

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

August 13, 2013

The Zoning Board of Appeals held a public hearing at 7:00 P.M., Tuesday, August 13, 2013 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 two new cases before us, Case No. 2013-14 Yurly and Inna Babayan, Trustees of the 118-120 Willow Street Realty Trust for a Variance and Case 2013-15, Frank Jr., and Michael Valentino, 753-755 South Street for a Special Permit and a Variance.

The first action this evening is for a motion to accept the minutes of July 9, 2013.

On motion of Mr. Sergi, seconded by Mr. LaSane, the board approved the minutes of July 9, 2013.

Will the clerk please read the Petition in Case 2013-14?

The clerk then read the petition of Yurly Babayan, Trustees of the 118-120 Willow Street Realty Trust in an application for a variance. The locus is 118-120 Willow Street, consisting of 4,000 +/- square feet of land with a two story structure with a basement. The second floor is a

residential apartment and the first floor, now vacant, was used for commercial purposes. Petitioner proposes to convert the first floor to a residential unit, construct a one story storage room in the rear of the property and have two tandem parking spaces on both the north and south paved areas on the property. Location and Zoning District: 118-120 Willow Street, Business B Zoning District.

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

Steven Parnagian, Esquire, 58 Winter Street, Boston, MA came forward.

Mr. Parnagian: Madam Chair, if I may approach and provide copies of the Brief as well as the Proposed Findings of Fact and the Proposed Decision, Also, just to save a step, Madam Chair, if I may approach I have some photographs which I probably will be going to later on.

Mr. Sergi: Counselor have there been any changes to what you passed out?

Mr. Parnagian: No, there has not, absolutely not. I do not want to take too much valuable time with the board and reiterate what I have already set forth in my brief. Those are our arguments. If the board would allow me to make a brief presentation. The only thing that the board does not have would be the photographs that I just handed out now. (Mr. Parnagian went over some points contained in his brief with the board and the photos that he submitted. He also introduced one of the Trustees, Mr. Babayan.)

I will be happy to entertain any questions the board might have.

Mrs. Rando: Sir, is this a rental house?

Mr. Parnagian: Yes, it is a rental. My clients do not live here.

Mrs. Rando: Could you tell me in this picture, the two cars on the right where the white van is, is it rented now?

Mr. Parnagian: Which picture, Madam Chair?

Mrs. Rando: The second picture,

Mr. Parnagian: This is tenant's parking.

Mrs. Rando: So the tenant has three cars?

Mr. Parnagian: No, the first car on the left is my client's car. He parked there to take pictures.

Mrs. Rando: And what's with the fifteen minute parking sign out front?

Mr. Babayan: That was there when the store was there. I don't know where they got that from.

Mrs. Rando: Now if you don't put that room in the back, is there room for the cars to go? How big is it?

Mr. Parnagian: The room in the back is 10 x 12. The issue is, I don't believe the cars would be able to go back there without blocking each other.

Mrs. Rando: Well I have a problem with increasing the floor area ratio, double, when it's a room for him to store his plumbing supplies in. If he has a basement in this house, and this house does have a basement. Why can't he use the basement for his supplies?

Mr. Parnagian: Because part of the basement would be used for tenant storage as well as for the tenants could use that and the type of storage that would be in this storage room would be you're talking cast iron, pipes and not things that are generally very light to go up and down with and not very clean. Again, I think most of the basement if not all would be dedicated between

the two occupants of the first and second floor.

Mrs. Rando: Mr. Sergi, do you have any questions at this time?

Mr. Sergi: No, but just a point of interest. Has there been construction done in this house in the last four months?

Mr. Parnagian: There was siding done. That siding is new since he bought it and the first floor, I think you painted the walls and put a new floor.

Mr. Babayan: Yes.

Mr. Sergi: When did the alterations from the store happen here? Was it before your client purchased the building?

Mr. Babayan: When I got the building it was, it was left over from store was a ceiling came down because they had a flood before or something.

Mr. Sergi: It seems to me that the store front is gone, right? So I was just curious when the store front left.

Mr. Babayan: The glass windows?

Mr. Sergi: Yes.

Mr. Babayan: Yes, just those two windows but inside everything they took out. They took refrigerator out.

Mr. Sergi: Did you put new windows in?

Mr. Babayan: Yes.

Mr. Sergi: So you did it after you bought it.

Mr. Babayan: Yes.

Mrs. Rando: Do you have the building card?

Mr. Parnagian: I do in my file. Just give me a minute. (Mr. Parnagian submitted the building card to the Chair.)

Mrs. Rando: Everything you have done, you've done by permit?

Mr. Babayan: Yes, the siding by permit and just have a permit for restoring ceiling.

Mr. Parnagian: That's somewhat dated, Madam Chair.

Mrs. Rando: When did you buy it?

Mr. Parnagian: July of 2011.

Mrs. Rando: The ceiling insulation, that must have been upstairs?

Mr. Babayan: No, that's the first floor. Upstairs it was in good condition.

Mr. Hickernell: Where will the petitioner park when he's there to pick up things for his plumbing business?

Mr. Parnagian: He will have to park either, well if there are two tenants there, well he would have to park right in front or somewhere on the street. If there are two tenant cars in the space he's not going to be able to park there.

Mr. McCarthy: Do you have a layout of the floor plan for the building?

Mr. Parnagian: I believe the plans were submitted, Mr. McCarthy.

