

FOR THE
CITY OF WALTHAM
ZONING BOARD OF APPEALS

GENERAL HEARING

February 26, 2013

7:00 P.M.

at

Public Meeting Room, First Floor
Arthur Clark Government Center
119 School Street
Waltham, Massachusetts 02451

Barbara Rando, Chair
Mark Hickernell, Clerk
Glenna Gelineau
Gordon LaSane
John Sergi

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Waltham Zoning Board of Appeals/2-26-13/2

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A T T A C H M E N T S

Legal Notices: Case No. 2012-30
Case No. 2013-03

Case No. 2012-30:
Law Department Memorandum
Photographs
Parking Plan A

1 P R O C E E D I N G S

2 BARBARA RANDO, CHAIR: Good evening.
3 The Zoning Board of Appeals for Tuesday, February 26,
4 2013 is called to order at 7:00 p.m.

5 At this time, we just received an
6 opinion from the Law Department that we would like to
7 read, so I am going to ask for a five-minute recess.

8 Do I have a second?

9 GORDON LASANE: Second.

10 BARBARA RANDO, CHAIR: I have a
11 second.

12 All in favor?

13 ALL BOARD MEMBERS: Aye.

14 BARBARA RANDO, CHAIR: Opposed?

15 (None opposed.)

16 BARBARA RANDO, CHAIR: The ayes have
17 it. We're going to take a five-minute recess so we
18 can digest this.

19 Thank you very much.

20 (Whereupon, a brief recess was taken
21 off the record at 7:07 p.m.)

22 BARBARA RANDO, CHAIR: We are back in
23 session.

24 Good evening. Tonight we have one

1 continued case and one new case before us.

2 Case 2012-30, Monika Raesch, Nate
3 Salemmme, Samantha Henry, and Bara Blender, trustees
4 of 64 Cherry Street, that is the continued case; and

5 Case 2013-03, Rose Flynn, 62-½ Cherry
6 Street.

7 The members sitting this evening are:
8 Mr. Sergi, Mr. Hickernell, Ms. Gelineau, Mr. LaSane,
9 and I am Barbara Rando, Chair.

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1 ACCEPTANCE OF MINUTES OF FEBRUARY 5, 2013 MEETING

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3 BARBARA RANDO, CHAIR: The first
4 action this evening is for a motion to accept the
5 minutes of I believe it's February 5th. Was that the
6 last time we met? Does anyone know? I think it's --

7 MARK HICKERNELL: Yes.

8 BARBARA RANDO, CHAIR: To accept the
9 minutes of February 5th. Do I have a motion?

10 JOHN SERGI: So moved, Madam Chair.

11 BARBARA RANDO, CHAIR: Motion by Mr.
12 Sergi.

13 Second?

14 GORDON LASANE: Second.

15 BARBARA RANDO, CHAIR: Second by Mr.
16 LaSane.

17 All in favor?

18 ALL BOARD MEMBERS: Aye.

19 BARBARA RANDO, CHAIR: Opposed?

20 (None opposed.)

21 BARBARA RANDO, CHAIR: The minutes are
22 approved.

23 //

24 //

PUBLIC HEARING

Case Number 2012-30: 64-1 Cherry Street

BARBARA RANDO, CHAIR: Would the Clerk please read the petition in Case 2012-30?

MARK HICKERNELL: (The Clerk reads the notice for the above-mentioned Case into the record. See Attached.)

BARBARA RANDO, CHAIR: Thank you.

May we hear from the Petitioner or the Petitioner's representative please? And while you're coming to the microphone, we will read the opinion that was just handed us from the Law Department, if you wouldn't mind.

(The Clerk reads the memo from Michelle Learned, Law Department, to Barbara Rando, Chair of the Zoning Board of Appeals, into the record. See Attached.)

BARBARA RANDO, CHAIR: Thank you very much.

You've heard the opinion.

ATTORNEY MARK ROTONDO: Although I respectfully have read this opinion, I don't agree in whole with the Solicitor's opinion. There's no case

1 law supporting. She's reading specifically the
2 section which says, "Properly granted prior to
3 January 1st, 1976, but limited in time, may be
4 extended on the same terms and conditions that were
5 in effect for such variance upon said effective
6 date." Again, back in my original argument, the
7 statute or the provision there is that the right to
8 modify that they had prior to January 1st, 1976
9 carries forthwith now. If they had the right on
10 January 1st, 1976 to modify that condition, that
11 condition, or the right to modify that by this
12 language, does not extinguish that.

13 What I'd like to do first though, just
14 to give more context, because with the recent storm
15 and also with some of the issues in light of the City
16 Solicitor's memorandum here, there are two issues
17 that weren't addressed in this memorandum. And,
18 again, I'm going to speak with my client about how we
19 proceed with this. But one of those issues
20 specifically is the Zoning Board of Appeals in 1970s
21 grant of the zoning relief that encumbers the
22 property rights of two different landowners. And,
23 since meeting with you folks, I've had an opportunity
24 to go back through the Registry of Deeds and do an

1 extensive deed search on these properties. And there
2 is no written expressed authority that granted 64
3 Cherry Street the right to encumber their property
4 rights, i.e., the right of way.

5 And, this Board in 1970, expressly
6 granted two variances for two parking spots that
7 encumbered the rights of those individuals. And as I
8 expressed in the *Barron Chevrolet* case and in other
9 case law that talks about what a Board can and cannot
10 do, a Board cannot encumber the property rights of
11 another when granting relief and so forth.

12 We know that Chapter 40A, Section 10,
13 or, excuse me, Section 6, protects their rights
14 because more than 10 years has passed since the use
15 of that property in 1971 when that property, they've
16 occupied it as a four-family for more than 10 years.
17 So, I don't know how to address the issue of this
18 encumbered property and so forth.

