TAD HEUER: I mean again I would say that rear yard -- any of these things are Special Permit that are distinct from and are expressly distinct from in the ordinance itself are a different level of review than to the type of permitting

process then a variance. But again, rear and front yard setbacks I think will have -- I would disagree personally. I think it sounds like legal disagrees to a point, but the Board's practice has been to include it. I don't see any way to justify the north side window because that just doesn't fall in anything that we advertised remotely relating to what we have.

MICHAEL SZALAJI: So my brief conversation with Sean when I went over exactly what we were looking to go do sort of pointed towards a variance as being the direction that we went. That's sort of the direction that we took the application not thinking there's a two-tiered approach. So I guess I would play ignorance knowing there's even a --

CONSTANTINE ALEXANDER: There's no suggestion. What's the question? What's the sentiment of the Board? You want to

ask the case to be continued and re-advertised for both a variance and a Special Permit or do we want to continue our past practice?

BRENDAN SULLIVAN: We can vote on what's before us which is the majority of the work, and then second the question is should we require them to come back with a Special Permit?

CONSTANTINE ALEXANDER: That's the same way of saying it. Okay. That's what I was going to get at as well. We need a hearing.

BRENDAN SULLIVAN: Should we wing it and go by what the Department has been allowing?

CONSTANTINE ALEXANDER: My view is that we should -- I would defer to the practice of the Department until someone challenges it formally before this Board and makes an appeal for the decision, an abutter. I would accept the way this

Department's been administering the code.
That's my personal opinion.

SLATER ANDERSON: I concur. I mean, this has been by the Cambridge folks and there's nothing controversial in this project.

JULIE PETERS: I actually happen to be parenthetically currently the resident on the north side because we're hoping to do the renovations on the house, so I'm the one who actually looks at that window. The owners live in Hawaii permanently.

CONSTANTINE ALEXANDER: You need -- in order to grant you relief, you need four votes. And I think you heard Mr. Heuer indicate he would vote against it for reasons that are good and sufficient.

TAD HEUER: Well, I would -- I want to clarify. I would vote for the variance as to what's being advertised.

CONSTANTINE ALEXANDER: But you would require them to come back one more time.

TAD HEUER: Yes.

SLATER ANDERSON: It would be conditioned on the window not approved as part -- because they're shown on the plans.

TAD HEUER: Right.

SLATER ANDERSON: The windows as shown.

CONSTANTINE ALEXANDER: I for one -- we're going to go that route, I would prefer to have it all in one hearing. Sean?

SEAN O'GRADY: I was going to suggest you could split the vote.

CONSTANTINE ALEXANDER: That's what we would do.

TAD HEUER: I mean, I have no problem -- I would presume they would like to get working sooner rather than later

because these issues are discrete from one another. Windows are not in the same place as the bays. I have no problem with them being granted the relief they've asked for in terms of the deck. In terms of the bay window, because that's just an advertisement, that's an appropriate variance for relief, but not to proceed as to the relocations of the windows which I believe is a Special Permit. So what they've advertised here is fine. Just what's reflected in the plans have not been granted but limited to what they asked for.

TIM HUGHES: Wait a minute, wait a minute, wait a minute. If we're going to go against passed practice on a legal technicality to make them come back again for one window on the north side essentially?

SLATER ANDERSON: Two.

TIM HUGHES: Two windows.

TAD HEUER: I would say all the windows, but the Board has a different --

TIM HUGHES: But there are windows that fall within the setbacks they have advertised for and you wouldn't even give them that?

TAD HEUER: Correct.

TIM HUGHES: Do we have four votes here so we can just go ahead and vote? This is ridiculous to make them come back for this when we're going to give it to them later anyway, you know?

BRENDAN SULLIVAN: My suggestion, Mr. Chair, would be to make a motion to grant the variance encompassing all the work for the plans submitted.

CONSTANTINE ALEXANDER: I wanted to get a sense of the Board before making that. I certainly got the sense from him.

BRENDAN SULLIVAN: Then going forward from this time and place forward, from now on I think that when Sean catches

these, that he would probably say that it should be a variance and advertise at the same time for a Special Permit.

SEAN O'GRADY: I simply don't have that ability, Brendan. I've already been told not to do that.

BRENDAN SULLIVAN: I appreciate that. It's not that you would have to come to two different hearings, but come to one hearing and ask for two different things.

TIM HUGHES: It happens often enough that we do see that.

BRENDAN SULLIVAN: I just feel that we would be imposing a terrific --

SEAN O'GRADY: I thought the issue was settled.

