

**CITY OF WALTHAM**  
**ZONING BOARD OF APPEALS**

January 7, 2014

The Zoning Board of Appeals held a public hearing at 7:00 P.M., Tuesday, January 14, 2014 in the Public Meeting Room of the Arthur Clark Government Center, 119 School Street, Waltham, MA. In attendance were Chair Barbara Rando and members Mark Hickernell, Gordon LaSane, Edward McCarthy and John Sergi.

The chair called the meeting to order at 7:00 P.M.

Mrs. Rando: Tonight we have one continued case before us: Case 2013-15 Frank and Michael Valentino, 753-755 South Street.

The first motion this evening is to accept the minutes of December 3, 2013.

On motion of Mr. Sergi, seconded by Mr. LaSane, the board voted to accept the minutes of December 3, 2013.

Mrs. Rando: Will the clerk please read the petition in Case No. 2013-15?

The clerk then read the petition of Frank D. Valentino, Jr. and Michael D. Valentino in an Application for a Variance – side yard and Application for two Special Permits for expansion of non-conforming building. Variance on the northerly side yard from the required 15 feet to existing 11.05 feet setback; and use one special permit to create additional non-conformity for 390 square foot expansion of existing footprint on northerly side yard authorized by variance;

and a second special permit to remove third floor, install a new roof at a height conforming to the zoning requirement, and to maintain second floor living area above existing first floor. The renovations proposed in the second special permit do not intensify the non conforming aspects of the structure. Location and Zoning District: 753-755 South Street; Residence A-3 Zoning District.

Mrs. Rando: May we hear from the petitioner or the petitioner's representative, please?

Richard F. Dacey, III, Esquire, 707 Main Street, Waltham came forward.

Mr. Dacey: I am here tonight on behalf of the petitioners Frank and Michael Valentino and have with me Mr. Frank Valentino. This is a continued hearing. We were snowed out the last time and which, frankly, I thought that was a good decision. I don't know who was here that night, That was bad.

Mrs. Rando: I was here opening the meeting just in case some one was here and I continued it.

Mr. Dacey: I do have some additional materials which I have under my arm, and with your permission I will distribute.

Mrs. Rando: Is this the same as the one you gave us at the last hearing?

Mr. Dacey: No, this is in addition to. So since I am handing you a weighty packet of information, perhaps the first order of business would be to just go through it. I am using the index which is the first page inside the cover and just describe to you what's here.

So what is in this book is ten tabs. The first tab is a Revised Proposed Findings of Fact.

Tab 2 is a Revised Proposed Decision and these are generated by some discussions that we have had with the neighbors and they involve changing plans, adding conditions and we can

go through them in detail as we go along.

Existing Condition Plan which was revised and would have been available for our last meeting and that contains a lot of the visual representations of the conditions that the neighbors were concerned about.

Architectural Plans which were the interior of the two units and these have been revised as of today. The revisions are minor but nevertheless they are here and we can go through those.

Affidavit of Frank Valentino and this is very similar to the affidavit that was submitted in the Land Court Case that was the appeal from the 2007-17 case.

And Tab 6 are documents that will prove this was submitted and this has to do with the status of the property as a nonconforming two family. We'll talk about that.

The matter that should generate some discussion tonight and hopefully peak your interest is Tab 7 which is a memorandum on the Res Judicata issue. And I went and reread the Law Department Memorandum and read it carefully for the information contained on Res Judicata and looked at the cases that were cited and copied them for you. So the two cases that were cited in the Law Department Memorandum are Heacock which is at Tab 8 and Petrillo which is at Tab 9. I have added Kirker which is at Tab 10. So these are three cases that have to do with the issue of Res Judicata and since this has been a common theme and it's permeated all of our previous two meetings, I thought it would be worth our while to meet the issue head on and just deal with it and see where we end up. With your permission that is where I would start tonight if that is acceptable to you.

Mrs. Rando: Mr. Dacey, I would like you to start with Tab 6, the Unofficial Property Record Card. Is that up to 1952?

Mr. Dacey: No, that is the current card. What is behind the current card is my note to the effect that these were documents that were submitted to you in 2007 and also submitted in

conjunction with an affidavit prepared by Attorney Richard LeClair and given to the land court. These are the documents that are referenced in the land court decision.

Mrs. Rando: I thought the land court decision just assumed and let it slide that up until 1952 it was a nonconforming use but from 1952 on, have you proved to us that it has been continuously used as a nonconforming use?

Mr. Dacey: Well, interestingly enough, and this is the reason that I photostatted these documents because there was an allegation or comment, if you will, in the Law Department Memorandum to the effect that there was no evidence submitted past 1952 and that is just factually incorrect.

Mrs. Rando: So you have the information here?

Mr. Dacey: It's the same information that was submitted before. If the Law Department concluded that there was no information submitted that was relevant to the status of the property as a two family after 1952, they are wrong.

Mrs. Rando: I think they took that out of the Land Court decision if I read it correctly.

Mr. Dacey: No.