19 So, with that said, I do want to
20 submit a couple of pictures to you folks just to give
21 you some context, which we didn't have at the last
22 hearing, in terms of those two parking spots that I
23 just talked about that this Board granted, parking
24 spot three and parking spot five.

1 You will hear from my brother later
2 on, Mr. Dwyer, Attorney Dwyer, regarding a variance
3 for his client, Ms. Flynn. And we have a picture of
4 Ms. Flynn's car parked here. And, on this picture,
5 we show exactly where parking spot five, based on the
6 plan, is supposed to be parked. We show you from a
7 front view and also from a side view where parking
8 spot five was granted by the Board in 1971.

9 And, Madam Chairman, if I may submit
10 this into the evidence, I'd like to do that.

11 BARBARA RANDO, CHAIR: Do.

12 ATTORNEY MARK ROTONDO: This gives
13 some context about where plan five is.

14 And then, Madam Chairperson, I would
15 like to submit into evidence also Plan A where car
16 three was supposed to be parked. And, again, as I
17 was talking at the last hearing, this gives some
18 context about the neighbors to the right of that
19 property who have a section of the fence removed who
20 have been using that right of way to enter into that
21 property. There are four parking -- there's four
22 cars there. My clients expressed to me there's a
23 plow that parks in this garage.

24 But, also, I have the other property

1 owners, not Mrs. Flynn, but the other property
2 owners, the property that was owned by Mr. Kirsch
3 back in 1971, and then part of that discussion about
4 where the snow and so forth was going to go. And
5 we've drawn where parking spot three would be on Plan
6 A to give you some context about the actions of being
7 unable to modify this plan has on this particular
8 neighborhood.

9 BARBARA RANDO, CHAIR: Sir, I don't
10 understand this picture at all. Do you want to
11 explain it to me?

12 ATTORNEY MARK ROTONDO: This photo is
13 an aerial view of the properties, the right of way to
14 the left of 64 Cherry Street.

15 BARBARA RANDO, CHAIR: Let me see it
16 as you're talking because I'm having trouble.

17 ATTORNEY MARK ROTONDO: That's an
18 aerial view of the property.

19 BARBARA RANDO, CHAIR: And where is
20 64?

21 ATTORNEY MARK ROTONDO: 64 Cherry
22 Street is over --

23 BARBARA RANDO, CHAIR: In this
24 picture, is it over here?

1 GLENNA GELINEAU: Mm hum.

2 ATTORNEY MARK ROTONDO: 64 Cherry
3 Street is roughly here. The right of way is here.

4 BARBARA RANDO, CHAIR: Oh, so you're
5 just showing us how the parking --

6 ATTORNEY MARK ROTONDO: If you look at
7 parking spot three, parking spot three completely
8 blocks the entrance for these folks who have parked
9 four vehicles to the left. There's no other ingress
10 to that property to the immediate right of 64 Cherry
11 Street, and there are plans that show how the
12 property to the right rear is also impacted. That is
13 the property that actually has a valid recorded right
14 of way from 1914 that has run with that property; how
15 that property also is impacted, there's two vehicles
16 parked in front of that property.

17 And so this is one of those cases that
18 every attorney hates to have. And, again, as I
19 stated, I disagree with the City Solicitor's
20 interpretation of the statute. I don't have any
21 cases that she cites in terms of anything but that
22 the plans -- the variance requires strict compliance
23 with the plans.

24 I know that the statute specifically

1 states that said variances properly granted prior to
2 January 1st, but limited in time, may be extended on
3 the same terms and conditions. Here, if they had the
4 right to modify before January 1st, 1976, as I stated
5 before, that right to modify continues.

6 A hypothetical --

7 BARBARA RANDO, CHAIR: Not under a use
8 variance.

9 ATTORNEY MARK ROTONDO: The
10 hypothetical I give you is the following. If the
11 Waltham Zoning Board of Appeals in 1970 granted a
12 business owner on Moody Street a use variance to
13 operate a restaurant or to operate a supermarket, and
14 at the time Moody Street had two-way traffic, and the
15 condition attached to that use variance was that the
16 supermarket had to exit southbound on Moody Street,
17 and then what happens is through traffic studies,
18 through redevelopment, the City of Waltham decides to
19 make Moody Street a one-way traffic lane and rather
20 than traffic traveling two ways north and south, and
21 this variance condition to travel only south, the
22 City now tells everybody that there will only be
23 northbound traffic on Moody Street, the rationale
24 used by the City Solicitor is that this Board has no

1 authority to address that condition.

2 I don't think the legislatures
3 envisioned that what was fixed in 1970 with such
4 marked changes is fixed in time so that a right to
5 modify a condition, not the use -- we're not saying
6 we want to change this property from a four-family
7 back to a three-family. We're not saying that. What
8 we're saying is that we're trying to modify a
9 condition. We're coming to this Board and saying to
10 you if you look at these pictures, the Board in 1970
11 granted two variances -- excuse me -- granted a
12 variance on a parking plan that encumbered two pieces
13 of property, the rights of ways of these property
14 owners. And if we decide that they were not allowed
15 to grant that, then what we're left with is that the
16 use required -- and I agree with the City Solicitor,
17 five parking spots, one-and-one-quarter spots per
18 unit. And what we're suggesting here is to park five
19 parking spots, one-and-one-quarter per unit.

20 Now, with that said, I don't want to
21 prejudice my clients from filing something that looks
22 at that type of argument. At the same time, I'm
23 trying to appeal to some common sense here,
24 especially in light of these pictures, and also

1 suggest to this Board that my interpretation of the
2 law is better than your City Solicitor.

