

# *Town of Brookline*

## *Massachusetts*

**BOARD OF APPEALS**  
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TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO. BOA 070021

On March 23, 2007, Petitioner, Jeffrey Klein, Manager of One Somerset Road Realty, LLC (“Klein”) filed an appeal with the Board of Appeals pursuant to G.L. c.40A, §§8 and 15 from the written decision of James J. Nickerson, the Building Commissioner (the “Commissioner”), dated February 22, 2007, to revoke the certificate of occupancy<sup>1</sup> for the property at One Somerset Road (hereinafter referred to as the “Property”). The Commissioner’s reason(s) for revoking the certificate of occupancy is set forth in his letter dated February 22, 2007 (the “Revocation Letter”) and includes, among other things, his opinion that the Property as constructed violates the special permit granted by the Board in Case No.04-0052 (the “Special Permit”) as well as the Zoning By-Laws.

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<sup>1</sup> The Developer’s March 23, 2007 appeal also requests relief from two prior written decisions by the Building Commissioner. The first of those letters from the Commissioner to Klein is dated October 10, 2006 and orders Klein to remove finishes in the attic spaces and basements. The second letter, dated December 12, 2006, is the Commissioner’s refusal to issue a building permit to finish the attic areas. General Laws Chapter 40A, Section 15 requires that any appeal under section eight shall be taken within thirty days from the date of the order or decision which is being appealed. Therefore, the only matter filed within the statutory time period and properly before the Board is the appeal of the Commissioner’s February 22, 2007 order revoking the certificate of occupancy.

The owner of the Property for the purposes of this appeal is One Somerset Road, LLC (hereinafter referred to as the "Developer").

The Board of Appeals determined that the properties affected were those shown on a schedule in accordance with the certification prepared by the Assessors of the Town of Brookline and approved by the Board of Appeals, and fixed May 3, 2007, at 7:00 p.m. in the Selectmen's Hearing Room on the sixth floor of the Town Hall as the time and place of the hearing on the appeal. Notice of the initial hearing was mailed to the Petitioner, the attorneys of record, if any, to the owners of the properties deemed by the Board to be affected as they appeared on the most recent local tax list, to the Planning Board and to all others required by law. Notice of the hearing was published on April 19, 2007 and April 26, 2007 in the Brookline Tab, a newspaper published in Brookline and mailed to all interested parties as required by law. The Board conducted a site visit on Thursday, May 10, 2007 at 8:30 a.m. and invited all town officials to attend.

At the time and place specified in the notice, a public hearing was held by this Board. Present at the hearing was Chairman, Diane Gordon and Board members Lawrence Kaplan and Jesse Geller. The hearing on May 3, 2007 was not completed, and therefore, the Board scheduled a second night and continued the matter to May 24, 2007. On June 21, 2007, the Board upon the written request of the Commissioner and after notice in the local newspaper as well as to all interested parties in accordance with G.L.c.40A, s.11 reopened the hearing to accept additional information provided by the Commissioner and reconsidered its vote of May 24, 2007.

### **May 3, 2007**

Present on behalf of the Developer was Joshua Fox, Esq. of Rollins Rollins & Fox LLC, 60 Williams Street, Wellesley, MA along with Walter Blair Adams, Architect and Certified Building Inspector, with a background in inspectional services for several communities who was present to speak relative to the building code and zoning by-law. The Chair, Diane Gordon opened the hearing and acknowledged receipt of a letter dated March 23, 2006 from Attorney Fox appealing the decision of the Building Commissioner. The Chair made note of the following Exhibits for the record:

Exhibit A – Letter dated October 10, 2006 to Klein from the Commissioner

- Exhibit B - Letter from Commissioner to Klein (date unclear)
- Exhibit C - Hresko Associates, Inc. Plans of Basement, First Floor and Attic dated January 25, 2005
- Exhibit D – Commissioner’s Revocation Letter to Klein dated February 22, 2007
- Exhibit E – Excerpts from the State Building Code 780 CMR 3603.8 (Ceiling Height Requirements)
- Exhibit F - Certification from HKT Architects, Inc., William R. Hammer to the Commissioner
- Exhibit G – Letter from WBA Associates, Walter Blair Adams to the Commissioner dated February 24, 2007
- Exhibit H – Memorandum dated November 20, 2007 to the Commissioner from A. Vernon Woodworth of the Sullivan Code Group
- Exhibit I – Application for Administrative Appeal with letter submitted by Attorney Joshua Fox dated March 23, 2007
- Exhibit J - Board of Appeals Decision (Special Permit) Case # 04-0052
- Exhibit K - Planning Board Report dated February 3, 2005.
- Exhibit L - Letter to Klein from the Commissioner dated January 16, 2007

