

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

**October 9, 2018**

**The Zoning Board of Appeals held a Public Hearing at 7 P.M. in the Public Meeting Room of the Arthur Clark Government Center, 119 School Street, Waltham, MA.**

**In attendance were Acting Chair John Sergi, and members Glenna Gelineau, Mark Hickernell and Marc Rudnick.**

**The Petitioner, Alliance Realty Partners LLC applied pursuant to Massachusetts General Laws, Chapter 4B, Section 20 through 23, as amended, for the issuance of a Comprehensive Permit permitting the applicant to construct 195 apartment style rental units, with associated parking and relating utilities on the approximately 77,879 +/- square feet parcel of land located at 341 Second Avenue. Location and Zoning District: 341 Second Avenue Commercial Zoning District. Said property is shown on the City of Waltham Atlas - Atlas Page R039, Block 001, Lot 0016.**

**Michelle Learned, Assistant City Solicitor for the City of Waltham, was also present to assist the board with any questions that the board might have.**

**Michael Bourjoulian and members from Alliance Realty Partners also attended along with Judi Barrett from Planning Group LLC. . and Werner Lobe, former Head of the Housing Appeals Committee.**

**At 7:05 P.M., the Chair asked for a motion to go into Executive Session for the purpose of hearing from the board's Counsel, Michelle Lerner, for anticipated litigation.**

**On motion of Mr. Sergi, seconded by Hickernell the board voted go into Executive Session and after that return into open session.**

**Roll call: Mr. Rudnick, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. Sergi, yes.**

At 8:43 P.M., on motion of Mr. Hickernell, seconded by Mr. Rudnick, the board voted to go back into regular session.

Roll call: Mr. Rudnick, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. Sergi, yes.

Mr. Sergi: I am sitting as the Chair tonight as Mrs. Rando is out ill. We have had a thorough discussion with our counsel and I will start off in doing the draft that our counsel had presented to you and the amendments that you have made. It seemed like there were more edits and you kind of went backwards. It's hung up on legalities more than anything else. Can you tell us why this wasn't acceptable and can it be amended?

Mr Bourjoulian: I prepared remarks to address that. So those changes were by really putting a condition out of the waiver list and into the conditions. That's the first.

At first blush I think this redline has appeared to change much and a lot of redlines weren't necessarily meaningful. They were simply clerical. The goal here with this draft was to try and bridge a workable draft with law department's comments. We tried to get as close as we could but bridge those comments . Most of the changes that were structural had things in the wrong place and conditions in the wrong place and is important for how we are to execute the deal.

The second, there are some jurisdictional matters that are just candidly that the zoning board doesn't have the authority. For example on one of the matters that was raised was on the square footage, 40G. The square footage for affordable units vs. market rate units does not have to be exact and identical. In fact in our PDL application with Mass Housing Partnership they weren't and of course we obtained that PDL. Those little details we made are the jurisdiction of subtidness.

Mr. Sergi: We had agreed to that initially then you took that out,

Mr. Bourjoulian: The vast majority of those changes, we were moving pieces around. We do have a list here. I think the total list here is eight items of which maybe four we just couldn't do. And I am happy to walk those through with you.

**Mr. Sergi:** I'm not an attorney but I have listened to our counsel, again this is engineering legalize in my opinion. You deleted the operative fact language in this document which is very important for the city to enforce certain parts of the agreement. That's a major change. On Page 3 of the counsel's draft, you deleted findings and the rational for us to present, you know, we have to have some sort of conditions and the conditions were based on impacts into the city and it was delineated here in their decision, on page 3. You eliminated that whole section and we feel that it needs to be inserted to grant those conditions. It ties directly into the conditions that we are asking for.

**Mr. Bourjoulian:** This is just again, this is what's customary in the permit appeals. Those are wired if you should vote to decide and impose conditions. That's what those conditions are for. If you should vote to decide and put conditions, that's what those conditions are for. They are to address those things.

First of all in operative facts, that is a legal strain of litigation. So whether or not there's a separate definition that has a definition in the law community that is different, that is going to raise a dozen flags when we go and raise and again it's just something that we aren't going to be able to explain. They are not going to accept it. I don't really agree that this is a substantive narrative. An operative fact is a litigation term that is about something that is not disputed.

The other problem I think is that the Executive Session, Mr. Chairman. You know Executive Sessions are required by law to be noticed. And this happened a few times and we've just sort of accommodated. We don't want to make any waves, just kind of been a posture for this whole process and we're working in good faith to work with the board. We don't have any intent of an appeal or any litigation with you. Our entire posture for the past nine months has been to work with you and get your concerns addressed and to try and get this thing into a place where we can execute on it.

**Mr. Sergi:** I think we've been acting in the same good faith.

**Mr. Bourjoulian:** I think you have, but the Executive Session in particular is something that is required to be noticed and they haven't been and in these processes we could have spent time working through these issues with you rather than having them addressed in a packet. So, we are not being in a confrontational mode here. We don't want a litigation. I don't know why there's still discussion talking about litigation.