3 I would like to take an opportunity to
4 see if this is a Board that, prior to taking an
5 official vote, does a poll to see if I have the votes
6 or not. And if I don't have the votes, then I would
7 speak to my clients about respectively requesting
8 from you folks to withdraw this petition and come
9 back and refile it under a different legal theory.
10 Or, in the alternative, to get the feeling of the
11 Board on how they'd like us to proceed and perhaps
12 request another continuation to see how to work out
13 this matter. So, I'm looking, Madam Chair, for
14 guidance from you.

15 BARBARA RANDO, CHAIR: If you come
16 back and refile, won't you lose the protection of
17 this use variance with the five parking spaces you
18 have now, and won't you be required to provide eight?

19 ATTORNEY MARK ROTONDO: Madam
20 Chairperson, I would argue if I were to come back
21 before this Board that this Board did not have the
22 authority to grant or to require as a condition two
23 parking spots that encumbered the property rights of
24 two people in this matter.

1 If you look at the conditions in the
2 variance, based upon your Solicitor's argument, it is
3 that it runs with the land. And the *Barron Chevrolet*
4 case, which I talked about -- there is another case I
5 don't recall off the top of my head -- in which a
6 Board conditioned the variance on the life of an
7 individual.

8 The courts specifically do not uphold
9 action by the Board in the granting of a variance.
10 If a petitioner came to you today and told you that
11 they wanted to have a variance that touched on two
12 properties without an expressed agreement between
13 those parties that satisfied the statute of frauds,
14 you wouldn't have the ability to do that, Madam
15 Chairperson.

16 So, my argument would not be that the
17 request to have five parking spots nullifies that.
18 In fact, I would argue that they have a protected
19 right because that variance, which was not required
20 to be filed, was acted on within one year, that the
21 building permits that they have, the occupancy
22 permits, all were granted within the statute, and
23 that 10 years has lapsed. It's a protected right.

24 In terms of the five parking spots, I

1 would argue that to find that the intent to ensure
2 that there were five parking spots is what I'd be
3 arguing. But I will argue that the Board did not
4 have the right to place that on two other peoples'
5 properties.

6 BARBARA RANDO, CHAIR: First of all,
7 when the use variance was granted, it was only
8 granted if the parking requirements were complied
9 with. That's the only reason you got the use
10 variance back in 1970 because you were able to comply
11 with the Parking Plan A.

12 ATTORNEY MARK ROTONDO: But, Madam
13 Chairperson, you have no action before you right now
14 that is an adjudicated action taken by the Town of
15 Waltham against my clients saying they're
16 noncompliant with that plan. What you have right now
17 is --

18 BARBARA RANDO, CHAIR: That's right.
19 We're just saying you can't change the plan.

20 ATTORNEY MARK ROTONDO: You're saying
21 you can't change the plan.

22 BARBARA RANDO, CHAIR: Right, because
23 it's a use variance and we don't have the power to
24 change it.

1 ATTORNEY MARK ROTONDO: I'm arguing
2 and saying that under the statute that their right to
3 modify is a protected right that carries over and
4 that this Board has the right to modify a condition
5 as part of that use variance.

6 Alternatively, if I withdrew, with
7 your permission, this application and refiled without
8 prejudice, I would be coming back to you and arguing
9 that this Board had the right to grant the use
10 variance in 1971, which they have done, had the right
11 to request five parking spots, which they'd done, but
12 they did not have the right to encumber the property
13 rights of somebody else. And, as such, this Board
14 has the right to correct something that it has done
15 improperly by modifying the parking plan to something
16 that's within their rights.

17 What you're arguing, Madam
18 Chairperson, I think we're looking at it from the
19 same perspective; we're coming at it from a different
20 result. What you're saying is that this Board has no
21 way of correcting an error that it's made.

22 BARBARA RANDO, CHAIR: Dimensional.
23 If it was a dimensional variance, yes, I agree, we
24 can change that.

1 ATTORNEY MARK ROTONDO: Madam
2 Chairperson, respectfully, if this Board granted a
3 variance on somebody else's land, you and I would
4 agree that --

5 BARBARA RANDO, CHAIR: That's right.

6 ATTORNEY MARK ROTONDO: -- this Board
7 does not have the right to grant a variance on
8 somebody else's property.

9 BARBARA RANDO, CHAIR: No.

10 ATTORNEY MARK ROTONDO: We agree on
11 that, right?

12 BARBARA RANDO, CHAIR: Right.

13 ATTORNEY MARK ROTONDO: You would
14 agree that based on the face and the four corners of
15 this document that there are two parking spots that
16 encumber the property rights of two separate
17 landowners? Are we agreed on that?

18 MARK HICKERNELL: Does that mean that
19 the original use variance is invalid?

20 ATTORNEY MARK ROTONDO: No, because
21 the original use variance that these folks have, that
22 use variance they have acted on, they have operated
23 under that with all of their proper permits for a
24 period of 10 years. So, the statute has recognized

1 that sometimes Boards make mistakes. And, when they
2 make mistakes, property owners who act in reliance on
3 that, as long as the statute of limitations has run,
4 are protected. The Building Inspector and I, that's
5 one of the few things that he and I did agree on,
6 that they are protected in that.

7 What I was trying to do when I came to
8 you to reaffirm the 1970 variance was to make sure
9 that they had clear title because no one knew that
10 this variance existed. And as I expressed at the
11 last hearing, several conveyancing attorneys never
12 picked up on this variance. And, more importantly,
13 no one picked up on the encumbered rights of two
14 other property owners until this whole mess occurred.