Mrs. Rando: Yes, I saw it in there. Judge Trombly stated that - - -

Mr. Dacey: No. He was perfectly comfortable saying that the property, and see this is part of the LeClair affidavit. The history of this, I think I'm sure you will recall for the sake of completeness here tonight. This property was built in the 1800's, sixty years prior to zoning. The first zoning ordinance that we had in the City of Waltham was 1925. That zoning ordinance had, as is typical; a zoning map which describes the district and 753-755 South Street was in fact in a Residence B District at the time which permits two families. So, what Judge Trombly was saying is, look, I am not too concerned about the status of the property between 1925 or 1952,

because it was legal as a two family regardless. It was properly zoned between 1925 and 1952. That was his point. What happened since 1952 is that the property became nonconforming because the district changed from Residence B permitting two families, to Residence A3 which does not. So, after 1952, the proof of the status of the property as a nonconforming property becomes much more relevant. He wasn't concerned about 25 to 52 because the zoning was proper for a two family.

Mrs. Rando: Right. But for you to come to us to seek a variance, you will have to prove to us that it was a nonconforming use as a two family house from 1952 on without any break, or you lose your nonconformity and can't come here to ask for a variance, Right? Correct?

Mr. Dacey: No. If we are going to be precise, then we will be precise.

Mrs. Rando: Me too.

Mr. Dacey: If the application is for a variance, there is no underlying requirement of nonconforming. You can apply a variance to any property. You do not need to prove that a property is nonconforming in order to get a variance. I will be the first to agree that in order to obtain a special permit, you need to prove nonconforming.

Mrs. Rando: Right, for a variance, for a variance on your 10%.

Mr. Dacey: No. A variance, Chapter 40A, Section 10, does not require proof of a nonconforming status. Variances you grant routinely here on proof of substantial hardship, and all the rest of the requirements under 40A, Section 10. It has nothing to do with the nonconforming nature of the property. Special permits issued under Chapter 40A, Section 9, to modify or expand a nonconforming use or structure require proof of nonconformity.

Mrs. Rando: You're right. The land court determined that the structure was more likely a two family dwelling at the time the zone changed, correct?

Mr. Dacey: Correct.

Mrs. Rando: It was a legal nonconforming use in 1952.

Mr. Dacey: Correct.

Mrs. Rando: However the Petitioner has failed to present enough evidence in the Summary Judgment record to show that the property was actually used as a two family from 1952 to date to enable the ZBA court to determine whether the current use of the property fits with the protected nonconforming use under the Powers Test.

Mr. Dacey: Are you reading from the Law Department Memorandum?

Mrs. Rando: No. Valentino 2107-8. So it has to be Trombly's opinion.

Mr. Dacey: I think you are reading from the Law Department Memorandum but that's okay.

Mrs. Rando: Let me see. Section, in your binder - - -

Mr. Dacey: Well it depends on the section you want to read. I am looking at Page 11 of 18, Judge Trombly's decision, and this is the section where he's talking about the information that was submitted, the city directory, assessors' cards, etc. So, ten lines down, starting with the word "Given", "Given that the Defendants (which is the City of Waltham) do not include in the record any information or evidence that would suggest the property was not, in fact, used as a two family dwelling in 1952, the court finds that there is no genuine issue of fact on this question. The evidence presented by the Plaintiffs is sufficient support to indicate that the property was, in fact, a two family dwelling at the time the zone was changed from RB to RA-3, and therefore legally nonconforming."

Mrs. Rando: And then continue.

Mr. Dacey: So the issue is what transpires from 1952 to the present. And of course, the law department when they were in front of Judge Trombly made a large point of saying, we don't like the evidence submitted. We think that the Powers Test applies. We think we've got to establish that this is not a lodging house. Okay? Well, Judge Trombly gave the City of Waltham as the Defendants in the case every opportunity to introduce evidence contrary to what was submitted and they declined to do so. So the presumption reverts, is basically what happens in the case. So if the city wants to raise the issue of this is a lodging house, then they create the burden for themselves to prove it. Nobody suggests that this is a lodging house.

Mrs. Rando: I think Judge Trombly knew that you would have the Powers Case before you came to us. That you have to prove the Powers Test.

Mr. Dacey: Okay, if that's the direction you want to go in, all you have to do is say that to us and we will do it.

Mrs. Rando: Well, I am saying it. I want you to prove from 1952 on, it was used without any break as a two family, legal nonconforming use.

Mr. Dacey: Well, here's what's in the book. There are assessors' records which recite that this is a two family property, okay. And the records go from various and sundry dates. Judge Trombly was candid enough to say, not every date, not every year, not every moment has been accounted for in this submission by the Plaintiffs. But taken on balance, and given the fact that this information is seventy years old, it's the best we have and you are free to either believe it or not and that is why you're here. I am not suggesting to you that this evidence is incontrovertible, I am simply saying that this is the best that anyone can come up with to show by assessors records, and by voting records and by the Polk Directory that this property was used as a two family from 1952 until the time Frank Valentino bought it in 1992.

Mrs. Rando: What about a lease? They have leases. Just show us the leases.

Mr. Dacey: Is your issue from 1992 on?

Mrs. Rando: 1952 on.

Mr. Dacey: Well, Frank Valentino has only owned the property since 1999. So, he can prove his use of the property

Mrs. Rando: From 1999 on as a legal two family.

Mr. Dacey: Yes. And if that's information you want to see, that's available. That's not a problem.

Mrs. Rando: But then again you get into your determination on what a family is and what's um ---

Mr. Dacey: Now, that is a fantasy that the City of Waltham Law Department would like to send you down. That is not where this case goes. The defensive marriage act is not going to be applicable here, folks. We are well past that.

Mrs. Rando: I don't think we are saying the marriage act.

Mr. Dacey: What we are saying here is, that if you want to go back to the Law Department memorandum and I saw it. I saw that language in there and I said, Oh boy, that's a riddle I don't think I would want to put my finger on. That one has a lot of electricity in it.