BRENDAN SULLIVAN: -- and unjustifiable hardship on you to do --

MICHAEL SZALAJI: I appreciate that.

CONSTANTINE ALEXANDER: Ready for

the motion?

BRENDAN SULLIVAN: I think we have two rights here, but anyway --

CONSTANTINE ALEXANDER: The Chair moves to grant the petitioner the relief requested, which is the relief that's set forth on the plans submitted which includes windows on the north side, the two windows on the north side?

MICHAEL SZALAJI: That's correct.

CONSTANTINE ALEXANDER: On the grounds that a literal enforcement -- well, grant the variance on the basis of the following findings:

That a literal enforcement of the provisions of the ordinance would involve a substantial hardship to the petitioner. Such hardship being that the ability to enjoy this structure is -- the ability to enjoy it requires modification to the structure, and such modification cannot be done without relief from this Board.

That the hardship is owing to special circumstances relating to the shape of the lot. The lot being relatively long and narrow causing the deviance in the Zoning By-Law that requires a variance, and there would be no substantial detriment to the public good.

In fact, the relief being sought is modest in nature. It is a slight increase in FAR. That the -- although there are setback relief being sought, they're not in fact increasing the setback from what the setback situation currently is.

The Chair would further note that the matter has the support of the Cambridge Historical Commission. And further, that there have been no neighborhood opposition to the project.

And further to the fact that if one of the functions of our Zoning By-Law, one of the purposes of our Zoning By-Law as set forth in -- I think it's -- give me a

second, I'll find it. The purpose of our Zoning By-Law was set forth in Section 1.30 of the code is to encourage the most rational use of land throughout the city. To also encourage and this would do so, to provide adequate light and air. And for the purpose of this petitioner there is testimony that you do not have adequate light and air without the relief being requested.

And so we find that the purposes of the Zoning By-Law would be satisfied by the relief being sought, and therefore, there is no derogation from the intent the Zoning By-Law.

Such variance would be granted on the condition that work proceed in accordance with plans submitted by the petitioner, prepared by On The Boards Design, dated July 30, 2009, and they're numbered A.1, A.2, A.3, A.4, A.5, A.6. And the first page which has been

initialed by the Chair.

All those in favor of granting the variance as proposed, say "Aye".

(Aye.)

CONSTANTINE ALEXANDER: Four in favor.

(Alexander, Hughes, Sullivan, Anderson.)

CONSTANTINE ALEXANDER: Opposed?

TAD HEUER: No.

(Heuer Opposed.)

(Whereupon, a discussion was held off the record.)

(10:30 P.M.)

(Sitting Members: Constantine Alexander, Tim Hughes, Brendan Sullivan, Slater Anderson, Tad Heuer.)

CONSTANTINE ALEXANDER: The Chair will call case No. 9831, 16 Mead Street.

Is there anyone here wishing to be heard on this.

FULTON HARLEY: My name is Fulton Harley and I'm the architect working --

CONSTANTINE ALEXANDER: Spell it.

FULTON HARLEY: Oh, yeah.

F-u-l-t-o-n. Harley H-a-r-l-e-y. And I'm working with Julian Chang and Patricia Palmer. And I think they'll maybe briefly introduce themselves and --

CONSTANTINE ALEXANDER: Only if they wanted to speak.

JULIAN CHANG: We feel very -- Mr. Chairman and members of the Board, very lucky to be in this neighborhood. We were on Sherman Street just three blocks

away and this spring and last Christmas we were lucky to find this property and we're here just to present our case.

CONSTANTINE ALEXANDER: You're looking for a Special Permit to enclose a section of an existing covered porch and rebuild to rebuild a porch and to add nine windows?

FULTON HARLEY: That's right. I'll walk you through it. It's getting kind of late.

Patricia and Julian are looking to convert an existing two-family to a single-family. And the posing question from the photographs is there -- as you see there and along the side of the house and along the rear. And we're talking about 14 square feet on the first floor and 125 square feet on the second. And the porch as exists, there's a lot of rot around the roof. And in particularly where the lower pitched roof runs into the

--

CONSTANTINE ALEXANDER: I'm sorry. I got distracted. Where is the porch located? Not the front porch?

FULTON HARLEY: No, along the rear.

CONSTANTINE ALEXANDER: Okay.

FULTON HARLEY: And the first -- part of the porch had already been on the first floor previously enclosed. And on the second floor it completely opened. The para pit wall there is about three and a half feet tall around the second floor.

TAD HEUER: Are those photographs in our record? I don't recognize them.

FULTON HARLEY: They should be. They were with the application.