Mr. McCarthy: You're essentially making this a two family?

Mr. Parnagian: That's what we are proposing.

Mr. McCarthy: Two bedrooms in each, providing two parking spots. So you're going to duplicate essentially what they have next door?

Mr. Parnagian: Correct, Mr. McCarthy. Attempted with the city council's approval as well.

Mr. McCarthy: Why is this parking, why is this a question? Why can't they use this driveway here?

Mr. Parnagian: No, we can. I just wanted to show that there was some discussion. We saw some old plans that didn't show a paved area.

Mr. McCarthy: Is it paved now?

Mr. Parnagian: It's paved.

Mr. McCarthy: Is that a shared driveway, per se on the left hand side and the other side?

Mr. Parnagian: No it is not.

Mr. McCarthy: How wide is it between the two buildings?

Mr. Parnagian: The only thing I can tell you, Mr. McCarthy, with certainty is that our

driveway is fourteen feet wide from our boundary line.

Mr. McCarthy: Those stairs, there?

Mr. Parnagian: Those are going to come out.

Mr. McCarthy: Existing basement plan. Do you have a proposed basement plan?

Mr. Parnagian: I don't believe that's going to be changed at all.

Mr. McCarthy: Now, are you divvying this up between the two tenants, the basement?

Mr. Parnagian: I think that's the plan.

Mr. McCarthy: I see two rooms there. Is that the plan, its one storage for one and one for the other or?

Mr. Parnagian: The basement, we are going to divide those up amongst the tenants and each one is going to get space.

Mr. McCarthy: Is there a common access to the basement for both units?

Mr. Babayan: First floor, there's a door on the side and the second floor is a separate from the outside.

Mr. Parnagian: So these stairs, are they going to remain?

Mr. Babayan: Yes.

Mr. McCarthy: I can see how that kicks out one of the cars toward the middle of the driveway. So you are going to have eleven feet going by there, correct?

Mr. Parnagian: Correct.

Mrs. Rando: Is there anyone in the audience that is in favor of this petition?

(Four people raised their hand in favor.)

Mrs. Rando: Is there anyone in the audience that is in opposition to this petition?  
Seeing none, is there anyone in the audience seeking information. Seeing none, we have a letter to be read into the record.

The clerk read an email dated August 13<sup>th</sup> from Lisa Curro, 114 Willow Street indicating that she is in favor of this petition.

Mrs. Rando: Can you tell me what side of the street parking is allowed on?

Mr. Parnagian: I believe it's our side of the street.

Mrs. Rando: Is there no parking across the street?

Mr. Parnagian: The parks over there. It's impossible.

Mrs. Rando: Have your tenants had any problem backing out?

Mr. Babayan: No.

Mr. McCarthy: The streets not that busy.

Mrs. Rando: All right, you may continue with your Proposed Findings of Fact.

Mr. Parnagian: Would you like me to read that into the record?



Mrs. Rando: I have read them. I don't know if the entire board has read them.

Mr. Sergi: Madam Chair, I would like to make a motion that this has been on file with the Legal Department and I would like to make a motion that we waive the reading.

Mr. LaSane seconded the motion and the board voted to waive the reading of the Proposed Findings of Fact.

Mrs. Rando: You may continue with your proposed decision.

Mr. Sergi: In a similar fashion, Madam Chair, I would like to request that we waive the reading of the Proposed Decision since its been on file at the Legal Department.

Mr. LaSane seconded the motion and the board voted to waive the reading of the Proposed Decision.

Mrs. Rando: Your hardship, again. You're talking about not being able to make use of the building because of the commercial use, you could not use the building as a commercial use, correct?

Mr. Parnagian: Yes.

Mrs. Rando: And for that reason you feel that you will not be able to rent the bottom because at one time it was a commercial use?

Mr. Parnagian: As a practical matter, renting that small of a space in that type of area for commercial use would be problematic in that obviously right now we would have to allow parking for any commercial enterprise would actually have to deal with the people who are working there in addition to the people who are coming to patronize that business whether it be a lawyer's office or a dentist's office with people coming there. It's such a tight space; it's a little

bit of a tight street and the residential nature of it. so that's what the hardship arises from.

Mrs. Rando: What about the neighbor on the other side?

Mr. Babayan: On the right side, it's a rental property.

Mrs. Rando: Did you get in touch with the owner to see if she was in favor?

Mr. Babayan: I never saw him there, so I don't know. There are a couple of neighbors here.

Mrs. Rando: You're neighbors to this? Where about on Willow Street do you live?

Matt Petrus, 28 Evergreen Avenue, Waltham: My wife and I we live adjacent to the back.

Mrs. Rando: So you will be near the addition he wants to put up.

Mr. Petrus: Yes. My wife and I are all for it. And actually the property line to my property line actually extends along side of Yuri's property, so the large rental house immediately to the right, that's not actually that person's land that abuts this. It's my land. So we are actually okay with the way things are shaping up. It's been a big improvement.

Mr. Ira Boyd, 32 Evergreen Avenue. I've been there for twenty years. What he's doing is acceptable and basically a lot nicer.

Nikolay Khachiyani, 20 Evergreen Avenue stood in favor.

Mrs. Rando: All right. Are there any other questions from board members?

Mr. Hickernell: I propose adding a couple of conditions.