We are trying to get an operable permit. So that's troubling. So, I'll just say in the same tone, this process is supposed to be a function, the second phase extension, to bring in the law department's concern was intended to address legal matters that were of grave concern to the city, major procedural matters. And these are not major procedural matter. In fact we spent most of the discussion and coordination talking about conditions with material items discussed at length with parking and things your consultants have advised on. So this wasn't about grave issues for the city and I mentioned it last time before I went away on vacation, my concerns we were going to get to a point we had a draft. We just got two drafts that were so far apart it was going to be confusing. And we have an operable draft and all consultants on both sides understood to be executable. So the discussion of the material points was another major part of this. It's just material things we discussed about how the affordable parking spaces were going to work and Mass Housing Partnership's advice; statutory, regulatory, etc. Of course that was one of the things we left out. We already discussed that with you and unless the board directed the law department to make those changes, we didn't think that was something we knew because it was something we discussed at length with you guys.

**Mr. Sergi:** So, the other issue. What we have on that draft, on page 4, there's six parallel spaces. It seems like the way you drafted this, it deals with a private way. You should not be asking our consent. I mean obviously we want to have the best parking available. It makes sense. But a private way, you should go through your proper steps. You don't need the approval from us. It's a private way and I think you should rewrite that in some sort of language that indicate that you will do the proper steps you need to do.

**Mr. Bourjoulian:** Some of that was raised from a health and safety standpoint. I disagree with you on this.

**Mr. Bourjoulian:** It was something that was raised from health and safety, sir. So I disagree with you on that. There was a review with respect to that with the transportation team, the chief of police and with a number of other groups, so it was actually a part of this process. It was reviewed and it was part of the project. That we can truly put the spaces in, that's on us. But it was reviewed and was part of the project. It was part of the improvements just like the sidewalk. The sidewalk was something that we reviewed and how to get connections and where the school bus would pick up and these are all on the road and street as well and through matters of transportation and pedestrian access, etc. We are not asking for your approval to do it. So it was just part of the project - -

**Mr. Sergi:** It says that the board notes that the six parking spaces will be adjacent to the property and along Second Ave. We don't have a right to say that. And then the requested waiver, you're asking for a waiver. I think you're better off, this wasn't here before and I think you need to go through the proper steps in order to get those and we encourage that and you can put that in, we encourage you, but we can't the way this is written—-

**Mr. Rudnick:** What Mr. Sergi is trying to point out here is really a narrower issue than you're taking up Mr. Bourjoulian. We know that we are acting instead of the Traffic Commission here under the 40B Rules. It doesn't really give us the authority to override decisions they have made in the past.

**Mr. Bourjoulian;** It does. This board has jurisdiction over all local permits.

**Mr. Rudnick:** The question here is whether the Traffic Commission can ban parking on private ways. I understand the Traffic Commission authority is on the streets that are under their control in the City of Waltham. Let me be a little clearer first of all. I like the parking there. I like the six spaces on the street. I haven't heard any testimony that there's a problem with it. We've heard from the variety of authorities who oversee issues around our streets including the traffic engineer, our own traffic consultant, police and fire. I didn't hear anything that made this a problem. What's making it a problem for

me is that you are asking to overturn a ban that I don't think actually exists here? The Traffic Commission wouldn't ban parking on a private way.

**Mr. Bourjoulian; You're saying the waiver is unnecessary?**

**Mr. Rudnick: That is what I'm saying. I'm saying I would like you to refer back to the parking as a part of your plan. Everything about your plan is essentially to say we agree to do this as it is outlined in the plan and state which plan we are talking about.**

**So asking for us to give you waivers, I think that's what's inviting a legal complication here.**

**Mr. Bourjoulian: I have an answer for you and I do know, I think it's probably better to speak to your own affordable housing team, 40 B team. The zoning board on any comprehensive permit process has the authority, so if the waiver is not necessary, then the waiver is not necessary. We could either cross it out or it doesn't matter if it stays in because you're saying it's irrelevant it could stay in.**

**Ms. Lerner: Ms. Lerner: The city's position is this board cannot step in the shoes of the Traffic Commission in the process of the 40B action because the Traffic Commission does not have the power to ban traffic on a private way. grant a waiver with respect to that action. Therefore this board cannot step in the shoes to grant a waiver with respect to that action.**

**Ms. Barrett: I don't know what the Traffic Commission's authority is, but I can certainly say this. If they have the authority to issue a ban before this, the board clearly has the legal authority to grant a waiver.**

**Mr. Bourjoulian: If it's simple as striking that - - -**

**Ms. Barrett: That would be the simple fix. It's not required. Boom! That solves our problem.**

**Mr. Sergi:** Get rid of the waiver. I mean we are all in agreement that these six spaces makes sense, okay. But I just think we are getting caught up in the way it is being presented.

**Mr. Bourjouliau** If we could put language in that just says, “to the extent required”, then if it’s not required, then there’s no harm or foul.

I know these are matters we were really hoping to resolve in June or July, This is exactly what I was concerned about when you issued that extension was that issues continue to come in.

