

CITY OF WALTHAM
ZONING BOARD OF APPEALS

October 8, 2013

The Zoning Board of Appeals held a public hearing at 7:00 P.M., Tuesday, October 8, 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 one continued case and one new case before us: Case 2013-15 Frank and Michael Valentino, 753-755 South Street and Case 2013-19, 10-52 Second Avenue, Waltham, LLC 40 Second Avenue.

The first motion this evening is to accept the minutes of October 1, 2013.

On motion of Mr. Sergi, seconded by Mr. LaSane, the board voted to accept the minutes of October 1, 2013.

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

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

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

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

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

Mr. Dacey: I do represent the petitioners Frank and Michael Valentino in the matter of an application for a variance and special permits in this matter this evening.

I would like to preface my remarks by saying that we have taken your directives seriously and met with the neighbors twice on a formal basis and informally by email and telephone. Two of the neighbors most directly affected, the Holtey's and the Kneightley's are both here this evening and I would say the conversations have been correct, if not warm and fuzzy, but I think we are making some progress on a couple of points. At the risk of expressing wild optimism, I would say that we have spent some time on the exterior issues associated with the property, namely, the reduction of the third floor and how we handle that aspect of it and we seem to have come to an agreement on how we would handle that aspect of the case.

We have also spent some considerable time on the landscaping, and the parking arrangements and how the basic structure of the yard works.

Mrs. Rando: Before you go any further, could I ask you one question? You also asked us to continue the case so that you could speak to the law department, to the person who gave us the opinion. Did you, in fact, speak with her?

Mr. Dacey: I never spoke to her. I will, if she will speak with me which, frankly, would

be somewhat unusual.

Mrs. Rando: Okay. Well, my question is because I have been laid up the last couple of weeks and I've had a lot of time to really dissect the opinion that was given by our counsel and I noticed that she mentioned something called res judicata which I looked up on the computer and it means a law, layman's term, matter already judged. And I think that it prevents future judgment from contradicting earlier judgment made by the court. If, in fact, the court has already made a judgment on this case, then, if I am correct, we cannot hear anything that was mentioned in the case beforehand which is taking down the building, which would be parking arrangements, would be anything like that. They said that no this case is finished. Now we have a new case. It has a new number, it's a new case.

Mr. Dacey: Correct.

Mrs. Rando: So now I have to stop and think, does res judicata influence that case. In my opinion I still don't think that we can touch anything that the court has already decided is wrong. So I believe the only thing that we can discuss with you this evening would be the ten percent that would be on the nonconforming structure. And that, what you are asking for in the ten percent and what we are allowed to give on a nonconforming is ten percent which would equal something like 177 square feet, but I think that you have asked for, how many feet, three times the amount. So I think that's the only thing that we can discuss this evening. And then we have to decide if that ten percent is more detrimental to the neighborhood.

Mr. Dacey: Let me bring my little synopsis to a close and then I will go right back to your ten percent which I think has been an issue that's under laying this case from the beginning.

And so, suffice it to say, we have spent some considerable time working through the details of the site which is the structure and what it might look like after an affirmative grant of some sort of a permit, variance/special permit, and how the site would work which is the site plan equally important to the neighbors, landscaping and all the things that go with it. Where the discussions ended was, what happens interior to the property; occupants, how many units, how

many bedrooms or layout? That internal operation of the unit is important to the neighbors, not generally something within your purview but you don't generally decide how many bedrooms in a two family house. If it's a two family house, it's a two family house. But nevertheless, it's a direction that the neighbors want to explore. It's a big house and it's bigger than everything else in the neighborhood and there's a logic to their question and no one is disputing the fact that this property has an impact on the residential properties around it, so that it's a fair question and it's something that my clients and I are willing to engage in. We don't know where it will go but the purpose of my standing up here tonight is to ask you to be prepared for a request for an additional continuance and the specific reason for it would be to continue the discussion with the neighbors.

Mrs. Rando: May I stop you right there. You mentioned it doesn't matter how many people live in the apartment. Didn't you just say that?

Mr. Dacey: It matters to the neighbors.

Mrs. Rando: Well, doesn't it say that you can't have more than four or more people unless they are in the second degree of kin dredge or something like that?

Mr. Dacey: Well, that's a definition of family and you know what, not that I'm clairvoyant or anything, but actually I do have a little bit of information on that point and maybe that's the second point that we ought to consider tonight.

So, two points that we are going to talk about tonight are the ten percent rule and the definition of family. I'm not running away from your questions, fair question, its what needs to be talked about in this case. So with your permission, these are just exhibits. (Mr. Dacey passed out some exhibits to the board.)

So the first sheet is a color site plan showing the landscaping and suffice it to say the neighbors have a number of interesting points as to where the cars are going to be parked, where the landscaping is, what landscaping gets maintained and it and the goal here was to express that

in some visual way.