Mrs. Rando: They are saying that they want to know that it has been a legal, or we want to know as a zoning board before we go further that it is a legal nonconforming use. And their definition of a family is people living together, not students living together all having the same beliefs and educational desires or whatever. That does not constitute a family in my opinion and according to the law department and our building code.



Mr. Dacey: So my question to is, who am I trying to convince?

Mrs. Rando: You're not trying to convince, you're trying to prove.

Mr. Dacey: Five members of this Zoning Board of Appeals or am I going to try and convince the law department?

Mrs. Rando: Well, I think you have to prove us but I think that our legal counsel is there to help us make the right decision and not do something that is legally wrong by overturning the Land Court decision which we have no power to do.

Mr. Dacey; Okay, apples and oranges, here we go. Where do you want to pick this one apart? Definition of Family, is that where you want to start?

Mrs. Rando: Where did you get your definition of Family?

Mr. Dacey: The definition of Family is now part of federal law.

Mrs. Rando: Was it in single or two family uses or was it in a multi family use. Could you answer me that. Was it in single or two family or in multiple - - -

Mr. Dacey: Madam Chairperson, I don't think it matters. I think the definition of Family by Federal Law is not going to be four people related by blood or marriage. It's not that way anymore. Right? We are well past that.

Mrs. Rando: It's not what I am saying. I am saying, my definition of a family is not twelve college students living together in a harmonious atmosphere and you can't prove to me that that would be considered a family. That's ridiculous! Anyone can have a boarding house or have a lodging house and have Bentley students or have Brandeis students living in there.

Mr. Dacey: Okay, one of the things that you can do, and I really do not want you to have

you believe that I am here to just pick a fight with you. The building inspector's office deals with this issue every day of the week and they are very comfortable with the conclusion that the definition of "Family" as no more than four people related by blood or marriage is ancient history. What they look for is a common purpose and if there is a common purpose, then that matches the definition that allows people to live together regardless of their sexual orientation or  
- - -

Mrs. Rando: And I am not saying they have to be blood relatives within a second degree of kindred. I am not saying that.

Mr. Dacey: Well, that's what the law department is trying to tell you. That's in their memorandum and that's wrong. It is an absolute flat out violation of Federal Law. I don't know where they came up with this. I don't know how they have the courage to come in here and say it on television.

Mrs. Rando: A bonafied single housekeeping unit consists of two or more individuals living together with a relationship to one another in a distinct domestic character and achieve the cohesive inherent in the nature of a single housekeeping unit.

Mr. Dacey: Right. That's what you have here.

Mrs. Rando: I have a rooming house. I have a lodging house.

Mr. Dacey: If you choose to conclude that this is a lodging house, I can't help you.

Mrs. Rando: First of all, do you have the proof in here or are you going to be able to get the proof that is been used as a two family since - - -

Mr. Dacey: Let me tell you what I can reasonably do and what I can't reasonably do. I am building on two previous cases here. If there were more records available, I have every confidence that either Attorney Connors or Attorney LeClair who are both competent and

talented attorneys would have produced the information for the benefit of Judge Trombly and for the benefit of this board in Case 2007.

Mrs. Rando: Why don't we have it?

Mr. Dacey: You have what they had. What you have here is more than the law department would lead you to believe because, in fact, the documentation from the assessors office, the documentation from the voting records goes considerably beyond 1952 and at stated intervals documents fairly clearly the use of the property as a two family at various points. Now are there gaps? Of course there are gaps. If somebody doesn't register to vote they may still be living there but they are not in the voting records, so what do you do?

Mrs. Rando: What about telephone records?

Mr. Dacey: Well those are the Polk Directories and they are here. And if you go through them and I would not hesitate to recommend that you do this, it's a bit tedious but, for example, the voting records are here from 1959, 54, 59, 60, 61, 63, 65, 66, 67, 68, 69. They all show two distinct surnames in the house. Now, is it possible that these people were all living together or that that is not a clear indicator of a two family but I mean if you got one surname Powers in 753 and a different surname in 755, isn't it reasonable to presume that its two separate families?

Mrs. Rando: Does Mr. Valentino have leases from the time that he took over?

Mr. Dacey: He sure does. Would you like to see them?

Mrs. Rando: I'd like to see those too.

Mr. Dacey: Well, all right. That gets us from 1999 to 2014. Such records is are available you are welcome to see. Nobody's hiding a thing, but - - -

Mrs. Rando: Nobody is hinting that you are hiding something. I am saying you don't

have proof. You haven't proved to us that it has been used as a two family continuously since 1952.

Mr. Dacey: And What I am saying to you is that - - -

Mrs. Rando: And you have to pass the Powers Test, that's all. How you do it is up to you. You have to convince us. It's not my job. You have to convince us

Mr. Dacey: If you want to raise the Powers Test, I would be more than happy to talk to you about it.

Mrs. Rando: I know what it is. The Trombly decision brought it up.

Mr. Dacey: This is the law department all over again.

Mrs. Rando: This is Trombly's decision. Trombly stated it.

Mr. Dacey: No, it's what the Law Department raised. Trombly's decision was, look, if somebody wants to introduce evidence that this property is a lodging house which is basically what the law department alleged at the Land Court trial, Trombly said, well show me some proof. You're here. You're a defendant in the case. You have a right to produce evidence. Show me some proof. And guess what? There was no proof. So Trombly said, what am I suppose to do with this? There is a bare allegation by the city that this is not a two family it's a lodging house, but there's no evidence to support it. What can he do with it if there's no evidence? That's what a judge does. If there is no evidence, he's weighing air.