**Mr. Sergi:** I guess if you use the language “to the extent required” then - - -

**Mr. Hickernell:** I want to think about that. You know, despite, you know I understand you didn’t want to do the extension. It’s a private way. Somebody should have picked up on that before now. The person that picked up on that was the City’s Counsel. So we are going to deal with it now that it’s been pointed out to us.

**Mr. Bourjouliau:** Okay. I think it would be helpful if we could walk through the actual changes. I think we have eight here which maybe four are something substantive that we weren’t able to address and were required to change. So we really did stretch as far as we could to make a draft that got as much of the Law Department’s instruction that we could. We are really working hard to get a draft that, we are really at the end of what we can accept. I’d rather walk you through a few items that are at odds and explain why they are are at odds. I don’t think they are material and certainly won’t affect the hard work that the board has done. There’s a little bit of risk if we can’t get this draft and decision done that we are going to end up in appeal. It’s just a huge shame. We are so close. We have a very good project but these items are not substantive and they are not material. I’d rather walk through them with you and make sure that’s the case - - -

**Mr. Sergi:** Your saying that’s not the way it was presented to us by our legal counsel?

**Mr. Bourjoulian:** I understand that. For example like the authority with the zoning board's authority is, you guys have a consultant team here with as much expertise as anybody on Comprehensive Permits, 40B.

**Mr. Hickernell:** The best consultants, the best attorneys, you know, sometimes things get overlooked. I think that's what happened here.

**Mr. Bourjoulian:** Of course. Is that helpful to walk through or do you want to walk through or do you want to - - -

**Mr. Cosimi, Attorney for Alliance:** I'd like to answer questions that the board has rather than walk through. Whatever the board wants to do.

**Mr. Sergi:** There was one other issue raised on Page 21, Item #24. It seems like it's a new item. Maybe Mr. Cassaza should review that.

**Mr. Bourjoulian:** This in another one. We had a number in there and we had agreed to and in the late stage after the deal was closed, Mr. Cassaza was concerned that it could be more and we capitulated again and we are okay with the increased mitigation amount.

**Mr. Rudnick:** It's not about the money. It's about the items A, B, C, D and #25. It generated new criteria and new methodology for assessing what was determined which is great. So the city engineer didn't have a chance to look at that. It's new stuff that we are adding in that's within his purview, so we would just like him to get a chance to look at that. I do appreciate that it's being done.

**Mr. Bourjoulian:** It's the condition of the building permit that I have to comply with stormwater. So I don't know what you're going to do. He's going to have to review it as part of our application.

**Mr. Rudnick:** So this is language about what happens if it doesn't meet the requirements.



**Mr. Bourjoulian:** It's extremely customary. We have to go back and make minor adjustments and that's it.

**Mr. Rudnick:** Your testimony that this is all statutory. The building commissioner is aware of this and if I ask the building commissioner what happens if it doesn't meet the requirements he'd spell out this ABCD?

**Mr. Bourjoulian:** My engineer has to certify it with their own personal stamp.

**Mr. Rudnick:** Condition 25: I don't have a complaint about the condition. It's just that the condition was written into the agreement after the city engineer had his opportunity to look at it.

**Mr. Bourjoulian.** It says right here: The building department will have to review the redesign material. So he's got an opportunity before they issue a building permit to look at it. My understanding is when we file for a building permit, engineering, police, fire, everybody signs on. We have big pow wow meetings.

**Mr. Rudnick:** So you're not willing to put in the words "and the city engineer" into this document?

I'm not really understanding why this is a problem.

**Mr. Bourjoulian:** I don't have a problem with it. It's the building department's purview is why.

My concern frankly is time. We need to get to a point on this.

**Mr. Rudnick:** I do agree with you in general, Mr. Bourjoulian, that you've done some really good work in reorganizing the document and it's much appreciated. Things moved into better places to a large degree and as you're saying, I also don't have significant issues with a lot of the changes. I don't believe that there's just too many changes here. So I'd like to focus on the few changes that I thought were worth discussing. I would also just mention that, I'm sorry you weren't here at the last hearing, but I had said what I really

wanted was to work from the law department's draft and that a letter from your attorneys stating what the issues were in the draft and how you would resolve them.

I appreciate the work that's been done in creating an entire new redlined document did make it easier for me but now I am separated from our own attorney's view of this and just reading critique of that which is where I wanted to be.

**Mr. Bourjoulian:** I apologize for that.

**Mr. Rudnick:** So on page 5, the paragraph, After review of the evidence etc., the first thing that comes off to me in other words is Page 1, 2,3,4. On page 5 you removed a long paragraph that starts "After reviewing the evidence", these really outlines the city's position about how we viewed the project when it started and how we view the project now; what the improvements have been in the project and why they relate to the community need and the original need for affordable housing. I think they are importantly said and I don't think they undermine your case in any way. I'd like that paragraph to be restored.