First the standard condition of obtaining permits within a year and completing work within two years. And second condition that the petitioner obtain the necessary special permit from the City Council.

Mrs. Rando: And you have no intention of renting out the basement.

Mr. Parnagian: No. It's not habitable.

Mrs. Rando: So you don't mind offering to put that in.

Mr. Babayan: No.

Mrs. Rando: I am ready to entertain a motion on the Proposed Findings of Fact.

Mr. Sergi: Just one question. For clarification on the storage unit that you want to put behind. How tall is that going to be and is it going to be in character with the neighborhood?

Mr. Parnagian: Yes it will be sided the same.

Mr. Sergi: It doesn't seem the neighbors have a problem with that.

Mr. Babayan: No.

Mrs. Rando: Do I hear a motion on the Proposed Findings of Fact.

Mr. Sergi: I will make a motion that the board accept the Proposed Findings of Fact and that they become the board's Findings of fact. Mr. LaSane seconded the motion. The roll being called: Mr. Sergi, yes; Mr. Hickernell, yes; Mr. LaSane, yes; Mr. McCarthy, yes and Mrs. Rando, no.

Mrs. Rando: I have a problem with you increasing the floor area ratio, doubling it, when it's just for his business. That's my reason.

Do I have a motion on the decision?

On motion of Mr. Sergi, seconded by Mr. Hickernell, that the Proposed Decision as amended become the board's decision.

The roll being called: Mr. Sergi, yes; Mr. Hickernell, yes; Mr. LaSane, yes; Mr. McCarthy, yes and Mrs. Rando, no.

Mrs. Rando: I have no problem with the rental, its increasing it when it's for storage for your business. I am worried where you are going to park when you come.

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 do represent the petitioners this evening. I have Frank Valentino with me here this evening. Perhaps I will take a somewhat unusual tact here and start with the conclusion in my memorandum and that's on Page 14 at Tab 3. And I would summarize it by saying, I believe I am the third attorney, maybe I may even be a higher number than that. I'm aware of two previous attorneys. I am aware of two previous proceedings, one a variance proceeding which was ultimately withdrawn and then a very protracted hearing on special permits which ultimately ended up in the land court. So I am the third attorney and to my knowledge, this is the third proceeding in which you or some variation of members may have seen or been exposed to this particular case.

My goal here tonight, and I speak for my client, is to see if we can bring some commonality here, to bring some rationality to the proceedings. There's been a lot of heat and perhaps not a lot of light. This has gone on for seven years and it's been contentious at times and I think that if I could speak for my client who is one of the petitioners, what you have in front of you this evening is a sincere attempt to try and resolve this matter with some finality. No one is ever going to be completely satisfied with the results that any of us do here. It's just one of those cases that started badly and its not likely to end perfectly, but the goal here, at least if I have anything to say about it, is to try and resolve the situation in a manner that at least develops some accord, allows the neighborhood to resettle and the petitioners and everyone else involved in this to get on with their lives.

It's never easy particularly where the matter has been the subject of some litigation. Positions harden, and positions are hard to move once they've been solidified. I would ask you to keep an open mind. I would ask you to look at this with a fresh set of eyes and see if we can't come to something that we can do a little better with than just end up back at the land courts or back or back in an appeals court or back in some sort of a tong war with the building inspector.

So having said that, I was provided with a memorandum which was addressed to you as members. It is from the law department. It is dated August 12<sup>th</sup>. For the record, I did not see this until seven o'clock this evening. It is a rather prototypical four page single spaced legal memorandum that we have come to expect. I can't say I'm surprised. It is dense and there is a

lot of material in here that is worthy of further discussion and I agree with some of it and I disagree with a lot of it. I'm sure that doesn't shock you.

One of the things that might help is, it might help if you as a board directed the law department or the representative of the law department which in this instance seems to be Michelle Learned and me to see if we could come to some joint agreement on what we do agree on. We can try this case like it's an appeals court and you people can be the judge but I think that it's probably easier on all of us if you sent a different directive and said, look folks, there's a lot of history here. There's a land court decision. Tell us as a board what we can agree on and let's start there. If you have disagreements, then narrow them, focus them and tell us what we need to decide and we will decide it. But to go off into the stratosphere here, is to provoke another five or six hearings and I am not sure that that's in anyone's best interest but that's where I see this heading unless someone intercepts the process and says, look, do it different. Just a suggestion. I am only the attorney.

Mrs. Rando: Well, let me tell you that I read the final land court opinion and that is why I asked Attorney Learned for an opinion. I wanted to know how the outcome of that decision affected this case this evening. And she seemed, I don't know if sitting down with her is going to make a difference.

Mr. Dacey: Well, for example, Attorney Learned says, "The doctrine of res judicata precludes the parties from raising a subsequent action", and then she goes on to say, "if you choose to do that you need to consider the following bing, boom, boombidy boom. I mean is she saying the case is closed and we are all wasting our time here or is she saying there's a possibility of coming back and talking about something else?"

If the res judicata resolves the issue what do we need four more pages of fine print for? It's either resolved or it's not resolved.

Mrs. Rando: I think it's resolved, but I think she was telling us the other problems in this case.

Mr. Dacey: There are no problems. If res judicata which means the matter has been decided in Latin. Converted to English, it means you're done!