TAD HEUER: I didn't see any photographs. I saw photographs of things that were not the porch. I see the edge of the porch here.

FULTON HARLEY: That's the porch

in question.

TAD HEUER: There is no long --

FULTON HARLEY: So, on the first floor -- and this project is going to proceed in a couple of phases. In the back, it's a two-family now. And in the back there's a kitchen in the corner, a small dining space. And the proposal is eventually to move the kitchen more to the center of the house and then open up the rear to the large family room. This would be to square off that space and still leaving a small rear entry force gets you down to the backyard and the back of the house.

On the second floor, this space is existing. Virtually it's identical now, but really to open that up for play space for the kids. And then to add a small closet for the master bedroom is essentially what we're doing. Again, adding windows along the rear and the

side. We're within the rear yard setbacks but to add a little bit of light and ventilation to the plays pace.

CONSTANTINE ALEXANDER: Perhaps we're going to hear from the neighbors. Did you with regard to the new windows, have you spoken to the neighbors most directly affected by them? In other words, privacy concerns and their reaction was?

JULIAN CHANG: We sent a letter.

CONSTANTINE ALEXANDER: We're going to speak to it. We'll give you the opportunity.

FEMALE AUDIENCE MEMBER: We're really just here to listen.

CONSTANTINE ALEXANDER: Okay.

The issue is the addition of windows is intrusion of -- potential intrusion of privacy on abutters.

FULTON HARLEY: On all the abutters we did send letters and drawings

and then met with a number of them.

PATRICIA PALMER: And then regarding the issue of privacy, the windows that we're setting up are actually higher smaller windows, and what we're trying to do is be able to see up to the trees. We actually don't want to look down into any of the houses. We're putting fairly small windows as you can see near the top, and it's such a high house, it kind of feels like a tree house out there and you're sort of up in the trees. So the idea is to get the light in and, you know, we're going to use that as the studio space. We actually want to have wall space there. So we're not trying to have big windows on the back of the house.

FULTON HARLEY: And then as a part of this enclosing of the porch is to pull out the existing roof line in the back over -- did you take a look at the

photographs? It's kind of clipped off, but really try to incorporate the existing porch into more of the existing house.

CONSTANTINE ALEXANDER: Did you want to speak, sir? Give your name for the record.

ERIC MILLER: My name is Eric Miller. I'm an abutter, 42 Cogswell Avenue. On the issue of privacy which I'm only responding to it because you asked it. I look down now. If you were having a party in the back, you just have to invite them I guess. But what I'm questioning now is if you're going to be expanding the -- I want to call it the footprint of the house?

FULTON HARLEY: Not at all.

ERIC MILLER: Not on the bottom but on the top.

FULTON HARLEY: The only thing that's coming out is the overhang of the roof. So the porch stays the same.

PATRICIA PALMER: Same size.

ERIC MILLER: So now the second floor is going to be over to the pavement over the porch?

FULTON HARLEY: No, just the roof.

SLATER ANDERSON: This little edge. The edge.

FULTON HARLEY: If you see in the back it's clipped off.

SLATER ANDERSON: You see how it's flat to the side of the house?

ERIC MILLER: So if you don't mind. This is going to come out more?

FULTON HARLEY: No, no that all stays the same. The only thing that's coming out is just the roof just to protect that. See how that's just sliding out to protect the wall.

ERIC MILLER: Okay. Thank you.

FULTON HARLEY: Zero change.

CONSTANTINE ALEXANDER: Okay.

DOROTHY LINSNER: My name is

Dorothy Linsner L-i-n-s-n-e-r. I'm at 32 Cogswell. And my question is some of the light, light issues because right now with the porch open we get the light from Mead Street, you know, kind of opens up the yard. And I'm just wondering if there are going to be windows in there or something that would continue the light coming in rather than creating a dark backyard?

FULTON HARLEY: There is a large window about halfway down along that porch. So it -- the question in terms of the light, essentially this much of the wall stays, you know, roughly the same. There's a large window going there. So in terms of difference of the light, I don't think there's going to be a lot of difference. I mean, you have clappage there (indicating). A little bit of additional clappage there (indicating). But I think essentially the light will stay the same. You mean light coming from

the inside coming out?

DOROTHY LINSNER: I'm trying to picture a blank wall there as opposed to the porch. It's much nicer to see through to Mead Street than to see a blank wall. I'm just wondering what that wall will look like.

SLATER ANDERSON: This is the back of the house right here, right? So there's two windows.

FULTON HARLEY: Yeah.

SLATER ANDERSON: That was open?