Mrs. Rando: I think that he knew that you had to prove to us the Powers Test. It didn't apply to what he was doing.

Mr. Dacey: You know, let me just give you an example of what is here. Maybe it convinces you, maybe it doesn't. There's always going to be a problem proving information that

is seventy years out of date. There is never going to be the kind of conclusive proof that you would like to see. At seventy years ago, this property was used as a two family and there was never an interruption in that.

Mrs. Rando: Then the judge spoke.

Mr. Dacey: And if that is your decision, I can't help you. As I stand here I will tell you that with some reasonable inferences based on the information that is here, you can validly and properly come to a conclusion that this was a two family house and it was used as a two family house from 1952 until the time that Mr. Valentino bought it in 1999. If you refuse to make any kind of inference from the facts that are available, I can't help you. It would be distressing to me to think that you were that closed.

Mrs. Rando: I think it's not closed. I think its wanting to do the right thing. This is too big a case for us not to do the right thing. There are people on both sides of this issue and we have to do what is legally right.

Mr. Dacey: I would never suggest you do anything but what is legally right. But where is the opposition? I mean, where are the people, other than the City of Waltham's Law Department who is making all of this noise about lodging houses or families who are not related by blood or marriage? No one! No one!

Mr. McCarthy: They came to the meetings which you had originally before us. We had thirty or forty of the neighbors down here.

Mr. Dacey: Well, you've got two of the neighbors right now.

Mr. McCarthy: You are asking where this lodging house came from. That's where it came from. The neighbors complained that this place was being used as a lodging house with nothing but loaded with Brandeis students. Time and time again they came down here to every single meeting complaining about it. That's where it came from. It's not out of the blue. That's

where it came from.

Mr. Dacey: Well if somebody wants to know who's living there right now, the answer is its Brandeis graduate students. That's who there. Is that a shock to anybody? I don't think so.

Mr. McCarthy: But the problem is, that's been addressed, I understand that and they have taken care of that so you don't have the parties that were going on down there. That was part of the problem. There was all sorts of discourse. There were all sorts of police calls and things of that nature down in that property back then because of the parties that were going on and the things that were going on. So this is not something that is not brand new.

Mrs. Rando: And the rubbish.

Mr. Dacey: So, when Mr. Michael Valentino and Mr. Frank Valentino bought the property it was in much more deteriorated condition. There were all kinds of problems with the occupants. They went in, evicted the people that were in there; cleaned it up; fixed it up and rented it to responsible graduate students. That's who's there. That's who's been there since he's taken over the property.

Mr. McCarthy: These people weren't complaining about before 1999. Do you understand that? It was after 1999 they were having problems down there.

Mr. Dacey: Alright, so here's what you need to do. You've got a new case 2013-15. We are starting fresh. If the neighbors want to come down and talk in terms of what's going on in the property right now. If they want to continue the discussion that the property isn't being maintained; that there's wild parties down there; that the property is not being properly supervised; then they are welcomed to do that. If they want to come in and offer evidence that this is a lodging house or rooming house, they are welcomed to do it. If they want to come in and offer that this is a lodging house or rooming house, they are welcome to do it. This is an open meeting. There's absolutely no prohibition on them bringing in any information that's relevant and credible and they are happy to do it. I've talked to these people a dozen times at

this point.

Mr. LaSane: Since the Valentino's have owned the property, have they had asphalt work done there?

Mr. Dacey: There's been considerable work done to the property.

Mr. LaSane: No, I'm talking about the asphalt work.

Mr. Dacey: Is there a specific aspect about the asphalt work that you are interested in?

Mr. LaSane: Well, asphalt work being done on a property like this one, implies to me that more parking is required.

Mr. Dacey: Okay. I don't want to take things out of order here, but one of the concerns of the neighbors was, and they will correct me if was if I mischaracterized this, was that they wanted to reduce the amount of parking because they didn't want an excessive amount of parking. If this is a two family property then it should have four parking spaces. That's what they want. The site plan, the existing conditions plan that is in your packet tonight - - -

Mr. LaSane: But the issue is why would you take site plan out of the context of the neighborhood? Why would you increase asphalt when the context of the plan of other lots in the neighborhood have more landscaping? Why would you do more asphalt?

Mr. Dacey: You know, it's interesting to describe what the context of the neighborhood is. If you look at this property front on, look to the left. What you have is the Holtey driveway and immediately to the left of the Holtey driveway is another single family house. That single family house, asphalt to their front yard because they wanted more parking. So what's out of character?

Mr. LaSane: I wasn't concerned about that house. I am asking a question about this

property.

Mr. Dacey: The neighbors are very much concerned, and I think this is probably where you are pointing is that this property not be a magnet and the more parking spaces and the more occupants, I think this is kind of the message. So they wanted to restrict the parking to four spaces in the back and they wanted the front labeled that it can't be used for tenant parking. The front asphalt actually has a value. The value it has is that it allows a turnaround on the property so that the cars can go out on to South Street facing out rather than back out on to South Street.

Mr. LaSane: Four cars?