Mrs. Rando: I think she has someplace in here where she states that we do not have the right - - -

Mr. Dacey: My point is that if this issue is resolved by a res judicata argument, what are we doing talking about four more pages? It stops in paragraph one.

Now, I happen to disagree that res judicata is definitive here and I'll tell you why. Go to the Decision which is Tab 6, that's Judge Trombley's decision,

Mrs. Rando: What page?

Mr. Dacey: Page 18, last page, fourth line down and I am quoting: "Additionally there may be genuine issues of fact determined whether an addition exceeds the threshold of limits." An aside, we are talking about 3.7222 and the jurisdictional issues associated therewith. "Petitioners may be willing to alter their plans in order to conform to the by law thereby giving the ZBA authority to approve the petition. The ZBA should not preclude hearing cases simply because it believes this issue may arise, therefore, the court finds that the decision of the ZBA to the extent which it states the ZBA does not have jurisdiction to hear this case is incorrect."

What the judge is saying is look, if the plans change and the threshold limits can be altered, you do have jurisdiction. This is not a res judicata case. This is a different case, different set of plans, different parameters.

Mrs. Rando: Does anyone have any questions regarding what Attorney Dacey just stated?

Mr. Dacey: We are here, in my judgment, we are here at the express direction of Judge

Charles Trombley. This is precisely what he said to do. He said, look, on the basis of the facts that you have presented to me in this case, I am deciding this and I am saying, look, the city took the position that 3.7222 imposes a jurisdictional limit on the Zoning Board of Appeals. And it says, according to the city, or the law department, you being the city and I really don't want to put words in your mouth that if the petitioner seeks an expansion that is greater in area than 10% of the foundation area of the building, he can't do it. The city asked the petitioner to stipulate that the proposed addition or actually the existing addition because we all know its sitting there is more than 10% of the ground floor area of the building. Well, of course it is. The ground floor area of the building is 1776 square feet. That permits under the city law department Interpretation a 10% expansion or 176 square feet and that's all you are allowed according to that interpretation. Judge Trombley said, look, there's two more things at least that you should consider; one is if he changes the plans the thresholds may be able to be met. We are not suggesting here tonight that we want to revisit the same arguments that Judge Trombley has already decided. We are simply saying, look, if we are going to live with Judge Trombley's decision we are going to live with all of it. And if he says you need to meet the threshold requirement then we'll meet it. What we are saying is the threshold requirement ought to be calculated on a different parameter. 3.7222 gives more room which is Tab 2.

Mrs. Rando: Do you have the exact dimensions of the pre-existing nonconforming building?

Mr. Dacey: Yes, they are on the plan. There's no disagreement with the calculations that Attorney Learned came to. I mean this is the plan that was submitted with the petition. There's a box down the bottom. And it says, lot coverage existing 1769 square feet. With the 390 foot expansion, it's 2159 square feet. But the existing footprint, if you will, of the old building is 1769 square feet, 1770 square feet. That's what it is. There's no argument there. That's not the point.

Mrs. Rando: Well let's visit the argument of him losing his nonconformity because it's not a two family or a single, it was more like a rooming house.



Mr. Dacey: Its been decided. It's part of Judge Trombley's decision. You know what, that's what I consider to be the in artful part of this letter. If you're going to take Judge Trombley's decision and as much of it in there that is favorable to the city and the law department, that's to their credit. Good job! You have to take the whole thing. Judge Trombley clearly determined that this is a two family. He clearly determined that it is a nonconforming structure and a nonconforming use. Those issues are decided.

Mrs. Rando: He lost the nonconformity when he added the addition.

Mr. Dacey: Judge Trombley decided that as well and he said, look, the mere fact that this is here and that it is a legal fiction that we are trying to legalize something that has already been built is not troublesome. It does not destroy the nonconformity of the property. It does not conform to the nonconforming status of the property. It's in his decision and it is disingenuous to suggest tonight that his decision states anything else. That's exactly what it says.

Mrs. Rando: Mr. Sergi, do you have anything to say at this time.

Mr. Sergi: No, I've got to say I got home tonight from work and I got this in my email and I read it through and I'm trying to digest it. I'm having trouble digesting it all tonight and I would like the opportunity to go over a few questions with the legal department myself for some clarification.

Mr. Dacey: Madam Chairperson, if it is the pleasure of this board, we are perfectly comfortable adjourning this on to another night. We are perfectly comfortable having any of the neighbors who are here and wish to make a statement do so. I know they are here. I know they are concerned. I don't deliberately intend to have them dragged back but the issues that surround this case, the issues that underpin this case are legal issues that they require some thought, they require some understanding, they require some study and I think Mr. Sergi is probably appropriate to say I can't do that on the fly.

Mrs. Rando: Let's see if any of the other board members have questions.

Mr. Hickernell: No, I don't have any questions now. I think I am sympathetic to the petitioners' argument as far as res judicata goes. It's gratified that Judge Trombley found that we have jurisdiction to hear this case but there's simply too much to digest in this opinion which I also received today at work and the case citations alone will take some time to go through, so I am not going to be in any position to vote on it or even present all my questions tonight. I would like to make sure we hear from those members of the public.

Mrs. Rando: Absolutely.

Mr. LaSane: And because, as you pointed out, so much of the argument is going to be based on law that lay persons are going to have a tough time following. Perhaps a chart of what was and what's proposed now would be to everyone's benefit because, frankly, I spent an hour on my computer today trying to dissect history vs. plan. I couldn't put it together.