15 GLENNA GELINEAU: But it's obvious
16 that these right of ways exist. It's obvious. And,
17 obviously, the Board knew that in 1970. Why do you
18 think they did that then?

19 ATTORNEY MARK ROTONDO: But the Board
20 did not have the right in 1970 --

21 GLENNA GELINEAU: Well, whether or not
22 they had the -- I'm just saying what do you think
23 their thinking was? Why do you think they did that
24 if it's so --

1 ATTORNEY MARK ROTONDO: I would never
2 try to put myself in the position of a Board in 1970
3 that did not have the revisions of the 1975 Zoning
4 Enabling Act and try to come up with some logical
5 reason why they granted a parking spot or a condition
6 on the rights of two other properties. I would never
7 do that.

8 GLENN GELINEAU: And we didn't even
9 touch on this last time you were here.

10 ATTORNEY MARK ROTONDO: And, again, I
11 needed to have my surveyor go out to see if, in fact,
12 they were in right of ways.

13 GLENN GELINEAU: You had to send your
14 surveyor to figure that out?

15 ATTORNEY MARK ROTONDO: Of course,
16 because I needed to make sure that I had the right
17 dimensions and so forth to make sure. The Plan A, if
18 you read through Plan A and you read through the
19 decision, they say that it's off by two feet, they
20 say it's this and that. So, I wanted to make sure
21 that we had the proper dimension.

22 Again, I'm looking for the guidance of
23 this Board. And so I'm not sure if this is one of
24 those boards that does an informal poll vote

1 beforehand, and that's what I'm requesting.

2 BARBARA RANDO, CHAIR: So, tell me,
3 who owns the right of way?

4 ATTORNEY MARK ROTONDO: The right of
5 way is an appurtenance so the right of way is not
6 owned by anybody.

7 BARBARA RANDO, CHAIR: No.

8 ATTORNEY MARK ROTONDO: The right of
9 way --

10 BARBARA RANDO, CHAIR: It has to be
11 owned by one of the two properties.

12 ATTORNEY MARK ROTONDO: 64 Cherry
13 Street owns --

14 BARBARA RANDO, CHAIR: One person owns
15 it, but each --

16 ATTORNEY MARK ROTONDO: Reading from
17 the deed, and I have Attorney Dwyer here with me,
18 reading through the deeds, it appears that this
19 property was subdivided by Fredrick Law Olmstead in
20 1914. Mr. Olmstead then built two properties to the
21 rear of this property. When he did that, he granted
22 the two properties an exclusive right to pass over on
23 the right side and the left side of that property.

24 BARBARA RANDO, CHAIR: That's right.

1 Who is the owner? I believe it's 64 is the owner.

2 ATTORNEY MARK ROTONDO: Well, I think
3 your terminology of owner is not correct. Madam
4 Chairperson, I'm just trying to not get into
5 semantics.

6 BARBARA RANDO, CHAIR: Who is the
7 owner?

8 ATTORNEY MARK ROTONDO: The owner of
9 the right of way --

10 BARBARA RANDO, CHAIR: 64 Cherry
11 Street is the owner, is it not?

12 ATTORNEY MARK ROTONDO: No, Madam
13 Chairperson, I disagree with you. The owner of the
14 right of way, and those who have a vested property
15 interest in the right of way, are Mrs. Flynn, who has
16 the right to pass over it --

17 BARBARA RANDO, CHAIR: The right to
18 pass over it.

19 ATTORNEY MARK ROTONDO: Which is a
20 property right, Madam Chairperson. It can't be
21 extinguished and it can't be encumbered, as I've
22 allowed you, by this Board. You don't have the
23 ability.

24 Now, again, Madam Chairperson, what

1 I'm looking for is guidance from this Board, based
2 upon the facts you have in front of you. You have in
3 front of you this tremendous hardship on 64 Cherry
4 Street.

5 BARBARA RANDO, CHAIR: It's true.

6 ATTORNEY MARK ROTONDO: And I suggest
7 to this Board, based upon my interpretation of the
8 statute, that this Board has the right to modify a
9 condition.

10 BARBARA RANDO, CHAIR: And I disagree.

11 ATTORNEY MARK ROTONDO: I know you do,
12 Madam Chairperson.

13 BARBARA RANDO, CHAIR: I disagree
14 because it's attached to a use variance. And you
15 would not have gotten a use variance if you had not
16 shown them the parking plan A that had the required
17 parking. You wouldn't have gotten it. So, it's
18 attached. It's part of the use variance, I believe.

19 ATTORNEY MARK ROTONDO: Excuse me,
20 Madam Chairperson, for a moment.

21 My clients reminded me, in 1970, the
22 property to the right with parking spot three was one
23 owner, the Kirsch family. There's no express
24 agreement written that would satisfy the statute of

1 frauds that Mr. Kirsch granted himself the right to
2 park in that property. There's nothing in the
3 record, and there's nothing in the Registry of Deeds.
4 Because it is a right that touches on property, it
5 must satisfy the statute of fraud.

6 But, again, Madam Chairperson, I'm
7 looking for guidance here. And my guidance I'm
8 looking for is is there support? I know, Madam
9 Chairperson, you and I disagree on this. And it's
10 okay. We can agree to disagree on this. The
11 question I ask is whether or not this is a Board that
12 allows for an informal poll because I need to be able
13 to give my clients some guidance here without
14 prejudicing their rights.

15 And so based upon the evidence you
16 have in front of you, Madam Chairperson, would you be
17 inclined to take an informal poll to see if we have
18 satisfied the original variance application that we
19 have submitted, which is that this Board has the
20 authority to modify a condition and that we also
21 satisfy all the conditions of the variance, which
22 includes hardship and so forth?