**Mr. Bourjoulian:** I'll have to speak to counsel. Before we proceed, Mr. Rudnick, I think I want to go over the items you raised so far. The operative facts language. The the same comments that Mr. Rudnick made on Page 5, and the engineer added to the condition on Page 25. The city engineer is in addition to the building department, is that correct?

**Mr. Cosimi:** To the extent necessary.

**Mr. Rudnick:** Page 7, the redlined paragraph "the board's approval of the comprehensive permit etc. , I'd like that to be back in to be in a different spot at this time.

**Mr. Bourjoulian:** Is there a reason why?

**Mr. Rudnick:** I don't really feel there's something strongly here that says these are the conditions that were mutually worked out and we all agreed to them. That's what this paragraph says to me.

**Mr. Bourjoulian:** I can tell you that this is the board's decision. My position is not in here. I am not a member of the board. I don't vote. I am not part of this. So, I can tell you almost certainly the applicant has agreed that that type of language doesn't belong in this permit in a decision like this. I'll refer to counsel.

**Mr. Rudnick:** I will check with counsel on that.

**Ms. Lerner:** Indian Ridge has the last page of that affirmation that could be used.

**Mr. Bourjoulian:** Again, this is the zoning board's decision. You're deciding on whether a product will be approved or not in this comprehensive permit and with appropriate conditions. It's not a contract. You don't sign anywhere on this.

**Rudnick:** There were a variety of changes, subtle changes in the language referring to the plan. I would like to use uniform language that says in essence that this item, whatever it might be, "shall be in compliance with the plan", and the plan specified as the plan presented.

**Mr. Bourjoulian:** Where is that?

**Mr. Rudnick:** It's in a whole bunch of places just where that kind of language was softened to say, substantially like the plan or more or less like the plan.

**Mr. Bourjoulian:** We are giving you a copy of the permit plans. If we are fortunate to get a decision, a favorable decision we can execute it. We'll go off and for seven months do all the entire engineering and create a book of plans this big. So the concept plans are meant to be a schematic permit plan. They are not construction plans. So there's a construct that allows for the taking of eighteen sheets or whatever it is, and turning it into a big stack of engineering drawings.

This was worded in the law department's draft as though those were construction documents, That's not the case. The process is that the building department has to review these and make a determination whether you're in compliance So that part of the process has to be protected.

**Mr. Cosimi:** Can I answer that? So it's unfortunate, and to your earlier comment about a letter explaining the differences from the law department's draft and what we have done here. We tried that approach but the unfortunate part of this process we had a paragraph at the end of this document which said essentially what you are saying that the building department would have the ability and determination as to whether or not a change from the plans is material or , etc. What we did at the meeting at the law department was say, okay, we need something more objective and we hear their concern. So we inserted the language at the end of the document which hasn't showed up as a redline because its on the law department's draft so we inserted the last paragraph and then elsewhere we took out words in places where it said "substantally in accordance", I think the one change that you're still looking at and what we replaced that in one instance was in all material respects. We don't want the building inspector to think this has to be exactly static with the plans that you have in front of you now, otherwise I can't approve it. The building department is authorized under the regulation cited on page 26 to make a determination as to whether or not something is material and it adds to the facts of the board. So that's how we tried to have the objectivity here.

**Mr. Bourjoulian:** In short, we'd like the regulations that typically go in this part of the process to be the governing factor which is the building department is going to review our plans and special permit in the city and say this is not material. If it is material change ,we get this to the board and ask them if they believe it's material, too. We just want the regulations to be the governing piece there. That's one, candidly, our bank, that would stop us from getting banking.

**Mr. Sergi:** So your saying the building department would be the enforcing agent here.

**Mr. Bourjoulian:** Yes.

**Ms. Learned:** Respectfully, the City of Waltham in all of their special permits of all of the development in the City of Waltham, works with a specific reference to a specific set of plans and that when you're saying the parking must be in conformance with a specific *set*

of plans, that is how it is referenced. Of course, the building inspector is very use to getting a very large amount of building plans that expand upon the approval initial fact. But it does set in stone the parking dimensions; how many handicapped spaces are on that ground floor; the width of the isles. Whatever we are saying is in compliance with the plans remains in compliance with the plans. The other aspects that are construction related, of course, they change the construction plans. That is how every single development operates in the City of Waltham.

**Ms. Barrett:** With a comprehensive permit, the plans are preliminary. It's just customary for the approved plans which are the plans that the board is incorporating into the decision to be referred to as "the plans" and that the project will be substantially in accordance with these plans. There are final plans that are filed with the building department. The building inspector makes the determination if there are significant deviations here or not and if the building inspector has a concern, it's his authority to refer the matter to the board and in that case the board either makes the determination that there's a minor modification or a significant modification, but they're always in this decision It's not a special permit. It's a comprehensive permit. The regulations and the statute both are very clear. These are preliminary plans. The language is law.

**Mr. Sergi:** I'm just trying to understand the difficulty of identifying this section with your plan/

**Mr. Bourjoulian:** What line?

**Mr. Sergi:** Condition 1, Page 13. When our legal counsel reviewed their draft, they cited a number of areas in the draft where it referred to plans.