Mr. Dacey: I can't say I'm shocked. There's a lot.

Mr. McCarthy: You indicated that the judge said if there was a change in the proposal it would be something that this board could review. What change have you made?

Mr. Dacey: We are removing the third floor.

Mr. McCarthy: Talk about the footprint. Mr. Dacey: Well the second change we are making, I should add, is that we are offering you a new and different method of calculating your jurisdictional limit, and this is something that the - - -

Mr. McCarthy: That's not going to fly with me. Okay, I just letting you know right off the top. That won't fly with me. I've gone over these cases hundreds, well I don't know if it hundreds, but it certainly seems like that to me because it's always people pulling teeth on this 3.7222, the ten percent. As far as I am concerned, you should be going to the council to look for this increase and figure it out with them because we don't have the jurisdiction to do it. That's

the way I believe on it. I'm there. I'm just letting you know right up front. I haven't changed my opinion on this since I've been on the board. And we've had a hundred opinions from the law department with regard to the same situation and it's always the same, ten percent of the footprint we have it that way. If it's more than ten percent, we don't have it that way. It's pretty simple. You have to go to the council if it's more than ten percent. So if you're not changing 390, whatever the case may be, then I don't see any change that I could authorize.

Mr. Dacey: This is one of those inconvenient truths that we hear about periodically. Member McCarthy is entitled to his opinion but Section 3.7222 says: "Alter or enlarge in that use to an extent not exceeding ten percent of the ground floor area of the building or area of land used at the time of the passage of the chapter."

Mr. McCarthy: And the area of the land used at the time of the chapter was the footprint that you have right now. You didn't use any more than was the passage. Now you are trying to add to it. That's the way I look at it. That's the way the law department looks at it. That's why the court said, sorry.

Mr. Dacey: No. This little piece never came up. Not to pick a fight because that's not what I said I was here to do. But just test the logic of what you are saying, member McCarthy. If ten percent of the ground floor area of the building means the same thing as area of land used at the time of the passage of the chapter, why would we need the or? If it's the same thing, why wouldn't they just say ten percent of the ground floor area of the building, period.

Mr. McCarthy: At the end it says, granted by a special permit. So if there was a special permit that gave you more usage of the land at that point and time before the ordinance came about then that would make sense that you had to maintain it.

Mr. Dacey: So your theory is that you are only entitled to expand ten percent of area that's already been granted by special permit?

Mr. McCarthy: My theory is that I have the backing of the law department, because I am

not a lawyer. But the law department has gone over this time and time again with the same result. We have the ability to grant ten percent increase of the footprint of the building. That's it. Anything more than that you have to go to the council. There's a resolution there that you can go to the council and get it done.

Mr. Dacey: Well, fortunately for us tonight we have two representatives of the city council here and that may have an opinion on that. We'll see. Here's one other thought that I would like you to just - - -

Mrs. Rando: We certainly won't here from them because it could at some time be before them. I hope you realize that.

Mr. Dacey: We'll waive any conflict. Here's something that I would like you to consider. This is the lost Section of 3.722. Continue book at Tab 2, and it's actually 3.7225. Now, no one uses this and frankly I don't know why. And if this were my case from the beginning, in principio as we say, I would have used it because I think 3.7222 is just lethally poisonous. Don't go near it. And for a single and a two family house, I don't think anybody has to. 3.7225 says, "A nonconforming single or two family (and its limited to that) can be altered/reconstructed, extended or substantially changed provided that the structure is a single or two family residential structure and such alteration, reconstruction extension or structural change does not increase the nonconforming nature of the structure." Nothing about ten percent. Nothing about footprint. Nothing about FAR. And you know what? It comes right out of the second accept clause in Chapter 40A, Section 6. That's where this came from. If somebody wants to ask the law department a question, ask the law department the significance of 3.7225. What's that doing in the zoning ordinance? If she says, the only thing we can do is expand a single and a two family house by ten percent of the ground floor area of the building, then how does she justify 3.7225?

Mr. McCarthy: Without going to the council.

Mr. Dacey: It doesn't require a council.

Mr. McCarthy: That's the whole thing. We only have the authority to do a ten percent and the council did that for a reason. They wanted to restrict, I mean, let's face it, the Board of Appeals used to be able to do a lot more than they can do today than in years past.

Mr. Dacey: I think what's happened here, to be perfectly candid, is a reverse of what most boards would do. Most boards would guard their jurisdiction jealousy. Why this board is willing to concede on the basis of a letter from the law department that your jurisdiction is limited to ten percent of a footprint is beyond me.

Mrs. Rando: I think the land court did affirm our decision regarding the same footprint.

Mr. Dacey: It affirmed your decision on an entirely different basis, Madam Chairperson. It affirmed the decision on something that, I might personally disagree with, but that ship has sailed. The land court said, you cannot trump an additional nonconformity that requires a variance by special permit. If the nonconformity, if the expansion that we are doing, amounts to an incursion that would otherwise requires the variance, you can't trump it by special permit. You can't overlook the necessity for a variance.