Second two sheets behind it are elevations which show the property with the deck and the rails removed. It is the preference of the neighbors to discourage access to the deck so that the access from the internal to the house has been removed. The rails have been removed. The deck plating has been removed and there will be nothing on the top but a rubber roof. The goal and the preference on the part of the neighbors is to discourage pedestrian or personal access on a roof deck because it does have a potential for overhanging their property. So that's what those things are.

The third piece in this submission starts to address your point and this is directly from our Zoning Ordinance. This is not anything that I have invented. It's just that residential uses have two family detached or detached building (and I am quoting) designed for or occupied exclusively by two families is what a two family detached property is designed to do.

The next page is the definition of a Dwelling Unit and that is 2.317 in our Zoning Ordinance and it's defined as "one or more rooms designed for or occupied as a place of abode by one person or by one family with cooking, sleeping and toilet facilities."

Directly below that is the definition of Family and that appears at 2.317(a) in our Zoning Ordinance and 2.317(a) is a short definition and it basically says that, "A family is a bonified housekeeping unit consisting of two or more individuals living together where the relationship to one another is of a distinct domestic character and achieves the permanency and cohesiveness inherent in the notion of a single housekeeping unit."

So, to your point, now does it require a blood relationship? The answer is, no. And that is exactly out of our own Zoning Ordinance. It does not require a blood relationship. It does not require a marriage relationship. It requires a relationship to one another where there is cohesiveness inherent in the notion. There's case law on this and case law is favorable to an expansive definition of Family. I spoke with the building inspector today and the building inspector was aware of the case law and they look for a common purpose. So in this instance, if

you're graduate students living in an apartment, the common purpose may be defined as educational, that they have a common interest in education and it seems that that kind of common interest and mutuality of purpose is adequate to solve the bonified housekeeping unit consisting of other individuals living together where there is some commonality to their relationship. As distinguished from the rooming house or lodging house, people who don't know one another and they go into their individual rooms and have no communication or contact with one another. So, that if you were looking to draw an analogy here, these people have something in common. These people they all go to school. They're typically graduate students and they share that bond. But there's been a lot of misconception about what constitutes a family here. So rather than speculate on this, why not just go to the Zoning Ordinance and read it. Why not go down to the building inspector who's asked to interpret this. And this is where we are at. This is not startling. This is just how we work.

Okay, next question was: How many people can live here? I mean, you've got a big old house, you've got two units, you've got multiple bedrooms. Is there any control on the number of people who can live in a two family? And the answer is, not in the Zoning Ordinance. Zoning Ordinances do not control the size of a property except by dimensional control. So its lot coverage; its dimensions, side yards, rear yards, front yard setbacks, height, stories, that kind of dimensional control. But it's perfectly permissible in the City of Waltham and we have several to have 7000 square foot single family homes. It's entirely permissible to have a 13,000 square foot two family. Fourteen thousand square feet triggers a sprinkler requirement but it doesn't make it any less a two family. So if a property has fourteen thousand square feet in it, it must be sprinklered whether it's a single, or a two or a multi. But there's no numerical limit on how big a single or a two family can be. And if you think about it, again, this is not a startling revelation! There are some beautiful homes up off Forest Street that are six, seven thousand square feet. They're single homes. That's an important point. This house is big. It has four thousand square feet in it. It's bigger than anything around it but it doesn't mean that it's impermissible because of its size. It's not a problem to have a 4000 sq. ft. two family house. It really isn't.

So what is the control over numerical bodies? How many bodies can you put in it? Well it turns out its not in the Zoning Ordinance but it is in the State Building Code, particularly in

the Department of Public Health section and it's a CMR reference which is the code of Massachusetts Regulations, Section 105, Subsection 4,100.400 and this defines minimum square foot requirements for occupancy space and for bedrooms. So what you do is, if you have a dwelling which this is, you have to have at least a hundred and fifty feet of floor space for every occupant and at least a hundred square feet of floor space for each additional occupant. Bedrooms are created differently. You need seventy square feet of floor space for sleeping purposes unless there's more than two people in the bedroom at which point you only need fifty square feet per bedroom. So, if you had a hundred square foot bedroom, a 10 by 10, you could put two people in it. But the controls are minimum controls, they are not maximum controls. Does that resonate? There's no limit on the number of people you have, it's just that you have to take the number of people that are living there and make sure you have enough square footage to support them. If you do the math backwards, and you do a house the size of this, and you divide the forty five hundred square feet in the house by a hundred and fifty, then you could probably have thirty people there. I don't have a calculator, but it's a substantial number of people. So the Department of Public Health CMR Codes have some minimum standards but they do not impose maximum limitations on the number of people that are here. They simply say, look if you have a big house, you can have a lot of people, but you need to have a hundred and fifty square feet per person. That's how it works. Nothing in the Zoning Ordinance that says if you have a two family house you can only have four people living there. Nothing in the Zoning Ordinance that says if you have a two family house it has to be less than twenty five hundred square feet. Nothing in the Zoning Ordinance that says if you have a two family house you can only have two bedrooms or three bedrooms. You can have as many bedrooms as you want as long as you meet the dimensional requirements of the zone and the lot will accommodate the structure without violating zoning.