**Mr. Bourjoulian:** They are defined in Item 1 page 13 "the plans".

**Mr. Sergi:** I think when you were referencing specifics, parking spaces and such like that, is there a specific place in the plan that identifies that term?

**Mr. Bourjoulian:** It's maybe on half of the plans and in a number of sheets, so it's in a number of places. Plans are plans. Specifically, how this is done is the exact language that Ms. Barrett stated which is substantially in accordance with the plans. I've seen it on every comprehensive permit I've worked on.

**Geoff Engler, SEB, LLC Affordable Housing Consultant:** I think I understand your concerns and the counsel's concerns and my client's concerns. I think where we are having a disagreement is you all and counsel is concerned that, for instance, applying for this permit we are committed to a ratio of one and a half spaces per unit how many spaces that we commit a plan set that has five fewer spaces or something like that which is not our intent when that happened. I would say that that would be a change that the building inspector could say, wait a second, this permit you have to be 297 spaces and you have 292, you have to go back to the board and my client would agree with that.

I think where my client is hung up and this is according to the schematic plan, is if the building shifts six inches or if something changes the course of moving from schematic to working drawings which happens in the course of this process, if the building inspector needs enough leeway which is as written to interpret that those plans are in conformance with the schematics that were approved as part of the permit, I believe that your concerns through how this is written and the building inspector's power, the bigger issues like parking spaces and open spaces and where the driveway is, he has to have all that authority where we can't be boxed in is the transition from schematic to working plans where it invariably that things moved slightly or something because of legitimate engineering and technical reasons have to be drawn that way and the building inspector most likely will say that can conform into the plans because it has outer exterior walls that moved four inches -  
- -

**Mr. Bourjoulian:** It would be like the window stats. All of the windows have been drawn and the elevation are exactly the same and scaled on scaled drawings but they might

move to accommodate a plumbing change a little bit. So those are things where the materials and performance language is what grant that leeway.

So, Mr. Sergi, our goal is to rap this up maybe tonight but certainly by Thursday night. So what would be helpful is to find specifically where these locations are on the plans.

Mr. Sergi: You brought up the driveway issue. The driveway on #18, Page 12, it begins with the driveway entrance to the development and the driveway south from the initial development proposal. Our counsel recommended that we refer to a plan

Mr. Bourjoulian: So why? What does that accomplish? Right now we have to design per plans or we have to define per plans. We have no choice. If the driveway moves whether or not, all of the driveways on all the sheets that have the driveway on and they are all designed. So I don't understand why they are not legal accomplishments. We have to put the driveway in as they appear on all the plans.

Ms. Lerner: So why are you objecting to this?

Mr. Bourjoulian: I am trying to makes changes tonight that we can live with. These are a lot of changes and I want to make sure that we accomplish something.

Ms. Learned: So what about language that you cited in the last comment that substantive changes from the schematic plan presented in this comprehensive permit will not be made unless, you know - - -

Mr. Bourjoulian: I think that in Condition 1 that is exactly what it says.

Mr. Bourjoulian read that section.

Ms. Learned: And actually the law department is requesting right now that in all material respect is open ended and what the law department has requested is to make a finite plan that can be referenced for parking so that the parking, we don't care about your windows, but when you are looking at the decision with respect to what the board has

decided is important you say here is the width of the isles are going to be this. The actual parking spaces are going to be this width and your not going to deviate from them.

Mr. Bourjoulian: We don't intend to.

Ms. Learned: So then what objection do you have to stating that the parking requirements will be in conformance with Plan, Sheet C whatever of the plan? That's all that is being requested in the waiver section.

Mr. Bourjoulian: Could we get a specific reference?

Ms. Learned: We did. It's highlighted in yellow in the law department's proposed draft.

Mr. Bourjoulian: I'll speak to counsel.

Ms. Learned: It's highlighted in yellow in the law department's proposed draft. Each and every time that there's a reference to "shall be in accordance with the plans" and I asked for you to identify which plan.

Mr. Bourjoulian: I'll speak to counsel.

Mr. Hickernell: Can I make a request for a five minute recess?

On motion of Mr. Hickernell, seconded by Mr. Sergi, the board voted to take a five minute recess at 9:30 P.M.

The board reconvened at 9:40 P.M.

Mr. Sergi: Thank you for allowing that. So where were we?

Mr. Bourjoulian: On the reference sheets. I spoke with my team. We'll figure out how to get the sheet references in here. Our goal is try and incorporate as much as we can for Thursday.