The Board first heard from the Developer’s counsel. Mr. Fox stated that his client was appealing the Commissioner’s February 22, 2007 decision revoking the certificate of occupancy for the Property. He stated that the Revocation Letter prohibited the finishing of the basement and attic, because in the Commissioner’s opinion this would violate the by-law and Special Permit. In his opinion, such finish work is not precluded by the by-law. He stated that the height of the attic is key. In this case the average height in the attic is less than 7 feet 3 inches. Under the State Building Code 780 CMR 3603.8 spaces less than 7’3” are not within the definition of habitable space. Presently, the by-law at Section 2.07 defines Gross Floor Area as the sum of the areas of all floors of all principal and accessory buildings whether or not habitable, but excludes attic areas that are not habitable. He went on to note that under Section 2.08 of the by-law Habitable Space is defined as space in a structure for living eating sleeping...and meeting the state building code requirements for height. He indicated that 3 code consultants have provided

opinions that the attic does not meet the state building code requirement for height because on average it is under 7'3".

Attorney Fox summed up by stating that if it is not habitable according to the state building code because of the ceiling height then it is not habitable space according to the Zoning By-Laws, and, therefore, according to the by-law it is not properly included in Gross Floor Area. Therefore, based on the Building Code, the 2006 Zoning By-Laws and the lack of any condition prohibiting finishing this space in the Special Permit decision, the certificate of occupancy should not have been revoked due to finished attic space.

Member Lawrence Kaplan asked what the difference was between the attic and the basement in this particular house, because Attorney Fox seemed to make a distinction and did not mention the basement area. Member Kaplan noted that the Commissioner cited the Developer for both the attic and basement. He asked what the petitioner's position was on the basement area.

Mr. Fox stated that the basement is in excess of the 7'3" in ceiling height. Mr. Fox stated that the attics were analyzed under the 2006 Zoning By-Law. The Special Permit was issued in February 2005, so there is an issue as to which By-Law applies to this case. He feels that if you look to the date of the Special Permit then the 2002 Zoning By-Law would apply to these areas because Section 5.22 had not been changed until May 2005.

Mr. Kaplan asked when the construction was started, because he was trying to establish when the six-month freeze applied so as not to be subject to the amendment to Section 5.22 pending at the Town Meeting in May 2005.

Mr. Fox stated that the Building Permit was issued on August 8, 2005 and on February 17, 2005 the Special Permit was issued. Mr. Kaplan stated that in that case the construction would have to have started by August 17, 2005.

Polly Selkoe, Chief Planner for the Town of Brookline noted that the plans submitted to the Building Department upon which the Building Permit was issued showed the basement and attic areas as unfinished space.

Mr. Kaplan stated that the Developer had until August 17, 2005 to pour foundation and start the construction, because that would be 6 months from the date of the Special Permit.

Walter Adams, code consultant retained by the Developer disagreed. In his opinion the Building Permit cements the zoning approval, so that the Developer had six months after the Building Permit was issued to begin construction.

Mr. Kaplan asked to see the case that says you can tack on another six months after you pull a building permit after six months has gone by since the Special Permit was issued. Ordinarily, pulling a building permit freezes the zoning for six months, but where you have a special permit this is what begins the 6 month time frame. Mr. Kaplan asked for a memorandum to support the Developer's position that Klein has the benefit of the 2002 By-Law in this matter.

Mr. Fox stated that in 2002 the Town Meeting amended Section 5.22. The Attorney General redacted a portion of the 2002 Amendment. He submitted the Town Clerk's certification of the amendment with the Attorney General's letter. The Board marked this submission as Exhibit M. Ms. Gordon stated that the issue that the Attorney General had was the distinction that was made between homes that existed and those to be built in the future.