Which gets me to my last page and this is for comparison purposes. I do not mean to make trouble for anyone. But this is a piece of property which is in the neighborhood of our piece of property that we are talking about tonight. This is a site plan for the property at 235 to 255 South Street which is on South Street, same side of the street but on the other side of the railroad tracks up by the Stanley School. So this is on the opposite side on South Street opposite the Stanley School. And you can see by the site plan that it is in fact a two family house and it is

nonconforming as to use because the zone is a Residence A4 Zone. And you will see that little note right on top of the title box on the plan. So this property is in a Residence A4 Zone. It is a two family structure. It is nonconforming as to use. We don't allow two families in A4 Zones.

It is nonconforming dimensionally because it is too close to South Street. We require 25 feet of front yard setback and this property only has 14.83 feet of setback. So this property is nonconforming as to use and it is also nonconforming as to dimension. And in that respect it is an analogist to the property that is the current subject of this petition which is nonconforming as to use and nonconforming as to its structural dimension.

So the owner of this property, and I honestly don't even know the name, decided that he wanted to put an expansion on this particular property. He went down to the building inspector, or I guess went first to the surveyor and surveyed the whole thing out and said, okay I want to put an expansion on the back of the property and you can see on the plan here that he put a proposed two story addition which is 18 by 31 off the back of the house. Now, this particular process is recent. The permit was issued and the addition is now constructed and what I have here for you this evening is pictures of the house as constructed. (Mr. Dacey submitted photos to the board.)

So, why is all of this important? Well, the answer is, because it raises the 10% issue. If you look at this little site plan here you will see the existing property had 1395 square feet, and this is down in the lower left corner under the lot coverage area so the existing house before the addition had 1395 square feet. So ten percent rule: 139 sq. ft. addition would be all that would be allowed if my math is correct. Well in this particular instance, the proposed addition is 562 sq. ft. So, how did that happen? Well, it happened because the building inspector correctly interpreted the zoning ordinance. And the zoning ordinance says, if it is a single or a two and its nonconforming both as to use and structure, we run a little test and we say, is the proposed addition increasing any existing nonconformity? The answer to that question in this instance is, no. The nonconformity was the front yard. This house and the expansion is to the back. It's not to the front. We are not expanding any existing nonconformity.

Second question: Are we creating any zoning violation? No, we are not. The zoning violations on the side are 21 and 36 feet. We need 15. The zoning requirements on the rear yard are 30 feet. After the addition we've still got 85 feet. Is there a problem with the rear yard? Absolutely not. Do we have a problem with lot coverage? No. Even after the addition we're only at 11.8% of lot coverage. So what's the problem? There isn't any problem. He got a building permit over the counter.

Mrs. Rando: Did this case come before us?

Mr. Dacey: No.

Mrs. Rando: Then why are we discussing it?

Mr. Dacey: Because it's exactly the same situation that we that we have down here. Yes! First Special Permit, we want to go up above the existing kitchen. Does that expansion above the existing kitchen, second floor expansion constitute a new nonconformity? No. We are staying within the footprint. Does that expansion over the kitchen create a violation of zoning? No. We are taking off the third floor. Now we are at 22 feet. The zoning requires us to be less than 35 feet. What's the problem? There is no problem except that the law department is telling you that you can't grant it. That's the problem.

Mr. McCarthy: Then why don't you withdraw it and go to the building inspector and have him approve it for you?

Mr. Dacey: Well, it's a little more complicated than that.

Mr. McCarthy: Come on, to prove your case because this guy got a permit>

Mr. Dacey: No, I'm saying that whoever this gentleman is was entitled to the permit. I'm saying this was done correctly. I'm saying this is in accordance with the zoning ordinance. What I'm saying is the aberration here is 755 South Street.

Mr. McCarthy: You realize there was a lot going on with this case. A lot more than what you are proposing or talking about at this point and time.

Mr. Dacey: Yes. And that, Mr. McCarthy, is the reason that we are here. Alright, and there are several reasons. And first, and for the record, my clients made a terrible mistake, terrible! They went and built something without a permit and turned out to be inside the setback, in violation of the zoning ordinance and for that they are suffering for seven years. And you know, there's no justification for it. Nobody is trying to say that it was a good idea. It wasn't. It was a terrible idea. And if my client sitting here tonight had the opportunity to take this back, he would, He can't. We're stuck with it. We are trying to make the best of it. But that is a major distinguishing feature from this case half a mile up the street where he went in, he applied, pulled the permit before he did any building, made sure he had all his dimensional stuff correct before he started digging. Kudos to him. But the legal underlying principles are what I want to approach you with, namely the law department because this case has gone through the machinations that it has, has a point of view that is at variance with your own zoning ordinance. And they are insisting on saying that you do not have the ability to grant this permit to allow the expansion over the second floor in the back. And they are wrong! They are absolutely flat out, wrong!