23 BARBARA RANDO, CHAIR: Mr. Sergi, do
24 you have any questions?

1 JOHN SERGI: I don't have any
2 questions. I sympathize with you, Counselor. I
3 think this, you know, request is being proposed in
4 good faith for good reason. I have an opinion here
5 from our counsel that says we have no right to. I
6 mean if you were able to, you know, support an
7 argument against that or give us some sort of grounds
8 to kind of see it differently, maybe I could
9 sympathize. But, as of now, I am not inclined to
10 vote in favor.

11 BARBARA RANDO, CHAIR: Mr.
12 Hickernell?

13 MARK HICKERNELL: Counselor, you did
14 point out that our Solicitor, in the second to last
15 paragraph, went from we don't have the authority to
16 grant a use variance to not having the authority to
17 modify a condition to a use variance without case
18 citation. Do you have a case citation for the
19 opposite proposition, which I have to say is
20 attractive logically, or do you need time -- if you
21 believe there's one that more time would allow you to
22 find for us?

23 ATTORNEY MARK ROTONDO: I will be very
24 frank with you. I think the reason why your City

1 Solicitor could not find case law to support that is
2 the same reason why I can't find -- or to support her
3 position -- is the same reason why I can't find case
4 law to rebut her position.

5 This is a very unique legal issue on
6 this whether or not a condition can be modified as
7 part of a use variance. So, frankly, I can't tell
8 you that I can find case law to rebut her
9 presumption.

10 MARK HICKERNELL: Perhaps you'd like
11 to make case law at the Appeals Court.

12 ATTORNEY MARK ROTONDO: I'm not
13 looking to make case law against the City of Waltham
14 at all. I'm looking to, as I said in that first
15 hearing, rectify what is going on on Cherry Street.

16 MARK HICKERNELL: Okay. So I
17 understand -- I understand the Petitioners' problems
18 here. But it sounds like you're telling us that a
19 continuance to provide further authority would not be
20 of any use to the Petitioners at this time?

21 ATTORNEY MARK ROTONDO: Under this
22 petition, I would probably -- based upon the fact
23 that you all -- that there's a feeling on this Board,
24 at least two of them, and I believe I can anticipate

1 others --

2 MARK HICKERNELL: Two no's is all the
3 -- yeah, you'd need four yeses.

4 ATTORNEY MARK ROTONDO: And you have a
5 City Solicitor.

6 MARK HICKERNELL: Right.

7 ATTORNEY MARK ROTONDO: So I
8 understand that the City Solicitor's opinion has more
9 weight than myself.

10 If I could have a brief recess so I
11 can speak to my clients about how to proceed here?

12 BARBARA RANDO, CHAIR: First of all,
13 let's see if there are any other questions for you
14 before you do.

15 ATTORNEY MARK ROTONDO: Sure.

16 BARBARA RANDO, CHAIR: Ms. Gelineau,
17 do you have any questions?

18 GLENNA GELINEAU: No, not at this
19 time.

20 BARBARA RANDO, CHAIR: Mr. LaSane?

21 GORDON LASANE: The only other issue
22 that hasn't been touched on is the issue of -- the
23 last issue raised in the opinion. Do you see curing
24 that set of issues a step prior to anything we do?

1 ATTORNEY MARK ROTONDO: It's
2 interesting because this was not an issue that was
3 brought out when we had the conversation with the
4 Building Inspector. So the Building Inspector did
5 not mention that they didn't satisfy the Town zoning
6 in terms of dimensional requirements.

7 GORDON LASANE: It's on the table.

8 ATTORNEY MARK ROTONDO: It's on the
9 table now. So, you know, there are several options
10 we have here. One is to respectfully request to
11 remove this petition and file a petition to go for a
12 dimensional variance. And that dimensional variance,
13 obviously, we'd be looking for a dimensional variance
14 on the eight parking spots, and then based upon this
15 new information from the City Solicitor, the
16 dimensional requirements on the front lawn and so
17 forth.

18 I don't believe that that would be an
19 abandonment of the original variance, again, with the
20 cause that 10 years have passed.

21 The other issue here is whether or not
22 I collaboratively look at the two parking spot
23 requirements that were made as a condition of that
24 original variance. So, again --

1 GORDON LASANE: But do you see curing
2 this matter having precedent over moving forward?

3 ATTORNEY MARK ROTONDO: I'm sorry?

4 GORDON LASANE: Do you see curing this
5 matter having priority over moving forward?

6 ATTORNEY MARK ROTONDO: I don't
7 understand your question.

8 GORDON LASANE: Do you see fixing this
9 issue --

10 ATTORNEY MARK ROTONDO: Fixing the
11 issue --

12 GORDON LASANE: -- as the first --

13 ATTORNEY MARK ROTONDO: Fixing this
14 issue to me means that I need to resolve the dispute
15 that I have with Mrs. Flynn. And we'd like to do
16 that through a license. To me, curing the issue is
17 making sure that my clients have clear title, and
18 trying to figure out legally a way of clearing their
19 title.

20 GORDON LASANE: And you don't see --
21 you don't see the Board playing a role in that
22 discussion, do you?

23 ATTORNEY MARK ROTONDO: I see the
24 Board emphatically being the only way, and that's why

1 I filed the petition.

2 GORDON LASANE: Clearing up title
3 issues?

4 ATTORNEY MARK ROTONDO: I'm sorry?

5 GORDON LASANE: Clearing up title
6 issues and deeds?

7 ATTORNEY MARK ROTONDO: Clearing up
8 the title issue to us is that these five parking
9 spots, based on the master deed -- the master deed
10 has a very different parking plan and they have very
11 different rights under that master deed.