Mr. Dacey: Yes. It also allows for a place for deliveries. The front yard is not a parking area. Under our plan and under our agreement with the neighbors it is restricted by plan so that it can't be used as tenant parking but I don't want to suggest that there isn't a value to the asphalt. Because it does allow the hammerhead turnaround that has proven to be a valuable safety feature for this property. It's a difficult driveway to get in and out of. So, I mean that's why its there.

You know, back to Mrs. Rando's point here. You know, I just pulled this at random. Here is the voting records from 1977. At 753 South Street, we had David Post. At 755 South Street, we had John Martin and some guy by the name of Bertrand Dupuis. So we have two different surnames, one at 753 and one at 755. Is that enough of a fact for you to draw an inference that there were two different families living in this property, one at 753 and one at 755? And if the answer is yes, then we are going to be okay because that kind of record and that kind of information is available. If you are looking for documentation that says I want to know who is in that property 365 days a years, 24 hours a day from 1952 until 1999. We can't do that. And I don't think it's reasonable to expect that anyone could. So if that's the basis on which you are going to decide this case, then why don't we save ourselves a lot of time and trouble?

Mrs. Rando: Mr. Dacey, I remember that at one of the other meetings, the neighbors said that there were a lot of cars that were parked across the street at the Watermill Complex and walked over. So there's still going to be more than two families and there will be rubbish and



garbage and beer cans and I have Brandeis students across the street from me and I am very well aware parties and rubbish. So, just because there are four parking spaces and you can't use the asphalt in the front, does not give me a warm and fuzzy feeling.

Mr. Dacey: Okay. You know, it's interesting what comes out of discussions with the neighbors and it turns out that the neighbors, not the residents of 753-755 South Street but the neighbors who live along that street use the garage. And they use it with, I guess, with either the permission or at least the benign acceptance of the owners that they will. They won't tow them. Because it's covered parking. All of these houses share a common feature, none of them have garages. The owners of these properties along South Street are parking over there because it's covered. So, are there people walking across South Street? Yes. But some of them aren't residents of 753-755, they are residents of the single family houses who don't have garages and they are using the covered spaces across the street. This is what came out of our discussions with Joe Giordano standing in the driveway down there. I mean it's obviously an interesting phenomenon as to how this thing has evolved. The other thing that you should know is that these are truly graduate students that are here. And they are typically foreign graduate students and they attend Brandeis University. They are in this building because they can walk to their classes. They have a van available to them in Brandeis that circulates and takes them up and back or takes them down town. They can walk to the train to get in town. Most of these people do not have cars; a) because they can't afford it, and; b) because it has no value to it to have a car. So its taken the Valentino's some time to refine the right tenant mix in this property but the right tenant mix is typically a graduate student, foreign born, here for a very serious program, masters or doctoral, wants to live close to the campus, doesn't have any money; doesn't need a car and is very happy without a car. So is Mr. Valentino willing to limit the number of parking spaces to four? Yes, because he has a tenant mix that doesn't cars. So, it works. Would it work if he were renting to families? Probably not. I mean, I don't know about you but I had three kids and they all have cars. So at one point we had six cars in front of my house. These people are a very unique set of tenants. They are not destructive. They are not particularly noisy. They are not particularly given to wild parties. They are graduate students as opposed to undergraduate students.

Mrs. Rando: Are you telling me that every time their lease is over, you are able to get graduate students or doctoral students to lease from you? You never have a time that you have to take undergrads?

Mr. Valentino: No.

Mrs. Rando: You do not. And you are lucky enough to get graduate students every time?

Mr. Valentino: Yes.

Mrs. Rando: It's amazing those doctoral students did make a mess according to the neighbors. So those foreign students as you have stated that do not have cars still - - -

Mr. Dacey: As I said, any rental property is going to have an issue. There is no such thing as a rental property that doesn't. I think that what the neighbors are looking at here is that on balance and they now have a fourteen or fifteen year history with the Valentinos and I think, in my discussions with them, they said we can work with these people. We can get ourselves comfortable with these people and frankly it's a better strategy than some alternatives if the Valentino's are forced to do something that they really don't want to do with the property. So maybe there's a negative connotation to this port here and I could understand that. Their first preference would undoubtedly be to have the property torn down.

Mrs. Rando: It's not just theirs; it's Judge Trombly's. You have a tear down requirement now by Judge Trombly.

Mr. Dacey: Well, you know what? Let's talk about that because that's an interesting point and I think it's something that the neighbors have been more than willing to think through. What we have in this case is, we have an addition that was put on without proper permits. Right? And there are actually two portions of the addition. One of them is the one that is on the right hand side of the house on the northerly side and that particular addition encroaches 3.9 feet into the northerly side yard and it goes up right now goes up three stories. Then we have the

other addition which is the third story over the old kitchen which is within the footprint of the old existing house. So if this case is decided negatively by this board and you say, nope, no variance and therefore no special permit or follow the cease and desist order of the building inspector and tear down the offending portion.

Mrs. Rando: We are not saying that. Judge Trombly is saying it.

Mr. Dacey: The building inspector is saying it. The building inspector is saying, go get relief or tear down the offending portion. It's very clear what the options here are.

Mrs. Rando: It's not to get relief; does he not mean the special permit?

Mr. Dacey: He needs a variance and two special permits. So, just stay with me for one second here, because this is where it goes. We can all agree that if the proper relief is not granted by this board, Mr. Valentino and his brother are all done fighting. There will be no more appeals. We are done. We will comply with the building inspector's order to tear down the 3.95 feet, all three stories of it, okay. And the question is, now that it's torn down, what's left?