Mr. McCarthy: In your opinion. In their opinion.

Mr. Dacey: Well, if you would like me to speak with them, I would be pleased to. I have no issue speaking to the law department. I would be happy to. Typically what they tell me is you're not my client, I have no reason to talk to you - -

Mrs. Rando: And they may be representing us in court so they can't talk with you anyway. Can they?

Mr. Dacey: That's normally what I hear. I mean if you want to invite them to the next meeting and we hash this out in front of the camera, I'm more than willing.

Mrs. Rando: Your proposed addition is how big, 1,113 square feet?

Mr. Dacey: No, our proposed addition is 300 square feet. There's two additions here. It doesn't matter. If you impose the ten percent rule, you're over.

Mrs. Rando: Right.

Mr. Dacey: The law department is looking for a shortcut way to end this case. They are looking for a way to say, it doesn't matter what they propose. If its over ten percent, they can't do it.

Mr. McCarthy: No, they didn't say that. They said if its over ten percent you have to go to the City Council for approval.

Mrs. Rando: No, what they are saying is that you can only add ten percent onto the nonconforming and yours is over the ten percent of the structure and your argument at the last meeting, you tried to bring in the land.

Mr. Dacey: I will be happy to talk about this. Mr. McCarthy is right. There's a long history to this. Section 3.7222 is the so called ten percent rule. Personal opinion, it applies to multi's. It applies to properties that are three and four or more that are either in C Zones or Business A Zones that need FAR relief if they go over a certain threshold. So, what actually happens in our zoning ordinance is that Section 3.7222 is directed at multi families, not singles and not twos. So if you have a multi, and you want to expand it and its nonconforming, you can come here for the first ten percent to the Zoning Board of Appeals, after that you go to the City Council. Why does that make sense. It makes perfect sense because the only people who can give you relief on FAR is the city council. You need a Special Permit for intensity of use at the city council. So, if you are going to expand a multi and if you are going to do something with a three, or a four or a ten unit apartment, you need FAR relief as well as what you need to get here. So you might as well go to the city council, because that's where you're going to end up. Singles

and twos are a different breed of cat. Singles and twos are not subject to FAR. There is no FAR requirement for a single or a two family in any of our single or two family districts in Waltham. We don't impose FAR on singles and twos which is why we have 3.7225 which says, if you are a single or a two you can come here. You are not limited to ten percent which is precisely why the building inspector did the right thing and gave this guy down the street a permit to expand his property by 583 sq. ft. because he's a two. He doesn't have to deal with FAR. He's not restricted by the ten percent. The building inspector knows that. That's why he gave him a permit.

Mrs. Rando: So what did he base the ten percent on that person?

Mr. Dacey: He ignored the ten percent. He's not subject to it. He's a single or a two. This is a two family house. This permit was issued under 3.7225. Perfectly legitimate.

Mr. McCarthy: The problem is you are here for 3.7222.

Mr. Dacey: Right. And you know why? Because that's what got us into the law suit.

Mr. McCarthy: This is a new petition.

Mr. Dacey: Yes. You know what, if we are going back to land court we are going to go back to the same judge.

Mrs. Rando: He won't discuss it with you because it's already been decided.

Mr. Dacey: No, no, no. Absolutely not the case. If this goes back to Judge Trombley. I read you that piece the last time in the last part of his decision. He encouraged you people to look at a change in plans and if it came back in a different format he would be happy to look at it under a new case. I mean that's basically what he said.

Mr. McCarthy: I mean, that's what bothers me. Its 3.7222 and you've got a 365, 35% as opposed to a 10% increase. And that's the cruce of the whole thing as far as I'm concerned.

You're over the 10%. You're coming in under 3.7222. We don't have the authority to give anybody, whether it's a single, a double or whatever even though you believe that its not for a single family or two family, then why come to us under those circumstances? If it's a single or a two, why come in under 3.7222. It's ridiculous.

Mr. Dacey: You know what, if I had a client who needed to expand a single or a two family, I would do the other section.

Mr. McCarthy: So you are here under the wrong deal. You've got to change that.

Mr. Dacey: Look, this is a legal issue and if you want me to sort it out with the law department, I'd be happy to do it. I'm just telling you that this is relatively easy to comprehend. This case has been in litigation. You need to understand that. Litigation is a blood sport. The goal here, if you're the City of Waltham Law Department, is to win the case.

Mrs. Rando: I don't agree. I think that they are here to counsel us because they will be representing us in court.