**I think we've got all of the substantive issues.**

**Mr. Sergi: I think you have done all the substantive issues.**

**Mr. Rudnick: Before we get off of that one, John, since we are using this in all material respects language, let's incorporate that into the paragraph at the end that reminds us of the building inspector's authority to determine zoning violations but let's also make sure he has the authority to determine materials from - - -Every time you describe how we're looking at the plans and how we are reviewing them. So let's make sure that it also says if in review of the applicant's building permit application , etc.**

**This is to be inserted in the second to last paragraph on the last page.**

**Mr. Engler: The language is written really just giving him the latitude if you need a waiver. It's not speaking to what we talked about.**

**Mr. Sergi: On page 24 item 47, give me your thought process why the board's peer review should certify.**

**Mr. Bourjoulian: This is something we discussed when the public hearing was opened. It was a request about the architectural, the facade details. I think this is language he actually wrote. The board asked that the potential peer review consultant when we submit to a building permit, I believe it was, and would also check and certify that their materials were appropriate and consistent with the plans. So that was just a response to a request from the zoning board.**

**Mr. Sergi:** Item #56 where you say this “shall be reasonable”. Can we indicate that it is, “in accordance with industry standards?”

**Mr. Bourjoulian:** I will ask my attorney.

**Mr. Cosimi:** That’s okay.

**Mr. Bourjoulian:** Did you say in compliance with?

**Mr. Sergi:** In accordance with industry standards.

**Mr. Rudnick:** I just noticed. The one that I have a concern about is your number 30. It’s on page 22, and this is this \$138,000 for the sewer pumps. So I need that to be related to the project, not just a whimsical gift on the part of the applicant. So it needs to be in order to offset impacts of the development. That’s why we’re doing this just because we want to give a gift under 40B. We want the next 40 B to address you are properly addressing the potential impacts of your project on the sewer pump issue there on Second Ave. So I’d like to just say exactly what you said, “in order to offset impact to the development”.

**Mr. Cosimi:** Our only concern is having to explain it to other parties and we have consulted with other parties because we consider all of these operative facts. all of these condition. I think if we have a sentence at the end that says this is an operative fact. So I think we are okay so long as it doesn’t change what we have to do.

**Ms. Learned:** Is this particular condition it is not an operative fact? This is connected so that your development is negatively impacting that sewer pump station and so

the language that Mark Rudnick just asked is to add the language similar to what I had at the end of 31 and the causation element which ties it to the impact to this development adding on the sewer pumping station, this amount of money will be paid to the city. So that one is not an operative fact. The two that were operative facts, I am fine if you want to have the sentence after the payment. I note those two other \$60,000 payments therefore to the Housing Trust Fund and I think that the \$500 is fine and there might be another one. But in any case where it was the operative fact, I'm fine with that sentence being added at the end. This is in Black's Law Dictionary. I am happy to give you guys a copy if you want to give it to your investors. I'm equally happy with the definition of operative fact being included somewhere in the decision.

**Mr. Cosimi:** I think we are comfortable with this is an operative fact.

**Ms. Learned:** I have composed the language in 31, just the connection that will be impacted by the project and that the payment will satisfy the condition.

**Mr. Crosimi:** I think I am fine that this is an operative fact on this instance.

**Mr. Bourjoulian:** It's condition 30, it's now we are going to say in order to meet the impact of the project.

**Mr. Crosimi:** It's not black and white to just say to mitigate some condition. What if that condition is not mitigated. I haven't satisfied the condition.j

**Ms. Learned:** I had some language in 31. Just the connection that would be impacted by the project and then the payment would satisfy the condition.

**Mr. Bourjoulian: Saying the payment should satisfy the condition.**

**Ms. Learned: Then you can say the payment satisfies the condition.**

**Mr. Bourjoulian: Yes.**

**Mr. Sergi: No. 17, a similar issue. The shuttle. I think we are going to have some excess funds from the calculations from, is it the I/I? I was wondering if we could kind of say here on the shuttle that in order to satisfy the isolation of this residential property from other residential properties that specifically to have this shuttle go to the Market Basket.**

**Mr. Bourjoulian: We don't know that we will be able to get that. We don't create the route.**

**Mr. Sergi: That's what I'm saying. If you have the money to allocate. What if we had that as a condition?**

**Mr. Bourjoulian: I don't know what it is going to cost. We need these conditions to be pretty clear to understand what you are saying. It's something that we can't do. We've got to look at what is costs. We need the conditions to be pretty clear and we need to have some kind of predictability in what these conditions mean to us. I don't want it to seem like counsel isn't being cooperative, I can't say right now.**

**Mr. Rudnick: Question, and respectively you're saying that you'll utilize other means if the 128 Business Council didn't work out and you're committing to do it with or without the 128 Business Council. I mean you can't get the bus to stop at the super market because you can't control the 128 Business Council but you are agreeing here that you will**

provide the shuttle service whether or not you can make an agreement with the 128 Business Council. You are saying or utilizing other means to provide shuttle service optimizing that goal. So it does work for me to use the 128 Business Council as the cause of the problem. You shouldn't have agreed to utilize other means. You should have said there's only one choice for us and we have to work with them. But you're saying you're committing to the shuttle. I appreciate that. This was one of the most important changes for me was getting the shuttle to stop at the super market. You really committed to the shuttle. Whether or not the 128 business council works with you or not. I don't know how you can use them as the reason you can't.