What this case tonight is all about, is an attempt on this petitioner's part and on my part to follow the dictates of Judge Charles Trombley who says you need a variance first, then you need a special permit to address the additional nonconformity. That 390 square foot expansion that Mr. McCarthy or member McCarthy is unhappy about can't exist by special permit and I would be the first to agree with you based on Judge Charles Trombley's decision. It needs a variance. And if it doesn't get a variance its game over for that 390 square feet because we never get to the special permit issue. Now, the appeals court law is different. Judge Trombley reached into the dust bin and pulled out Heaphy which is a land court case and frankly I don't know where he found it because it's not in any of the recorded searchable engines that, search engines don't kick out Heaphy, its too old. They found it and its there and it's in your book and you can see it. But that's what he said. He said, look if the additional nonconformity out on the northerly side of this house requires a variance, you can't avoid it and you can't trump that by special

permit. That's what he said. He's not upset about this ten percent thing. It's a local thing. Figure it out folks. It's a jurisdictional issue for you. If you decide that your jurisdiction is going to be limited to ten percent of the ground floor area of the building then you've shortchanged yourselves, in my personal opinion. What are you going to do when someone comes in with a five hundred square footprint; you're going to limit it to fifty feet because he wants to build a family room in the back of his nonconforming house in Cedarwood or Warrendale? It's crazy. Are you going to send him to the city council? Are you going to send him to Joe Giordano and George Darcy. Make him fill out a Development Prospectus, go to the traffic commission, get the sign off of every major department. That's what the special permit requirement is at the city council level. These people are doing Polaroid. They don't want to do additions to family rooms in Cedarwood.

Mrs. Rando: On page 3 of the opinion, (a)

Mr. Dacey: Which opinion?

Mrs. Rando: Michelle's. "As to the merits of petitioners' "land used" argument, case law does not support their contention that "area of land used" is more applicable to their request to expand the footprint of their nonconforming building"

Mr. Dacey: Willard v. Board of Appeals of Orleans, interesting.

Mrs. Rando: "The facts of this case, and logic, do not support their claim."

Mr. Dacey: Since when does logic have anything to do with this?

Mrs. Rando: Factually.

Mr. Dacey: Well, factually I think I have a hard time ignoring the plain language of your ordinance. I mean, assuming that we are stuck with 3.7222, which frankly if this were my case from the outset, I wouldn't have relied on it. I would have filed under 3.7225. But now we've

got eighteen pages of land court decision focused on 3.7222, so I said to my client, look, we need to find a way to stay within the frame work here, and we need to stay within the jurisdictional limits as described. But we don't have to agree with the jurisdictional limits defined by the footprint. There's a clear choice here.

Mrs. Rando: Does this building also exceed the height limit in this area?

Mr. Dacey: It does.

Mrs. Rando: I know.

Mr. Dacey: And you know what? That was a huge problem for the petitioner trying to cover by special permit. We solved that problem by removing the third floor from both the addition and the area over the kitchen. So, the height issue goes away. The height of this building, if this petition is given serious consideration and favorably reviewed, the height of this building for everything that Mr. Valentino's way with contractor constructed in 2005 will be limited to twenty two feet, eleven inches. So, which is something like, twelve plus feet shorter than the zoning ordinance allows in the district which is thirty five feet. So height issues are not the problem and that is a significant change in the petition from then to now.

Mrs. Rando: "In the prior case, the petitioners did not contest that the proposed addition was greater than ten percent of the ground floor area of the existing building."

Mr. Dacey: Of course they couldn't. How can they do that? How could they contest an obvious fact? What they said was, we are not contesting the fact, we consider it irrelevant and we consider a special permit to be a legal trumping mechanism that overcomes not only the variance requirement but any scripture that 3.7222 might apply. So basically, the petitioners in the special permit case said, yes you are right, but we don't need to rely on that particular item because we do the special permit as trumping both 3.7222 and the height issue. Judge Trombley said, I don't think so.

Mrs. Rando: Well, let see first of all if this is more detrimental to the neighborhood. Shall we?

Mr. Dacey: Well, you know what. Here's what I would rather do.

Mrs. Rando: Well they are here. I would like the neighbors to speak.

Mr. Dacey: Okay and I think that's fair because they may be very content to say their piece and move on. I think that this hearing process is likely to be protracted. I think that's an excellent idea.

Mrs. Rando: Didn't you say earlier that you would want the neighbors to speak?

Mr. Dacey: Absolutely, at any time they would choose. But what I don't want to do is I don't want to get into my case in chief in a piece meal basis. If this is more detrimental to the neighborhood ---

Mrs. Rando: Well we haven't decided to let this continue.

Mr. Dacey: is the third step, okay, and that's fair. I mean if this is another jurisdictional issue, then so be it. Nothing I can do.

Mrs. Rando: Is there anyone in the audience that is in favor of this petition?

Leo Keightley: 731 South Street, Waltham: And the reason I wanted to speak first, when you first would ask, I knew you would ask in favor and then not in favor, but the problem is that there are three requests here as far as I can tell, one for a variance and two special permits and so I cannot simply say by saying one time and four are against, I have to take them apart. And so in terms of in favor, I would be in favor of the special permit to reduce the roof height so that it is in keeping with Zoning 3A. On the entire structure that was added in 2005 which extends from what I think is the north side of the building, which is here, (referring to the rendering posted on



the board) and it also extends to the west of the building which is toward the reservoir, so that all of this roof area is there and the third floor is removed and the roof is in conformance with the zoning in the area. So that is the portion that I am in favor.

Mrs. Rando: Is there anyone else in favor?