Mr. Dacey: All fair, but you know what? Whether this makes sense, and what their position is in this particular case, makes sense as precedent and the way they would like to see the city administered as far as expansion of nonconforming properties is very much beside the point. That's not the goal. The goal is to win the case. So this is what came out of the case. This is the focus point. This is it. If it's not right, we'll fix it later. But right now, that's what you are dealing with.

Mrs. Rando: In your Land Court, the decision. - - -

Mr. Dacey: That's Trombley's decision.

Mrs. Rando: Right. It said that 3.7222, calculation should be based on ten percent of the land use rather than ten percent of the ground floor area of the pre-existing building. Well I'm

surprised that you even mentioned that in your argument last time because on one of the pages right over in the corner, I don't know what page it was, the judge stated that you cannot use the land. It has to be the structure. And then, you people went in for reconsideration, and again they said you can't use the land. It has to be the structure. So in res judicata, it's already been decided. It's the structure and not the land and it's finished.

Mr. Dacey: No. What he actually said was look; this is not an issue that was raised in the special permit argument. I'll tell you why.

Mrs. Rando: It was in the judgment.

Mr. Dacey: Right. The theory that this case was taken to the Land Court on was that a special permit trumps even a zoning violation. Under those circumstances, and there is appellate case law that says that's the case and they are in your packet if you chose to read them. Judge Trombley said, no I'm not buying it. I'm not going there. I'm going to rely on the Land Court cases that say we are not going to allow you to trump a zoning violation that would otherwise exist on the property by special permit. You need to go fix this first with a variance. That's what he said. The truth of the matter is that this whole business about ten percent was not challenged by my previous counsel because it was irrelevant to his special permit argument. It didn't matter. If that were right, if this theory were correct that a special permit trumps a variance, the ten percent rule is irrelevant. It did not matter. He therefore chose not to challenge it. It wasn't important to the argument that was in front of the court which was typically, does a special permit in a two family house like this trump an obvious zoning violation where the nonconforming expansion that you're trying to sell also violates a setback requirement. Case law at the appellate level says, yes, you can. Judge Trombley said, no you can't. It was worth a try. It's a good legal theory. It didn't work. Judge Trumbley said we are not going to allow you to trump an obvious zoning violation by covering it over with a special permit. Not happening in my court. Fair enough. His opinion, nothing you can do about it. That's decided. He said, go back and fix your problems. If you go back and fix the problem and get a variance, now you are in a position to do what you need to do under a special permit. This issue was never really decided in that case because it wasn't important to the petitioner's case at the time. It is now.

Mrs. Rando: It was decided in the Land Court case.

Mr. Dacey: No, it wasn't.

Mrs. Rando: It most certainly was. I read it. He said you have to go by ten percent of the structure and not of the land. I differ with you.

Mr. Dacey: The ruling was - - -

Mrs. Rando: And res judicata says that it's been judged, therefore - - -

Mr. Dacey; The ruling was, you need a variance. That is in here and Judge Trombley basically said this matter is going nowhere without a variance. You cannot trump an obvious zoning violation by special permit. Nice try! I read your cases. I understand your appellate position. I disagree with it. It's not happening. This case stops right here. We never get to the special permit because you need a variance. And, therefore, you're going back to the board of appeals and if they give you a variance, then we'll talk about a special permit. But Judge Trombley said, no variance, no special permit. End of story. So he stopped the special permit process analysis by interrupting it and saying, you need a variance first and we are not going to let you go beyond that. So Judge Trombley never got to the special permit aspect of this because by his logic you can't. His logic says, if there's a zoning violation and there was because this particular addition was too close to the right sideline of the property, the only way to fix that is by variance. Go fix it by variance if you can and if you can't the case is over. If you do fix it by variance, then find a theory that allows you to expand what you want to expand by special permit. You need both. But what he said was absolute fact. One comes before the other. If you can't get a variance here, or if you didn't have a variance here, I'm not going to give you a special permit to overcome a deficiency. So he never got to the special permit aspect of the case. That's what happened.

Mr. McCarthy: Then you are going back to the thing; we can't give you a variance on

anything over ten percent. No, you can give a variance under Chapter 40A, Section 10. You can give a variance because it constitutes substantial hardship topographic or otherwise. It's got nothing to do with ten percent. Ten percent applies to special permits.

Mr. McCarthy: But we are here under 3.722. That's why we are here.

Mr. Dacey: But we need a variance first. This case stops if we don't get the variance. That's why there's two parts to this. If we don't get the variance, case over. We never get to the point where we get to talk about special permits and ten percents and everything else. Judge Trombley made it absolutely crystal clear. He did not mince words. He said, you need a variance. Go get one and don't bother me unless you do. Fair enough. But the corollary to that is if he says you need a variance before I'll entertain a special permit, the absolute corollary is that if you don't have a variance he's not going to entertain the special permit. He didn't care about it. It's completely irrelevant to his decision. It starts and stops with a variance. So we are here for the variance. I am not arguing with Judge Trombley.

Mr. McCarthy: A variance to increase the footprint by more than ten percent.