FULTON HARLEY: That's correct. It will be two windows there and a soft window there (indicating). And I think what we'll be doing is picking up some of the details along the eaves that will help break that.

ERIC MILLER: Okay. We have this thing sticking out here?

SLATER ANDERSON: You have the existing back of the house?

FULTON HARLEY: Yes.

SLATER ANDERSON: You live in the back of the house?

DOROTHY LINSNER: It's our backyard. That's our view. And Mead Street is on the other side of that. What we were getting is an open porch right here straight through (indicating). And that's our curiosity how that was going to change.

CONSTANTINE ALEXANDER: And you see that?

DOROTHY LINSNER: Yes.

FULTON HARLEY: Yeah, I think there would be a couple points where, you know, if you were at the right angle you would be able to see through in the existing window closed off.

DOROTHY LINSNER: Happy to have you as neighbors.

ERIC MILLER: Will we be able to have a party on the porch.

CONSTANTINE ALEXANDER: We'll write that into the decision.

Anyone else wish to be heard on this matter? I guess not. Further comments?

FULTON HARLEY: I think we're good.

CONSTANTINE ALEXANDER: I don't believe there's anything in the file, any letters for or against or any commentary for anybody.

SLATER ANDERSON: Did you go to Historic?

FULTON HARLEY: Yes. I have that letter.

CONSTANTINE ALEXANDER: You do? We don't have it. Thank you. Can we keep this in our file?

FULTON HARLEY: I believe I've scanned it. I'm sure I have.

CONSTANTINE ALEXANDER: Well, all we have from Historical that no demolition permit is required. There's no -- I mean,

I'm just reading for the record. It's not any kind of formal approval or position of any conditions. Just there's no demolition permit required.

TAD HEUER: Is it visible from the street?

FULTON HARLEY: No.

TIM HUGHES: You can't see it from the street?

CONSTANTINE ALEXANDER: You can have that.

FULTON HARLEY: Okay.

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

TIM HUGHES: I'm good with it.

CONSTANTINE ALEXANDER: How come I knew that?

Do you have the plans? Now as we've said to others, these are the -- if we approve them, it's in accordance with the plans and these are the plans, they're not

going to change. If you change them, you've got to come back to the Board. You understand that?

FULTON HARLEY: Yes.

CONSTANTINE ALEXANDER: The Board moves to grant a Special Permit to the petitioner to enclose a section of an existing covered porch, rebuild a porch roof and add nine windows.

In so granting that Special Permit the Board finds that you cannot meet -- to do the relief you are seeking, you cannot meet the requirements of the ordinance that -- just by the nature of the structure itself in this location on the lot.

That the relief you're seeking would not cause congestion, hazard or substantial change in established neighborhood character. In fact, simply by nature of the work, there's no congestion impact, no hazardous creation

-- no creation of hazardous conditions and certainly won't make any substantial change in established neighborhood character.

And that the continued operation of adjacent uses would not be adversely affected by the nature of the proposed use. In fact, we're talking about closing off a porch to the rear that -- to the extent that this has an adverse impact on the lighting of neighbors. It's just ameliorated by the fact that there will be certain windows located in the enclosed porch and those windows will allow certain light to pass through.

And further, that the establishment of the nine windows would not have an impact on the privacy or adjoining property owners as witnessed by the fact that there seems to be no opposition to the proposal despite the fact or following the fact that you advised all of your

neighbors no one came forth with an objection.

That continued operation or development of adjacent uses would not be affected by what you're proposing. Like I said, it's a simple matter of enclosing a porch. And that no nuisance or hazard would be created to the detriment of the health, safety or welfare of the occupant or the citizens of the city. The work is self-evident. I mean, the conclusion is self-evident from the nature of the work that's being proposed.

And that the proposed use would not impair the integrity of the district or adjoining district. In fact, what is being proposed is to improve the aesthetics and inhabitability of the structure without any impact on neighboring property as witnessed by the fact that there's been no neighborhood opposition to the project.

The Special Permit will be granted on the condition that the work proceed in accordance with plans submitted by the petitioner prepared by FLH Architects, dated July 23, 2009. They consist of pages 1, 2, EX1, EX2 and that's it. Those four pages. First page of which has been initialed by the Chair.

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

(Aye.)

CONSTANTINE ALEXANDER: Five in favor.

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

CONSTANTINE ALEXANDER: Good luck.

(Meeting adjourned at 10:50 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 21st day of September
2009.

Catherine L. Zelinski
Notary Public
Certified Shorthand Reporter
License No. 147703

My Commission Expires:
April 23, 2015

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