Joe Giordano, Ward 7 City Councillor: Naturally I was prepared to say a few things tonight, Madam Chair, but in the event that was brought up. that this may come before the city council that I really have to restrict myself. But I just wanted to bring a point out that concerns me with Attorney Learned's letter. I've been on the city council for fourteen years and I don't think we've, that I can remember, have had one individual homeowner come before us for a special permit for an addition that I can recall. And up in Cedarwood, we have a lot of small homes, as you know, and my concern is, that if this is a fact what she's saying that we're going to get inundated with, the city council will, with people as Attorney Dacey stated if they want to put a family room on to come before the city council. Number one, I don't know if we can handle it and number two, I don't think we are qualified to and that's strictly my opinion. So, that's what concerns me aside from this case. So, I don't want to mix the two and jeopardize anything at this point but that's just one thing that I want to get out at this time. Thank you.

Mrs. Rando: Is there anyone that is in opposition that would like to speak?

Tom Holtey, 757 South Street: I got a little lost in this discussion tonight. I'm just a simple minded engineer and I'm not sure whether I am in favor or not of the proposition because I am not totally sure of what the proposition is.

Our concern is the fact that this is not simply the fact of just adding a family room or anything. That's not the thing that this should be judged in. These additions which were done without permit are changing the whole character of the building, intended purpose of the building, and its nature and its relationship to the neighborhood. It is far too massive for a simple two family house and both its appearance and its potential use is well beyond anything that is appropriate to the neighborhood especially when it even being a two family house is

beyond the situation even though it is now, if you will, a legal, its grandfathered. So we are very concerned both in terms of the nature of the neighborhood. I mean the whole lot has been blacktopped. There is enough space there for perhaps a dozen cars. I know a number of years ago; we measured how many cars there could be. I mean a two family house doesn't need that amount of parking. In fact it's not been used. So we're concerned about the use that the building's been put to and its potential use and the size and this massiveness in addition to being a visual issue and invite a use which is certainly not appropriate for the neighborhood. Now, I don't know if that puts me in favor or opposed to the issue because as I say there's so many double and triple negatives in this whole thing that it's a little hard to follow.

Mrs. Rando: What is it that you would like to see happen?

Mr. Holtey: Well obviously it would have been better if none of this work had ever been done. It would have been an appropriate two family house and very reasonable. I don't know how you back off from that. Our view is of the back and it's up there. It's just a massive slab. And certainly removing the third floor and putting on some kind of a reasonable roof. Now we have been regularly told that by right they could make a roof which would be even more objectionable and certainly doing something like a flat roof on the second story which could become a roof deck would be the wrong way to go. Certainly reducing that mass would help the visual situation and certainly reduces the amount of space that was there for an additional occupant. On the north side, the setback issue, again in terms of visually from our point of view we don't see it. The abutter at the time when this first came up was very much opposed to it because it severely bothered her view and her situation and her property. And she since sold. I would imagine that an otherwise uninvolved owner of that property would have the same position that she had because it really is an intrusion on that space.

Mrs. Rando: Tell me, has the neighborhood improved since that building, that partition has not been used, that new portion has not been used as far as cleanliness, noise?

Mr. Holtey: There's trash out there in the front area all the time.

Mrs. Rando: Has it improved since he's not using it?

Mr. Holtey: I don't think so, no. I mean, there's been a family and a number of other individuals living in the building.

Mrs. Rando: He's not using the third floor or the attic?

Mr. Holtey: There's lights in the attic all the time.

Mrs. Rando: I thought he wasn't allowed to use it.

Mr. Holtey: He wasn't allowed to use the attic. There are lights in the attic all the time.

Mrs. Rando: If I were coming for a case, I don't think I would do something that the board had requested that he not do. Third floor people are living there.

Mr. Holtey: I don't know how many people are living there. Do we have a number?

Mr. Holtey: The attic is the fourth floor.

Mr. McCarthy: I'm just curious one of the complaints before was that he had a rooming house for the students from Brandeis. Is that still going on as far as you can tell? I mean they were talking about parties and all sorts of animal house type thing.

Mr. Holtey: I don't think there have been a lot of parties or anything. There are a number of people. I mean there are two units there. One of them was a family which has recently moved out. The other one appears to be a number of people, who may be students. But I don't know how many. They don't use the parking. They park across the street.

Mr. McCarthy: If there's twelve spots, why wouldn't they use them.

Mr. Holtey: I don't know.

Mr. McCarthy: So those spots are empty?

Mr. Holtey: Yes. The spots in the front have almost never been used except to pile up trash. There are typically four cars maybe in the back parking lot but there's regular foot traffic across the street to the garage of the Watermill Center.

Mr. McCarthy: Perplexing.

Mr. Holtey: It is.

Mr. McCarthy: I don't understand why someone living there would be doing that.

Mr. Holtey: I don't either.

Mr. McCarthy: It makes no sense. So as far as you're concerned, because that's the impression we got initially when I saw this case before was that it had turned into like an animal house down there with frat parties.

Lady in the Audience: When this started there was more activity then there has been of late. That has not been an issue since the last proceeding.

Mrs. Rando: Any other questions from board members? Is there anyone else in opposition that would like to come to the microphone?

Leo Keightley, 731 South Street: In an appropriate time, are you going to ask if people have any comments because I'm reserving comment because I don't understand exactly what has been proposed and I don't totally understand it. We haven't gone through the drawings. So until

I understand it I oppose granting a variance for a setback at all.