12 GORDON LASANE: So what role do you
13 see us playing in that?

14 ATTORNEY MARK ROTONDO: The role I see
15 is that the master deed ultimately is the direction
16 we would like to go and ensure that they have clear
17 title to what they purchased. So, whether I do that
18 through a dimensional variance request or I do that
19 by collaterally looking at spot three and spot five
20 is something that is a legal decision. Based upon
21 the discussion before the Board here, I get the
22 feeling I don't have the votes to move forward on
23 this petition. And so, with that said, I'd like to
24 have a brief recess just so I could speak to my

1 clients and get some legal information to them and
2 get their direction on the matter.

3 Mr. Dwyer is coming up before you.
4 And he's going to be looking for a variance on a spot
5 that's --

6 BARBARA RANDO, CHAIR: We'll discuss
7 that when he comes to the microphone.

8 ATTORNEY MARK ROTONDO: I understand.
9 But parking spot five is directly in front of that
10 spot. So --

11 BARBARA RANDO, CHAIR: Well, I, for
12 one, am ready to make a motion to deny it.

13 MARK HICKERNELL: Well, I'll make a
14 motion, first, for a recess so that the Petitioner
15 can discuss with counsel their options.

16 BARBARA RANDO, CHAIR: All right. Do
17 we have a -- do I have a second on a motion to deny
18 it due to the fact that it was granted by use
19 variance in 1970, and the parking plan is a condition
20 of the use variance? Do I have a second on that?

21 (No response from Board members.)

22 BARBARA RANDO, CHAIR: Hearing none,
23 does Mark have a second on a five-minute recess.

24 JOHN SERGI: I'll second that.

1 BARBARA RANDO, CHAIR: All right. We
2 have a motion and a second.

3 All in favor?

4 ALL BOARD MEMBERS: Aye.

5 BARBARA RANDO, CHAIR: Opposed?

6 (None opposed.)

7 BARBARA RANDO, CHAIR: The ayes have
8 it. Five-minute recess.

9 (Whereupon, a brief recess was taken
10 off the record.)

11 BARBARA RANDO, CHAIR: Would the
12 attorney come to the podium please?

13 ATTORNEY MARK ROTONDO: Madam
14 Chairperson, if it pleases the Board, I have had an
15 opportunity to speak with my clients. And we would
16 respectfully request a motion from this Board
17 granting us permission to withdraw this petition
18 without prejudice so that we have an opportunity to
19 regroup.

20 MARK HICKERNELL: So moved. So moved,
21 Madam Chair.

22 JOHN SERGI: Seconded.

23 BARBARA RANDO, CHAIR: All right. We
24 have a motion to allow Case 2012-30 to withdraw

1 without prejudice.

2 All right. How do you vote -- and
3 second -- how do you vote, Mr. Sergi?

4 JOHN SERGI: Yes.

5 BARBARA RANDO, CHAIR: Mr. Hickernell?

6 MARK HICKERNELL: Yes.

7 BARBARA RANDO, CHAIR: Ms. Gelineau?

8 GLENNA GELINEAU: Yes.

9 BARBARA RANDO, CHAIR: Mr. LaSane?

10 GORDON LASANE: Yes.

11 BARBARA RANDO, CHAIR: And the Chair

12 votes no.

13 ATTORNEY MARK ROTONDO: Thank you.

14 BARBARA RANDO, CHAIR: All right.

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1 **Case Number 2013-03: Rose Flynn, 62-½ Cherry Street**

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3 BARBARA RANDO, CHAIR: Would the Clerk
4 please read the petition in Case 2013-03, Rose Flynn.

5 MARK HICKERNELL: (The Clerk reads the
6 notice for the above-mentioned Case into the record.
7 See Attached.)

8 BARBARA RANDO, CHAIR: Thank you.

9 May we hear from the Petitioner or the
10 Petitioner's representative please?

11 ATTORNEY KEVIN DWYER: Good evening.
12 My name is Attorney Kevin Dwyer. I have an office
13 here in the City at 707 Main Street. And I am here
14 on behalf of Rose Flynn, who is the owner of 62-½
15 Cherry Street, Waltham.

16 In light of Attorney Rotondo's
17 petition, and in light of the City of Waltham City
18 Solicitor's opinion, which I did have a chance to
19 read quickly, but I have not received a hard copy of,
20 with this Board's permission, I would like the
21 opportunity to continue my petition for another
22 evening to allow me the opportunity to review that
23 Law Department opinion.

24 I think it does also affect 62-½

1 Cherry Street, although 62-½ is not, I don't believe,
2 specifically mentioned in that opinion. I think that
3 that opinion may affect my client's petition and I'd
4 like the opportunity to review it a little more
5 carefully, do some legal research as Mr. Hickernell
6 suggested, and have the opportunity to go over it
7 with my client.

8 For another reason, I think this
9 petition and 64 Cherry Street's petition go hand-in-
10 hand. It's a relatively small area here. We have
11 limited parking, as the Board knows. And for me to
12 go forward on behalf of my clients without 64 Cherry
13 Street going forward to me I think would just only
14 complicate things before this Board and before my
15 clients.

16 So, if I could get the -- I mean I'd
17 be happy to go through my petition tonight and
18 explain the relief that my client is looking for and
19 answer any questions the Board might have, but I
20 certainly would appreciate the opportunity to go
21 through Attorney Learned's opinion a little bit more
22 carefully and do my own research.

23 BARBARA RANDO, CHAIR: Well, did you
24 not say that it didn't touch on your address, 62-½?

1 ATTORNEY KEVIN DWYER: It didn't
2 mention my address one way or another, but --

3 BARBARA RANDO, CHAIR: And why do you
4 think that would influence your case tonight?

5 ATTORNEY KEVIN DWYER: Well, certainly
6 the right of way is at issue here. And I know that
7 ownership of the right of way has been mentioned.