Mr. Dacey: No, to decrease the side yard from fifteen feet which is required to 11.95 feet which is what we have.

Mr. McCarthy: So we are not here for the footprint issue tonight.

Mrs. Rando: I understand that we need that too.

Mr. Dacey: Yah, but one comes before two.

Mrs. Rando: But you're not going to get two.

Mr. Dacey: We'll worry about that when we get one. I'm not going to presume. But I'm saying, if we don't get the variance, the special permit issue is moot. There's a good one for

you. Talk about res judicata.

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

Mr. Sergi: Madam Chair, I think this case has gone on for years and I think its gone back and forth to the neighbors and to the property owner and I think finally the neighbors have gotten the attention of the property owners to actually make some alterations that may come in conformity to what they would like to see happening in the neighborhood. To me, it boils down is what benefits the neighborhood. I think there's a legal argument that Mr. Dacey does present that I am open to, but I would like to encourage the continuation of the neighbors talking with the owner because I don't think that, if they don't agree, I don't think that it's going to really come to a favorable outcome either way.

So, I've seen some landscaping which seems extensive to me. I haven't counted up the bushes. You know if I count them up it's got to be almost over fifty bushes. I think there's some progress being made here and I think we as a board should acknowledge that. And so I would like to see that continue. I'd like to air out Mr. Dacey's legal arguments and see where that leads.

Mr. Dacey: I would request that this matter be continued. If you want to hear from the neighbors and get their take on it, that's fine. This case cannot go forward without cooperation from the neighborhood. I would be the first to agree with Mr. Sergi that the variance in particular is not going to get granted without active cooperation from the neighbors. Variances are hard to sustain, much more difficult to sustain than special permits. We're working with them. They understand what's at stake. They understand the consequences. They understand that there is a lot of other options for this property. This is not something that is still considered on either side. But at some point, we still need to satisfy your legal underpinnings here and hopefully we'll get to that point at some point.

Mrs. Rando: May I ask you one question about the variance?

Mr. Dacey: Yes, of course.

Mrs. Rando: Why do you think that you have the right to be granted a variance? Do you have soil conditions? Do you have more detrimental to the neighborhood; less detrimental or, I mean do you have anything? The shape of the land?

Mr. Dacey: Madam Chairperson, no one has a right to a variance.

Mrs. Rando: Absolutely.

Mr. Dacey: It is entirely discretionary on the part of this board.

Mrs. Rando: But you have a building here that is so detrimental to the neighborhood and you're asking us, or you're going to hopefully ask us to grant a variance which would be more detrimental to the neighborhood and you don't qualify for any of the criteria.

Mr. Dacey; Well, we'll see about the criteria. Hold that thought. Please bear in mind that the addition is removable. The major portion of the building is not affected by the variance. So "A" result here is that you deny the variance, which is entirely within your discretion and no one is suggesting that either of Mr. Valentino or for that matter any other petitioner in this board has a right to a variance. We do not. But if the variance is denied, a section of the building is removed, not the entire building. Land Court case goes to some length to say that the building is a nonconforming two family. At one point, this nonconforming two family had fourteen bedrooms. That's seven bedrooms if you split them up evenly. It's nine and five. You can divide them up any way you want. But the basic house isn't going away. The variance if it is denied is going to require Mr. Valentino to take down that portion of the structure that does not conform to zoning. That's about three feet of the right side of the house. The rest of it stays.

So why are the neighbors concerned about this? Because they want some control about what happens inside the house. Do you blame them? No. But if the variance is denied and there's no special permit here, then there's no affirmative grant and there's no opportunity to

condition. This house floats.

Mrs. Rando: Mr. Hickernell, do you have anything to add at this time?

Mr. Hickernell: No, I would second Mr. Sergi's sentiments and we're here to solve a problem and if the petitioners and the neighbors can solve the problem then I think that's a good step and I would be in favor of a continuance to give them the opportunity to do that.

Mr. Dacey: Thank you. But we continue this for a decision to December 17th, so we do have a little bit of time.

Mrs. Rando: Mr. LaSane?

Mr. LaSane: I agree substantially with Mr. Sergi and Mr. Hickernell. I just don't have the history enough on the board to know what's happened with the property thus far so I have to pretty much be in agreement.

Mrs. Rando: Mr. McCarthy?

Mr. McCarthy: I agree with Mr. Sergi in that the petitioner certainly has made strides compared to what we started off with in the beginning. It's like night and day in terms of the people who have showed up here in protest and are here almost in favor of it now. So, I'm glad to see that, well we will touch on that later on. So, I am also in favor of a continuance to see what happens with it.

Mrs. Rando: I disagree. I think that under res judicata, which I like that word, I think that we don't have a right to hear the case. I think that you didn't get what you wanted and you're coming back and trying again and coming in another door but I will respect the wishes of the board. If I have a motion to continue the case I will ask for a second.