Mrs. Rando: Mr. Dacey, if the board allows you to continue this case and if your plans are to sit down with Attorney Learned, would it not be a good idea to have a neighborhood meeting to explain to these people exactly what you want to do and see if you can work out with them?

Mr. Dacey: Excellent idea.

Mrs. Rando: Would the neighbors be willing to do that?

(The neighbors agreed.)

Mrs. Rando: You can get together after the meeting and set a date.

Mr. Dacey: As part of your package, my client has reminded me that Tab 9 does have some letters that were received earlier than today.

Mrs. Rando: We have letters and we will read them into the record.

Mr. Dacey: There were two I think that came in today and Tab 9 has a number of letters that were either addressed to the ward councilor or addressed directly to the board. So that those are in your package. Those two that were emailed to me this afternoon I think are in addition to the ones that are in your package.

Mr. McCarthy: That's quite a change from the last time I sat on this case as far as letters supporting the proposal.

Mr. Dacey: Well in fairness to Mr. Valentino, I think he recognizes that this is a single

family neighborhood for the immediate abutters. That he is the anomaly on that side of the street. I mean you are all aware that on the opposite of the street is commercial. That's the Watermill Complex. But on this side of the street the immediate abutters are single family. This is a nonconforming two. It's been there since 1880. The original house is much larger than anything that is currently built, so that it is bigger in structure and it is an anomaly in the sense that it is a two family. But he's tried very hard to improve the property and he has done that in several significant ways. He's been very careful about who he rents to. He's been very careful to preserve the two family nature of the property and he's been very respectful of the city's restrictions which involve the cease and desist which said you may not do any more building, you may not occupy the addition which is partially complete and frankly, I think he has made a concerted effort to be a good neighbor. No one's perfect. The neighbors have their opinions. No one is suggesting that they aren't valid and well formed. Mr. Valentino is doing the best he can with an old building and I would only ask you that you consider that the negative incentive of denying him any relief at all is not a pleasant prospect either. You know, to take all of his incentive away to do anything to restructure this building, to bring it back into better condition is probably not without its drawbacks and that is not designed as a threat. It is simply an economic fact of life. If he's forced to take everything off and live with the old structure, then, so be it! But there's very little incentive for him to fix it up and make it nicer. This is an opportunity for him to solve a problem, to fix an issue and to actually improve the situation by lowering the profile, lowering the density and then we can start talking about conditions which I think the neighbors may very well have some valid suggestions on. I mean if you haven't been down to this property recently one of the major changes have been that there's hemlocks that were planted are now fifteen feet high. This property is very well screened by mature landscaping at this point. The fact of the matter is that the circumstances at the property have changed and changed fairly significantly both by the natural evolution of some small plantings that are now mature and by some active effort on the part of Mr. Valentino to rather tightly control and rather stringently adhere to the restrictions that have been imposed upon him while this litigation has proceeded.

So, would we meet with the neighbors? Gladly. And as you can see from these letters Mr. Valentino has made an effort to go around and talk to them individually. If there's a reason for a neighborhood meeting, that's fine. If there's an interest in seeing the second floor apartment which is now vacant, that's available. If the board wants to take a site view, perfectly welcomed to do so. There's no reason to speculate here.

Mrs. Rando: Are there any other questions from the board members?  
The clerk is very anxious to read all these letters to you.

Mr. Hickernell: Should I point out to you that there's two letters from Mr. Keightley. Are your comments covered.

Mrs. Rando: Is there anything different in the letters?

Mr. Keightley: No, there isn't. I prefer you just take my comments.

The clerk then read a letter into the record from Melita Holtey, Jean Holtey and Thomas Holtey dated August 11, 2013 requesting that the board enforce all relevant zoning requirements in full.

He then read a letters in opposition from Linda and Thomas Rudzinsky, 737 South Street in opposition.

The following letters were in favor: Terry Berozsky, 759 South Street, Waltham dated 7/24/13.

George Bissias, 745 South Street, Waltham dated 7/25/13.

Michael Abrahams, 749 South Street, Waltham, dated 7/18/13.

Deborah Martin, 751 South Street, dated 7/8/13 written to Councilor Joe Giordano.

Mr. McCarthy: Can you address that trash issue out front?

Mr. Dacey: Yes, of course. You know it's never perfect. A tenant moves out and I'm sure they put trash out and we'll take a look at it.

Mr. McCarthy: A one time occurrence?

Mr. Dacey: I'm sure. When the tenants move out you end up with that kind of a problem. We'll look at it, absolutely.

Mrs. Rando: What is the wish of this board? Do they wish to continue this case this evening or to allow Case 2013-15 to continue to another date?

I think we will have to extend the time. What is the time on that?

Clerk: The hundred days is October 17<sup>th</sup>.

Mr. Hickernell: Madam Chair, I move that we continue the case to allow us all to at least digest the law department's opinion. Mr. Sergi seconded the motion.

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

Mrs. Rando: We will continue Case 2013-15 to October 8<sup>th</sup>.



We should change the hundred days for making the decision. How about December 7<sup>th</sup>?

All right, we have a motion to extend the time to act on this matter to December 7<sup>th</sup>.

The chair took a roll call: 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. LaSane, the board voted to adjourn at 8:45 P.M.

*Barbara Rando, Chair*