8 BARBARA RANDO, CHAIR: Absolutely.

9 ATTORNEY KEVIN DWYER: And so my
10 client certainly has the right to pass over the right
11 of way to get to her house.

12 BARBARA RANDO, CHAIR: Right.

13 ATTORNEY KEVIN DWYER: And so if
14 that's an issue here, and it's an issue brought up
15 with regard to 64 Cherry Street's application, I
16 think it's going to also apply to mine. So, that's
17 the reason why I'd like the opportunity to do my due
18 diligence, and speak with my clients about it, and
19 decide where they want to go at this point.

20 BARBARA RANDO, CHAIR: May I ask you
21 when you say you want to see what they want to do,
22 what are you talking about, the one parking space or
23 the two parking spaces?

24 ATTORNEY KEVIN DWYER: No, they need

1 two parking spaces over there. It's a two-family
2 house. Currently, my client lives there with her
3 brother. They have two cars. What we're really
4 asking for is for this Board to really endorse the
5 plan that -- the way in which my clients have been
6 parking over there for as long as they can remember.

7 My client bought the house in 1994
8 with her husband. Her husband died probably three or
9 four years ago.

10 As you can see from the parking plan
11 that we had drafted, she parks about four feet from
12 the front of her building. And that four feet gives
13 her room to plow during a storm and to also get into
14 her house.

15 What she has done for a considerable
16 amount of time, for as long as she can remember, is
17 park a second car, which is on the right of way.
18 Now, she doesn't really have the right to park on
19 that right of way. And that's where a licensing
20 agreement with 64 Cherry Street comes into play.

21 Attorney Rotondo and I have already
22 talked about and discussed a license that would run
23 with my client's property to allow her to park there.
24 And it was our intention to hire Mr. Rober, who

1 drafted the survey, to come out to the property and
2 actually paint a parking line on the right of way for
3 my client.

4 The second space, which is in the
5 right of way, as you can see from this plan, will not
6 block in any of the condo owners on 64 Cherry Street.
7 I think that the parking plan, at least from our
8 perspective, and in speaking with Attorney Rotondo,
9 would be satisfactory. And I believe that 64 Cherry
10 Street is in support of this parking plan that I have
11 drafted, or Mr. Rober's drafted on behalf of my
12 clients. I think it just really memorializes what,
13 you now, has been going on over there for some time
14 now.

15 BARBARA RANDO, CHAIR: Let me say that
16 if the right of way is owned by 64 Cherry Street,
17 then your petition tonight was not correct to ask for
18 the tandem parking on the right of way because your
19 petition doesn't own it, correct?

20 ATTORNEY KEVIN DWYER: That would be
21 dealt with with the licensing agreement between
22 Attorney Rotondo and I with regard to that second
23 space.

24 BARBARA RANDO, CHAIR: But I'm talking

1 about your petition tonight. Would not your petition
2 have to have the owners' names on it where they're
3 the owners of 64 where the right of way is? So, the
4 Petitioner for 64 Cherry Street's names would have to
5 be on the petition if I'm correct, and they would
6 have to ask for six parking spaces because they own -
7 - they own that and they're giving you permission to
8 park there.

9 ATTORNEY KEVIN DWYER: But there's no
10 history of them parking there and they don't have any
11 desire to park there.

12 BARBARA RANDO, CHAIR: It doesn't
13 matter. If you don't own it, they own it, they're
14 the owners. So, if I'm correct, their name has to be
15 on the petition and they're going to have to ask for
16 the tandem parking. I'm not talking about the first
17 one closer to the house.

18 ATTORNEY KEVIN DWYER: Right. I think
19 my thought process on the tandem parking issue is
20 that in order for my client to take -- to get out of
21 her property, that first car she parks on her
22 property, she would need the second car to move out
23 first because it's such a narrow area.

24 BARBARA RANDO, CHAIR: Mm hum. Mm

1 hum.

2 ATTORNEY KEVIN DWYER: And so we need
3 permission from the Board to allow her to park in
4 that way, and the second car, which will be in the
5 right of way, will have to get out of there first
6 before she's allowed to get out.

7 BARBARA RANDO, CHAIR: Right. But I
8 don't see it that way. I see that she doesn't have
9 the right for the tandem parking on the right of way
10 because she doesn't own it. They would have to
11 request it, the other Petitioner would have to
12 request it.

13 But, where the first parking space is
14 a dimensional one, we can address that.

15 ATTORNEY KEVIN DWYER: Just a moment.
16 I don't believe the licensed spot even requires a
17 variance at all.

18 BARBARA RANDO, CHAIR: The what one?

19 ATTORNEY KEVIN DWYER: The second spot
20 that's on the right of way. I don't believe that's
21 even -- would be before the Board -- because we're
22 not asking for a variance with regard to it. There's
23 never been any parking issues on the right of way
24 before.

1 BARBARA RANDO, CHAIR: Are you
2 requesting tandem parking on the right of way
3 tonight? Was that in your petition?

4 ATTORNEY KEVIN DWYER: No, I'm asking
5 for a continuance tonight.

6 BARBARA RANDO, CHAIR: No, no, on the
7 petition, did it ask for tandem parking?

8 ATTORNEY KEVIN DWYER: It asked for
9 tandem parking, but it --

10 BARBARA RANDO, CHAIR: And wasn't the
11 tandem on the right of way, the second one?

12 ATTORNEY KEVIN DWYER: I'm not sure I
13 understand that question, but could it -- the tandem
14 parking could be with regard to the first parking
15 space as well --

16 BARBARA RANDO, CHAIR: All right. All
17 right. All right.

18 ATTORNEY KEVIN DWYER: -- which is on
19 the property.

20 BARBARA RANDO, CHAIR: All right. The
21 second car -- the first one is close to the house.
22 The second one, I'm calling the tandem parked car.