Mrs. Rando: The tear down order that he is in violation of, Judge Trombly said make it whole again. Make it the way it was.

Mr. Dacey: Okay, and what is that? That is a twelve room house.

Mrs. Rando: Right. It's not my problem.

Mr. Dacey: No, it's nobody's problem.

Mrs. Rando: And I would like the neighbors to have some say in this. I don't think we can. I think that, first of all, the proof again with the Powers Test and you have a problem with that.

Mr. Dacey: Of course I have a problem with it. The Powers Test, basically it is based on a commercial case. It's not a commercial case, it never was. If you want to go through a Powers Test, we'll go through a Powers Test. But what are we going to prove on a Powers Test? That we are talking about a different use. We are not talking about a different use. It was residential before he put up this addition, it's residential afterwards. What are you going to prove in the Powers Test?

Mrs. Rando: This it has been continually nonconforming and that you had a right to do that. And that's all that Trombly said.

Mr. Dacey: The worse thing that I said to myself tonight was is do not fight with the chairperson and here I am fighting with the chairperson.

Mrs. Rando: Oh, Mr. Dacey, we are not fighting. In your brief Mr. Dacey, you said that Judge Trombly said go back to the zoning board and get some relief. He meant, just what you are trying to do now.

Mr. Dacey: Right.

Mrs. Rando: That's it.

Mr. Dacey: Right.

Mrs. Rando: That's it. And to get that you have to prove to us that it was a legally nonconforming use continuously. And until we have that proof, I don't think we have any right to go any further even if the neighbors wanted us to. It's not me. It's Judge Trombly. And if we do, then we were overruling the land court's decision which is illegal for us. We have no power or authority to do it.

Mr. Dacey: Hold on. I don't know how we can get this twisted around the axle but we are. Judge Trombly addressed the Powers Test because the law department insisted and they

insisted in the context that this is a lodging house and not a two family. Right? The problem with the logic, Madam Chairperson is, that they made the allegation but they didn't bother to offer any evidence so Trombly said, what do you want me to do with this? If you think it's a lodging house, okay. The petitioner says no, it's a two family. There's better evidence submitted by the petitioner that it is a two family then your non-evidence.

Mrs. Rando: And he let it slide.

Mr. Dacey: I'm not sure that he let it slide. I think he did what judges do. They weigh evidence against no evidence.

Mrs. Rando: Now we have to do what we have to do.

Mr. Dacey: Okay, but in fairness to you what Judge Trombly said was, look if the petitioner can amend his plans, come back with a different petition, then this board needs to hear it. Is part of their burden of proof tonight to show that this property is a nonconforming two family? The answer is, yes. I am in complete agreement with you, not because we need a variance, because we don't need to prove its nonconforming to get a variance, but we do need to prove its nonconforming to be eligible for the two special permits.

Mrs. Rando: Right.

Mr. Dacey: Now, that's a subtle distinction but I think at the end of the day, you and I are probably in agreement on that point.

Mrs. Rando: Yes.

Mr. Dacey: So, Judge Trombly said, look if you can change up your strategies here, revise your plans, come back with a different plan, come back with a different legal theory, you have every right to go back to the Board of Appeals. So, we are here with a different plan and we have reduced the third floor on the back piece of the house, and we reduced the third floor on



the side piece of the house. So the property now conforms as to the height requirement which is another violation. Judge Trombly said, listen, it's all well and good as far as the back piece goes but the side piece requires a variance. And as far as I am concerned, there's case law on both directions. He chose to seize upon the case law that says if you have a violation of the current dimensional zoning requirements, you need a variance. We are not arguing with Judge Trombly. That was his decision that is the law of this case and that is why we are here seeking a variance. Judge Trombly made it very clear that if there is no variance on this case, the whole issue of special permits is completely moot because he is not about to allow you to give a special permit to cover over a dimensional violation of the current zoning law. Okay, we're all clear on that?

Mrs. Rando: Uh hum.

Mr. Dacey: So first topic is the variance. We either get the variance and we move on to the special permit discussions, or we don't get the variance and the case ends. We can't do the special permits without the variance.

Now if you want to go step three which is you want to see the proof of the nonconforming nature of this property from 1952 to 1999, okay, we can do it. I'm telling you what's reasonable and available and that is city records which are assessor's records, which are voting records, which are Polk Directory records and if you are willing to make an inference based on these records you will be fine saying this property has been continuously used as a two family. If this factual information that I have here does not ring true with you, if it doesn't match your credibility test then there's not much else I can do because this stuff is seventy years old and there's no place else to go. So if you're into the point where you say, Mr. Dacey, you've got records from 1968 but where's your records from 1966? You go from 1965 to 1968. Not good enough. Sorry, can't help you. That's what I have. There were two different names living there in 1965. There were two different surnames living there in 1968. I don't know who lived in 1966 and 1967. Those records aren't available to me. Can you make that inference? Can you say, well okay, it was a two family in 1965? It was a two family in 1968, can we make that leap and say for the two years in between that it was probably a two family. That's what you have to do. But if you're telling me I have to go find 66 and 67, or you don't want to hear the case, I

can't help you. Tell me.

Mrs. Rando: I do, continuously, I do.

Mr. Dacey: I've got records in 1955. I got records in 1957. I've got nothing in 58. They're spotty.

Mrs. Rando: And whose duty it that to get the proof? Who are you supposed to get the proof and give it to?