Mrs. Rando: Do I have a motion to continue Case 2013-15?

On motion of Mr. Sergi, seconded by Mr. Hickernell, the board voted to continue Case 2013-15.

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

Mrs. Rando: When is the extension?

Mr. Dacey: December 17th for a decision. So, I would think any time in November is adequate.

Mrs. Rando: I think its going to have to be after Christmas. I am going to have to extend the time, also. How about December 17th or do you want to go to January? (The board agreed on December 17th.)

Mr. Dacey: So that's a new hearing date?

Mrs. Rando: That's a new hearing date. The extension time, let's say will be February 12, 2014. Do I have a motion to extend the time on Case 2013-15 to February 12, 2014?

On motion of Mr. Sergi, seconded by Mr. McCarthy, the board voted to extend the time to act on this case to February 12, 2014.

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

Mrs. Rando: So the case is going to be continued until December 17th.

Does anyone in the audience have anything new that they want to add? Everyone, I thought had spoken but if anyone has a new argument or something, I'll let it go.

Melita Holtey, 757 South Street, Waltham (directly behind 753-755): As its been mentioned, we've been meeting and talking and exchanging ideas and the discussion has started with the alternative should the petition be denied for the variance and that would include an exterior deck on the outside and the foundation of the addition that needs to come down and the second story added to the pre-existing kitchen. As an alternative to that, (Ms. Holtey read from a statement which is attached to the record).

Mrs. Rando: We'll submit that into the record. Thank you.

Joe Giordano, Ward Councillor, Ward 7: Over the past of couple of months I have attended a couple of meetings with the neighbors and the petitioner and the attorney. The latest one was last night and I was very pleased to see some of the progress that was made that the petitioner has made concessions and as the young lady spoke earlier that a lot of it is acceptable to them. Some of its going to pertain to conditions that would be put into a special permit which ultimately can be enforced by the city. So, I think we are going in the right direction and may it continue. Thank you.

Mrs. Rando: Do you have anything new that hasn't been said before?

Leo Kneightley, 731 South Street: No, all I would like to do is say that I concur completely with the statement that you have from Melita. I have participated in the discussions that have been referred to and I concur completely with the statement that you received just now from Melita. I wouldn't change a word of it.

Mrs. Rando: Is it your house that's for sale?

Mr. Kneightley: No.

Mrs. Rando: Because I noticed one of the houses there that is for sale. Anyone else? Seeing none, we will have another meeting on December 17th, 2013. Thank you.

On motion of Mrs. Rando, seconded by Mr. Hickernell the board agreed to a five minute recess at 8:10 P.M.

The board reconvened at 8:15.

Mrs. Rando: Would the clerk please read the petition in Case No. 2013-19.

The clerk then read the petition of 10-52 Second Avenue, Waltham, LLC in an application for variances – Dimensional, for Temporary Structure, Parking Space and Side Yard. The Petitioner seeks to have the board consider the application for one or more variances to permit the construction of a temporary trailer and ancillary enclosed corridor space, to accommodate an MRI Imaging Suite during the renovation of the existing facilities at the premises known as 40 Second Avenue. Location and Zoning District: 40 Second Avenue; Commercial C Zoning District.

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

Bill Proia, Esquire, 7 Executive Office Park, Burlington, MA came forward.

Mr. Proia: As Mr. Hickernell mentioned that we are here for variances for a proposed trailer to house an MRI Suite adjacent to the buildings located at 40-50 Second Avenue otherwise most commonly known as the Mass General Costco West Building and then situated at the intersection of Winter Street and Second and abutting on the east by the ramp going on 128. So it's a very prominent building. I am sure you all know about it. Current uses in the building are generally medical office and office and the reason for their request for the variance is that the tenants and the owners of the property would like to renovate the existing MRI space within the building to provide for state of the art medical service for the community.

In order to do that, we have to take some of that space off line and to again accommodate the patients while this work is being done inside. We are proposing a temporary trailer and

highlighting the location of it (referring to a plan posted on the board). It's adjacent to the building in Winter Place. The reason it's there, is it's a more sensible spot to put it on the property. It's adjacent to the existing building now and (Mr. Proia went over the proposed layout with the board).

Parking generally is under the building now. The building has been there since 1996-97. The current owners bought it in 2007 and are continuing to operate it as essentially a medical office building. Specifically the variances, if you look at the site plan, (Mr. Proia went over the site plan with the board). In order to accommodate the trailer, we need a 1 1/2 foot variance from the side yard requirements here which are fifteen feet and we are proposing thirteen and a half. The other variance is for the temporary structure. There's nothing in the by law that provides for that. The use is not an issue because it is a by right use in the zoning district, a medical office use. And the last variance relates to parking. I just wanted to make a comment on that. The overall proposed renovation is for 8500 square feet of the building to be renovated over time in four phases so there will be 2150 roughly of space within the building off line at all times that the trailer is on site. The trailer is about 932 square feet total. So in effect, we would be having less net space basically in play during the time that the trailer is on site. So we are not really acquiring any additional parking if you look at it that way because the parking is based on square footage that's being used on the site at any one time.