23 ATTORNEY KEVIN DWYER: Okay.

24 BARBARA RANDO, CHAIR: That one's in

1 the right of way.

2 ATTORNEY KEVIN DWYER: That space is
3 on the right of way, correct.

4 BARBARA RANDO, CHAIR: And did you
5 request that tonight in your petition?

6 ATTORNEY KEVIN DWYER: I did.

7 BARBARA RANDO, CHAIR: That's what I'm
8 saying. Your petition isn't properly before us
9 because it doesn't have the owner's name on it.

10 ATTORNEY KEVIN DWYER: Well, they're
11 in support of our plan. And I can represent that.
12 And I'm sure Attorney Rotondo will back me up on
13 that.

14 BARBARA RANDO, CHAIR: Mm hum. I
15 believe that.

16 ATTORNEY KEVIN DWYER: But we can
17 certainly modify the petition in any way that the
18 Board sees fit if we can --

19 BARBARA RANDO, CHAIR: Well, you'd
20 have to check with the Petitioner of 64 because then
21 they would be asking for six parking spaces.

22 Any questions from Board members?

23 (No response from Board Members.)

24 BARBARA RANDO, CHAIR: All right. Do

1 I have a motion to continue Case 2013-03?

2 JOHN SERGI: So moved, Madam Chair.

3 BARBARA RANDO, CHAIR: Second?

4 GORDON LASANE: Second.

5 ATTORNEY KEVIN DWYER: If there are
6 any other issues at this point that the Board would
7 like me to address with regard to my application, if
8 there's any other questions, we want to get this
9 right and we don't want to waste anyone else's time
10 by coming back a second time and having it not be
11 what the Board feels is appropriate. And I
12 appreciate the Chair for bringing up that tandem
13 parking issue, and I will address that with Attorney
14 Rotondo.

15 MARK HICKERNELL: I think before the
16 next hearing date you would be well advised to look
17 and see if the petition was, in fact, properly filed
18 where it seeks some result affecting 64 Cherry Street
19 and whether it has to be filed and published with
20 that address and property owner as well.

21 ATTORNEY KEVIN DWYER: Mm hum.

22 MARK HICKERNELL: And, if that's the
23 case, I would suggest you would seek leave to
24 withdraw and refile so that, again, you don't waste

1 the time to do what, at least in some of the Board's
2 view, should have been done that way to start with.

3 ATTORNEY KEVIN DWYER: Sure.

4 MARK HICKERNELL: I think you are
5 right that the legal opinion that we got tonight
6 affects your case as well. So, to the extent it
7 raises issues that you want to try to rebut, please
8 take the time to do that as well.

9 ATTORNEY KEVIN DWYER: I appreciate
10 that.

11 BARBARA RANDO, CHAIR: All right. We
12 have a motion and I believe I got a second, Mr.
13 LaSane?

14 GORDON LASANE: Yes.

15 BARBARA RANDO, CHAIR: To continue
16 Case 2013-03 to -- how is March 26th for everyone?

17 GORDON LASANE: The 26th?

18 BARBARA RANDO, CHAIR: March 26.

19 JOHN SERGI: It's okay with me.

20 BARBARA RANDO, CHAIR: Mr. Hickernell?

21 MARK HICKERNELL: It's fine with me.

22 BARBARA RANDO, CHAIR: All right. We
23 will continue Case 2013-03 to March 26.

24 All right. How do you vote, Mr.

1 Sergi?

2 JOHN SERGI: Yes.

3 BARBARA RANDO, CHAIR: Mr. Hickernell?

4 MARK HICKERNELL: Yes.

5 BARBARA RANDO, CHAIR: Ms. Gelineau?

6 GLENNA GELINEAU: Yes.

7 BARBARA RANDO, CHAIR: Mr. LaSane?

8 GORDON LASANE: Yes.

9 BARBARA RANDO, CHAIR: And the Chair

10 votes yes.

11 The case is continued.

12 ATTORNEY KEVIN DWYER: Thank you.

13 BARBARA RANDO, CHAIR: Thank you.

14 One more motion is in order.

15 JOHN SERGI: Motion to adjourn, Madam

16 Chair.

17 BARBARA RANDO, CHAIR: Second?

18 MARK HICKERNELL: Second.

19 BARBARA RANDO, CHAIR: I have a

20 second.

21 All in favor?

22 ALL BOARD MEMBERS: Aye.

23 BARBARA RANDO, CHAIR: Opposed?

24 (No Board Members opposed.)

1 BARBARA RANDO, CHAIR: We are
2 adjourned at 8:15. Thank you very much.

3 (Whereupon, the public hearing was
4 concluded at 8:15 p.m.)

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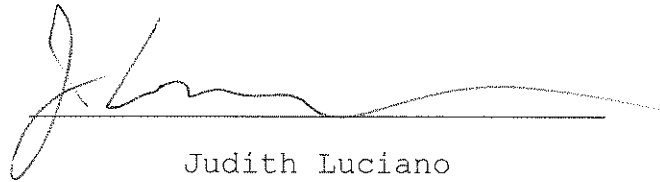
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C E R T I F I C A T E

I, Judith Luciano, do hereby certify that the foregoing record is a true and accurate transcription of the proceedings in the above-captioned matter to the best of my skill and ability.



Judith Luciano