Mr. Dacey: You. But it's your burden to decide whether the proof is adequate. If you wanted to draw a civil analogy here, it's a preponderous of the evidence. It's not beyond a reasonable doubt. This isn't a criminal case. The preponderance of the evidence is that if this property were used as a two in 1955 and it was used again by Polk Directory records in 1958 as a two family, and we don't have anything in 1956 and 57, the preponderance is, it's probably the same people. It's probably the same use. If you are asking me to prove this beyond a reasonable doubt, I can't do that.

Mr. McCarthy: How many different people do you have living there right now? How many different names do you have living there right now?

Mr. Dacey: I don't know.

Mr. Valentino: Eleven.

Mr. Hickernell: What's the point of the question? I don't understand.

Mr. McCarthy: Well, he's just showing that all of the records are indicating it's a two family, just two names, two names. But now you've got eleven people living right there.

Mr. Hickernell: That doesn't say anything. I've got three surnames in my family and



there's only four of us. It's a one family.

Mr. McCarthy: I just asked the question.

Mr. Hickernell: But what's the point of the question?

Mr. McCarthy: The point of the question is because you have two names in the voting record doesn't mean that there were just two people living there or two families living there. Now the questions I would have is this. Is the way the building currently is built, is it a legal two family in terms of bathrooms, in terms of kitchens, in terms of those things?

Mr. Dacey: Yes.

Mr. McCarthy: Okay. And there's no complaints from the building department indicating that you are using it other than a two family.

Mr. Dacey: Something that might help you because this came up. It's a fair question. The neighbors asked for it. It's a fair question by anyone on this board to ask. Show me how the apartments are configured. Fair question. Tab 4, white book.

Mr. Hickernell: Madam Chair, could we have a five minute recess while we look at Tab 4?

Mrs. Rando: I have a motion for a five minute recess, do I have a second?

Mr. LaSane seconded the motion and the board took a five minute recess at 8:12 P.M.

The board reconvened at 8:17 P.M.

Mrs. Rando: We are back in session. Mr. Dacey, this has been going on rambling for an hour. I would suggest at this time that we continue the case and I would like to go into Executive

Session with the board and with the Law Department. I would also like to look at all the information you have on your records. It's too big a case. We cannot do something that we do not have the power to do and I think it's necessary at this time. So I would like to make a motion at this time that we continue the case and go into Executive Session with the Law Department. We will make a date to meet with them and - - -

Mr. Hickernell: May I question the motion before we vote. What is the purpose of the Executive Session? We don't have any litigation.

Mrs. Rando: To explain the Land Court's decision and how we do not have the right to hear this case unless we have proof according to the Powers Test that you have a legal nonconforming use.

Mr. Hickernell: I am not opposed to a continuance of the case but I disagree with the premise that we are not allowed to hear the case. I don't think we can meet with the Law Department in Executive Session as opposed to an open session unless we have litigation on the petition. They are welcome to come here,

Mrs. Rando: I will request that they be here.

Mr. Hickernell: Well we request it sometime, and either they come or they don't. I don't think we can go into Executive Session unless they sought a law suit.

Mrs. Rando: Well as far as the law department, any time that I have requested that a representative from the law department be present, they have been here. Now, if you are talking about other departments you're correct. But we can do that if you like. We can request that someone from our legal counsel be here at the next meeting. But I definitely want to continue this because it's too big a case and I don't want to do something that would be against the Land Court's decision.

Mr. McCarthy: Madam Chair, I have a question on the motion. I think that one of the

things that we are looking is for information as to proof it's a two family. I would think that it's more logical for the current owner to have that information from the time that he owned it to the present. So I would think if they could supply that information as opposed to what happened previously. What happened previously, we might be able to get from the building department with any regards to complaints associated with the building being used as a rooming house in that time frame beforehand or offer anything in that regard. And that might be something that we can hang our hat on in terms of it wasn't being used as a two family. It was being used as a boarding house. But you said, when the city went to the court case, they did not have that information available and there should be something there. There's something there that should be either in the building department or maybe legal has something in that regard in that time frame. I think that's about it Madam Chair.

Mrs. Rando: Do you want that to go in for Carol to request?

Mr. McCarthy: Why don't we do that? We make a request to the building department. Maybe we should have them come to the meeting with the law department. If we are going to have the law department shows up with regard to that.

Mrs. Rando: We can request that but we want the information anyway.

Mr. McCarthy: We want the building department determine if there have been any complaints on this property over the years in terms of it being used as a rooming house going back to 1952. It has to be a continuous use as a two family, or do we have any proof that it wasn't then that's a horse of a different color. And then tell the building owner to come up with some type of proof as to it being used as a two family for the time that he owned it strictly as a two family, not as a boarding house because again when this first came before us he had indications from folks that were living there otherwise, not living in the building itself but living as neighbors complaining about the building being used as a boarding house.

Carol (Stenographer): So we are requesting that the building department attend with the law department at our next meeting to see if there have been any complaints on the property over

the years being a rooming house going back to 1952.

Mr. McCarthy: Right. I wonder if there have been any police complaints in that regard as well. How would we get that?

Mrs. Rando: We'll call the police department. They will give us that. Check police records also.

Mr. McCarthy: Who can check the police records?

Mrs. Rando: We can.

Mr. McCarthy: Is someone from legal going to check on that for us?

Mrs. Rando: Yes, someone from the law department can.