Mr. LaSane: So the trailer is going to remain there through all four phases.

Mr. Proia: Correct.

Mrs. Rando: How long will that take?

Gentleman in the Audience: The final phase, Phase 4 will be done some time in December of next year.

Mr. LaSane: December 2014.

Mr. Proia: That would be roughly a year. And what we ask for in the decision was to be able to have sixty days beyond the time I get the certificate of occupancy for that final phase, for all the phases, to dismantle it so we can make sure we have time for transition. If the existing sites aren't working as well as they should, maybe we will still have to use this for a short amount of time. So we are proposing sixty days following that certificate of occupancy before the trailer has to be removed. So that's really the case in a nutshell and those are the reasons for the variance essentially because of the oddity of this site where there is really a street in the middle of the site making it impossible for us to meet the side yard set back. It really just functions as a driveway. It obviously doesn't serve any other property. So if it were just a driveway, then we wouldn't have a need for a setback in any case. So that really is the reason. The unique shape of the property that justifies a variance or enables the property to be granted a variance by the board.

Mrs. Rando: Is it going to affect any traffic on that road?

Mr. Proia: No, again it's just the same use. Instead of it being within the building, it's going to be in this section. It's a bump out. It's like a tiny addition temporarily to the building.

Mrs. Rando: Same hours as the regular - - -

Mr. Proia: Yes, nothing will change. I forgot to show you, since Richard went through the trouble to put this second sheet together, just to give you an idea. You can obviously see on the site plan how diminutive the building is compared to --- (Mr. Proia went over the details with the board as to where the trailer will be placed.)

Mrs. Rando: Is this is going to be an attractive structure?

Mr. Proia: It does have a finish to it. And again, all you would see from Second Avenue if you had a chance to look over there as you drive by, would really be just a small surface like this (referring to the drawing). It's a very important project to get people in and out and keep the service going is really the idea so we don't have that service off line for any length of time.

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

(Two people raised their hands in favor.)

Mrs. Rando: Is there anyone in audience in opposition to this petition?

Seeing none, is there anyone seeking information? Seeing none, you may continue with your Proposed Findings of Fact unless the board members, does anyone have any questions they would like to ask?

Mr. Sergi: Just a couple. Let me understand, you currently have an MRI unit on the site.

Mr. Proia: Yes.

Mr. Sergi: Okay. And what's going to happen with that unit?

Mr. Proia: Well that's where the renovations are going to be happening. So that will be taken off line and four phases of basically 2100 square feet at a time, renovated, new equipment added, so brought up to state of art. Upgraded so that the equipment and the services can be brought to current standards.

Mr. Sergi: So that old MRI will stay on the site but would just be deactivated.

Mr. Proia: Deactivated and removed because the space where the current MRI is becomes something else.

Mr. Sergi: So it will be replaced with a new MRI unit?

(Man in audience: In phase four the old MRI appears back in the building in a different place and the trailer goes away.

Mr. Sergi: Who's the manufacturer of the trailer?

Man in audience: General Electric

Mrs. Rando: Mr. Hickernell?

Mr. Hickernell: No questions. I would just note that the Proposed Finding of Fact #5 has the sixty day termination. I think that ought to be moved over or at least incorporated into a condition. Other than that, everything appears to be in order.

Mrs. Rando: Mr. LaSane, do you have any questions?

Mr. LaSane: I'm fine.

Mrs. Rando: Mr. McCarthy?

Mr. McCarthy: Just curious. What is the shelf life of the new MRI unit going to be? How long is that going to last before you replace that?

Man in audience: Generally MRI's are replaced seven to eight years to nine years before the technology changes and they put the latest model in.

Mrs. Rando: All right. You may continue with your proposed findings of fact.

Mr. Sergi: May I suggest, Madam Chair, we waive the reading of the Findings of Fact since its been on file.

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

Mrs. Rando: There is one change that Mr. Hickernell mentioned.

Mr. Hickernell: That is to add the additional condition that “The variances will expire as stated in Finding of Fact #5.”

Mrs. Rando: All right, the Proposed Decision?

Mr. Sergi: In a similar fashion, Madam Chair, I propose we waive the reading of the Proposed Decision since its been on file at the Law Department.

Mr. LaSane seconded the motion and the board voted to waive the reading of the Proposed Decision since its been on file at the Law Department.

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

Mr. Sergi: I will make a motion that the Proposed Findings of Fact, as amended, becomes the Board’s Findings of Fact.

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

Mrs. Rando: Do I have a motion on the decision?

Mr. Sergi: I will make a motion that the amended decision becomes the decision of the board and the variances are granted in case 2013-19.

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

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

Barbara Fando, chair