Mr. Bourjouliau: I am not comfortable committing to have a stop at Market Basket no matter what. In fact I think one of the solutions we mentioned from our last hearing night when the hearing closed is that we are going to commit to having a full on site partnership with a grocery delivery company which candidly its what our customers want anyway. So we are not committing one hundred percent to that Market Basket stop no matter what because we don't even know that our customers want a Market Basket as opposed to Costco or Hannafords or Whole Foods. So we note that we are a mile from this which is much closer than most homes are from grocery stores. So we cannot commit. We are trying to work with the 128 Business Council as we have. We are committed to trying to work with them, but that's the extent of it.

Ms. Learned: Respectfully what you propose to handle the lack of access to facilities, whatever it is it has to be reduced to the decision as a separate condition. The fact that not having a dedicated shuttle whatever they proposed during the hearing - - -

**Mr. Rudnick: Did we miss putting this in the decision?**

**Mr. Sergi: We talked about it.**

**Ms. Learned: It is not in the current draft.**

**Mr. Bourjoulian. There's Pea Pod and maybe Amazon is getting into this. They are part of the grocery deliveries.**

**Mr. Rudnick: But using that as a reason to not being able to get a stop at Market Basket, then let's get that in as a condition.**

**Mr. Sergi: So #16, on Page 18, where we talk about the sidewalk approvals. Are you saying building inspector approves the plans beforehand or after just to make sure it meets all ADA standards?**

**Mr. Bourjoulian: Well, we are going to certify that it meets standards. So that will be done as part of close out.**

**Mr. Sergi: Under the direction of the building department?**

**Mr. Bourjoulian: Well it's under the zoning board's authority that you want a sidewalk there. It's under the zoning board's authority to approve that.**

**Mr. Sergi: So inclusive of specific building department approvals.**

**Mr. Bourjoulian: This is pretty standard language.**

**Mr. Sergi: Maybe counsel could use some language.**

**Ms. Learned: Sure. I'll do that.**

**Mr. Bourjoulian: Do you mind forwarding it to us tomorrow so we can have drafts submitted back with these comments in sufficient time for the board to review it?**

**Ms. Learned: I will make every attempt.**

**Mr. Rudnick: On Page 17, #12 You added or I guess we added (read statement). This is in preference for Waltham low income residents that after the initial submit period we will no longer offer a preference to the extent allowable to Waltham residents.**

**Mr. Bourjoulian: That's pretty standard.**

**Mr. Sergi: I think we have addressed the majority of what we wanted to bring to your attention.**

**Trash and snow removal. We need to address that here. I don't think we really touched on it.**

**Mr. Bourjoulian: I think we addressed it with the transportation consultant on how that would be handled.**

**Mr. Rudnick: Is it on the plan, the location of snow ---**

**Mr. Cosimi: Yes.**

**Mr. Bourjoulian:** Trash is in the building. I believe it's in the garage.

**Mr. Rudnick:** So just capture that within this idea that we are referring to.

**Mr. Sergi:** I think in the Indian Ridge decision there was a paragraph related to that in the decision.

**Geoff Engler:** Are you talking about physical location or are you talking about of the operation of the condition imposed trash and recycling will be privately managed?

**Mr. Sergi:** Both.

**Ms. Learned:** Just a condition on how you are planning handling it in accordance with the plans.

**Mr. Rudnick:** To me it's covered by just referencing the plan.

**Mr. Bourjoulian:** I guess my concern is everything is more detailed in our correspondence back and forth with the peer review consultant where there isn't a whole lot on the plans.

**Ms. Learned:** Draft a condition on how you want to handle those.

**Mr. Bourjoulian:** Can we talk about the specifics so we get it right on the first draft.

**Mr. Rudnick:** Well my concern is about the location of the snow storage area.

**Mr. Bourjoulian:** That is on the plan.

**Mr. Rudnick:** So that was my concern.



**Mr. Cosimi:** Snow storage will be in accordance with the plans.

**Mr. Rudnick:** We'll let's reference the locations of the trash and the snow and put a condition in that it's handled in your - - -

**Mr. Bourjoulian:** We will say it will be handled all in the building.

**Mr. Sergi:** Can you make a statement about the fire hydrants. And if you could include the fire hydrants, that the fire hydrants would be established in the locations as designated in the plan.

**Mr. Bourjoulian:** So I would ask is that we can reference the items that are located on the plan. We'll say in coordination with the fire department. They have to bless it to get a building permit.

**Mr. Rudnick:** The language that we have about an ANR waiver, was that something for consideration?

**Mr. Bourjoulian:** It wasn't really asked. Originally this was two separate lots and they were lumped together and I believe the engineer asked that we do it.

**Mr. Hickernell:** There were things that you initially prepared but we haven't addressed you might want to talk about.

**Mr. Bourjoulian:** I will be happy to walk through the at least half of everything that needs to be talked about. I think candidly a lot of this we can and will be able to accommodate by Thursday. There's a handful of items here we still need to look at.

The operative facts language, it sounds like something my attorney can get comfortable with and he's thinking about that so he's able to find a solution there.