Mr. Sergi: Just one comment. I acknowledge the need that you are voicing, Madam Chair. I would also like to acknowledge and the board acknowledge specifically that there has been a lot of work here between the neighbors and the petitioners and I think there has been some progress in a certain direction and we'll probably put some conditions on this property that haven't existed in the past. At least that's the way I am been reading what's been going on and the changes to the ongoing plans here. So, I do not want to discount those efforts. So I think it's relevant to continue this case to clear up these items so that the board can move forward in that in clear conscience.

Mr. Dacey: May I offer a comment before you continue the case? You have two sets of neighbors here tonight. If you have any information that might be relevant from them, I don't know when you are going to continue this case or what their availability might be the next time. If there's question for them regarding the use of the property, regarding the legal or nefarious conduct, ask them. I don't want that testimony to be lost just because the case has been continued. They have been very patient and very willing to come to these meetings but who

knows when this case is actually going to get resolved. If they have information and you have questions for them, you should get them while they are here.

Mr. Sergi: Madam Chair, as far as I am concerned. I have listened to the neighbors. I have heard what they had to say. I heard what the petitioner had to say in response to that. Unless there is anything new, I can't expect any new issues I think counselor that at least I am satisfied.

Mr. Dacey: It's your call. I feel terrible that we are inconveniencing these people.

Mr. Sergi: I don't think that we need to rehash that. It's already been discussed and you guys have been going back and forth discussing it for months not years.

Mr. Dacey: The second thing that I started to say tonight and we got sidetracked, and I apologize for that is that there is a memorandum here on Res Judicata and perhaps its useful for the record and anybody else listening to this, to at least get the overview on it so that perhaps that will aphrase a more productive discussion with the law department. I am here to help. I am not here to fight with the law department. They have a point of view. And their point of view is that they do this as a piece of litigation. They see this as a continuing aspect of the litigation and every comment that they have made has been made with that in mind, Res Judicata being the best example. Res judicata, if I might take five minutes, Res Judicata is an affirmative defense available in a legal proceeding. We are not in a legal proceeding yet. We are in an administrative proceeding here. It is your board. It is your decision where you make these factual determinations. If this case goes back to the land court and we are in a legal court room with a judge presiding, then Res Judicata is a defense that the city would raise under those circumstances and in that forum the Res Judicata argument would be appropriate if they can sustain it. But Res Judicata is an affirmative defense in a legal case. The city law department is not a party to this case right now. There is no legal case. We are here on an administrative hearing to talk about variances and special permits. If you look at the cases that the law department cites, one of them is a divorce case which is a fascinating case. The other one that they cite which is Petrillo and that's Tab 8 in your book is a land use case and that's important.

The first thing you should take out of Petrillo is that there were two petitions to the Cohasset Board of Appeals. The first petition was to expand a nonconforming use. It was denied. They came back and said we are going to use the land that we own in Scituate which happens to be adjacent to Cohasset and now we are going to do a conforming property but we are going to use the Scituate land to make up the missing land area. It was a different case. The neighbor took this to land court and alleged Res Judicata and said this has already been decided. The answer was, no it wasn't, it's a different case. But the real point to you is that the Cohasset Board of Appeals heard both cases. They heard the first one, denied it. Heard the second one. allowed it and the neighbor appealed it and then alleged res judicata. Your obligation here is to hear the second case. Let the land court decide Res Judicata issues. That's not you. That's somebody else. You don't have to concern yourself with that. Every case that deals with Res Judicata here resolved all of the administrative discrepancies here. And then the two cases were compared at the Land Court level or the Superior Court level to see whether or not they actually adjudicated the same issue or whether they were done on the same facts. And I think what you are going to see by analogy here is that this case is on different facts removing the third floor on a different legal theory, variance as opposed to special permit. So I am personally not concerned about the Res Judicata issue but I think you're spending a lot of time and a lot of angst on it and I think you are struggling with concept that the law department basically is giving you as kind of a prelude to where they are going when this thing goes back to the land court. It's not your problem.

Mrs. Rando: Well I think that we will have more information when we meet again. I am making a motion to continue Case 2013-15. Do I have a second?

Mr. LaSane: Second.

The roll being called: Mr. Sergi, yes; Mr. Hickernell, yes; Mr. LaSane, yes; Mr. McCarthy, yes and Mrs. Rando, yes.

Mrs. Rando: I would like to ask the neighbors. Are any of you going to Florida or are not

going to be around? What dates are not good for you?

Mr. Dacey: I have a case here on the 28<sup>th</sup> here. I would rather not mix the two.

Mrs. Rando: I think we should give the law department and the building department and the police department a little bit of time to get the information to us. So, I was thinking Tuesday, February 4<sup>th</sup> or February 11<sup>th</sup>. (The 4<sup>th</sup> was not good for some of the board members.)

Mrs. Rando (to the neighbors) February 11<sup>th</sup>, is that good for the neighbors?

So we are going to continue Case 2013-15 to February 11<sup>th</sup>. Now we will have to extend the one hundred days in Case 2013-15 to April 18<sup>th</sup>.

Mrs. Rando: I am making a motion to extend the one hundred days to act on Case 2013-15 to April 18<sup>th</sup>. Mr. Hickernell seconded the motion

The roll being called: Mr. Sergi, yes; Mr. Hickernell, yes; Mr. LaSane, yes; Mr. McCarthy, yes and Mrs. Rando, yes.

There being no further business, on motion of Mr. Sergi, seconded by Mr. McCarthy, the board voted to adjourn at 8:30 P.M.

*Barbara Rando, Chair*  
*1/28/14*