The health and safety issues I think we can stay with most of that being added back but the last sentence where the applicant has agreed to the following conditions, I know my team is going to say no to that.

To the extent necessary for the waiver on the six parking spaces. That's acceptable.

The plans we are going to reference the sheets, parking and isle widths. Parking counts, dimensions, isles, do you want that or just reference the plans.

Ms. Lerner: Just reference the plans. Any sites that were highlighted in yellow in the original draft of the law department

Mr. Bourjoulian; We'll go back to that draft and figure it out.

We are going to add "in accordance with industry standards" to condition #59. I think that's fine. Condition #30, we are going to add that

Partnering with a grocery delivery company, that's a separate condition that we are going to add.

Snow storage per plans.

Mr. Rudnick: You already have designated places for that, right?

Mr. Bourjoulian: We have that.

**We have a fire department condition in there for hydrants.**

**So I think but for maybe that one sentence we'll be able to get this to you so you have enough time. Can I ask if there are any other items?**

**Mr. Rudnick: My assumption here is that Thursday we are going to see a pretty complete draft from our Attorney with notes or suggestions about the language for the few areas that we don't agree on I don't want to see two separate documents again. I really would like to have the decision written by our attorney and a letter with your comments with it. It seems now we are down to a very few issues.**

**Mr. Bourjoulian: Do you want a redline on that?**

**Mr. Rudnick: No. I want the draft. I guess for me it works if you just put an asterisk before every paragraph that you do not like in the one and only draft we have that's produced by Attorney Lerner. Give us as much as you want but not crossing out her language. I would I like to see the whole document as a whole.**

**Mr. Bourjoulian: I will make sure we make those changes for you and make sure they are timely and delivered to you.**

**Ms. Learned: Depending on when they provide it to me then I could present you with the separate city's document so that you could see what the city thought and incorporate their stuff into it.**

**Mr. Bourjoulian: I'm confused. I am going to be sending you - - -**

**Mr. Rudnick: I'll withdraw my request.**

**Mr. Sergi:** Why don't you make the changes that we have spoken about tonight and submit it to Pam as earliest as you can and Pam will be responsible for getting copies to our counsel and a copy to us.

**Mr. Bourjoulian:** So we are going to add these things to the draft. We'll give you a memo and we are going to give you a clean one, maybe not redlined because redline is not the easiest - - -

**Mr. Rudnick:** I'll withdraw my request.

So the last thing I had there were some references in the conditions to this set of sample amenities on other projects. I kind of thought this page is a separate thing. That this wasn't a sample amenity. This is the design of our, so need this to be not a part of this package as isreferenced.

**Mr. Bourjoulian:** That's okay. I will note that we have drawn that in the plans,

**Mr. Rudnick:** So take that page off the back of that.

**Mr. Cosimi:** The intent is only to incorporate the comments discussed tonight. So we'll generate a redline and get it to you and Michelle at the close of business tomorrow.

The board set the date of Thursday, October 10th at 7 P.M. for their next meeting on this matter.

**Mr. Sergi:** Thank you.

**Ms. Barrett:** If there's something I can do between now and then to be helpful.

**Mr. Sergi:** We can get you a copy as well and maybe have your comments.

**Ms. Barrett:** Sure that will be fine. Will be happy to do that.

**Mr. Rudnick:** Like in every 40B we are the most inexperienced people in the room. So we very much depend on your advice. So if there are areas here that you feel are pitfalls, areas where we are clearly not understanding the Regs or where people understanding the Regs might help us to get some clarity of some of the issues. Those are the kinds of things I would appreciate getting a note from you.

**Ms. Barrett:** It may be you are the least experienced but I can tell you for doing this as long as I have my experience is that the board is usually the wisest. I try to kind of hear what you want.

**Mr. Rudnick:** That's what I want. I want you to assess for anything that's going on that's based on the inexperience of the board or unfamiliarity with the Regs that will help us.

**Mr. Sergi:** Counsellor Michelle, do you have any closing remarks?

**Ms. Learned:** I do want to remind the consultants that they are here to advise about the technical aspects and not the legal aspects.

**Mr. Sergi:** Otherwise we are okay.

**Mr. Bourjoulian:** I just want to reiterate Executive Sessions tied to litigation. Our goal is to execute on this. We have been cooperative and will continue to do that and again

**we have lived up to every one of things we have done and we really don't want any litigating in this matter. Our position is not to fight, We want to make a deal.**

**Mr. Sergi: We appreciate that . We appreciate the cooperation and we want to move forward in the same spirit. Thank you.**

**Ms. Barrett: This is a technical matter. There's a wonderful checklist from the Attorney General's office on the open meeting law and how you can comply with when you are going to have an Executive Session. You might want to look at that before your next meeting to make sure, for example, if you are going to have one, that it's actually on the agenda for the meetiiing and I will be happy to provide you with that checklist.**

**There being no further business, on motion of Mr. Rudnick, seconded by Ms. Gelineau, the board voted to adjourn at 10:25 P.M.**

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