Mr. Fox noted that under Section 5.22 as amended in 2002 it allowed the finishing of basements and attics in this zone as of right up to 150% of the Gross Floor Area. However, the language as approved by Town Meeting 5.22 was limited to existing homes already erected and did not extend to homes to be built. The Attorney General struck this portion because the provisions were not applied uniformly. Mr. Fox opined that applying the 2002 Zoning By-Law, the finishing of the attic can be done as of right as long as it did not exceed 150% of the permitted Gross Floor Area. Mr. Fox requested that the Board remand this matter to the Commissioner to reinstate the certificate of occupancy.

Mr. Kaplan stated that if the 2006 Zoning By-Law applies then what is the Developer's argument with respect to the basement areas that were finished. Mr. Fox conceded that if the 2006 By-Law applies then there is no argument that can be made with respect to the basement. Mr. Kaplan stated that if the basement ceiling height is higher than 7'3" it would be habitable space and exceed the allowable floor area ratio and require further zoning relief.

Walter Adams stated that some areas of the basement are over 7'. He noted that the areas over 7' would need to contain 70 square feet of room or more to be considered

habitable. He noted that at least 50% of the habitable room has to meet the minimum height requirements. He agreed that the basement would be habitable, so it would require additional relief.

Mr. Kaplan and Ms. Gordon noted that if the basement is subject to the 2002 by-law the basement may be finished as of right, however, under the 2006 version of the by-law the Property is at the maximum allowable Gross Floor Area without the basement and attic finished. Mr. Adams and Mr. Fox agreed that under the 2006 by-law they were at the maximum floor area ratio. Mr. Kaplan and Ms. Gordon noted that it was critical to know which version of the by-law applies and requested a brief on the issue from Mr. Fox. Mr. Fox submitted photographs of the Property which the Board marked as Exhibit N.

Ms. Gordon asked about the attic area if the 2006 version of the by-law applied. Mr. Fox reiterated that the key to the analysis is that the State Building Code requires a ceiling height of 7'3" to be considered habitable space and the Developer's consultants certified that the ceiling height in the attic is on average less than 7'3". He stated that the 2006 by-law does not include space that is not habitable under the state building code. He went on to state that regardless of the sheet rock, plaster and paint, the ceiling height takes it out of the State's definition of habitable space which takes it out of the zoning by-law definition of Gross Floor Area which then takes it out of the Floor Area Ratio calculation.

Ms. Gordon asked whether in the plans that were submitted to the Commissioner the basement and attic areas were shown as finished. Mr. Fox stated that the attics and the basement are shown on the plans that were marked as exhibits to the application for appeal. He stated that if you compare the first floor to the attic and basement they are the same. They do not show the details because they were not construction drawings. Ms. Gordon noted that the Special Permit does not seem to condition the relief on the space being unfinished, although the Planning Board report repeatedly notes the spaces as unfinished. She then called on anyone from the public wishing to speak.

The first speaker was Lorraine Goldstein an abutter who resides at 15 Greenough Street. Ms Goldstein submitted a written document with attachments that the Board accepted and marked as Exhibit O. She stated that since September 23, 2004 when the

Planning Board first met the Project has gone through many changes. There were large windows and dormers in the attic and large windows in the basement added. The Developer maintained throughout the process that these areas would remain unfinished. The Planning Board report indicates that the Developer's proposal showed the areas in the attic and basement as unfinished space. A front page TAB story from February 2006 has the Developer quoted as building a 2-story house with an unfinished attic and basement. She noted that does not seem to be the case. After the building permit was issued in August 2005, the Developer continued to make changes; substituting basement windows for wood panels, reinstating a denied Greenough Street entry and pathway to the basement and a full door to the basement rather than a bulkhead and adding windows and dormers to the main attic, some without first submitting plans to the Planning Department. When the neighbors noticed the changes were in violation, they brought it to the attention of the Planning Department to force the Developer to seek approval after the fact as seems to be happening tonight. At an August 2006 open house, the listing information showed a fourth bedroom on the fourth floor which was finished off with plaster, paint, electrical outlets and a window seat. The basement was advertised as a game room and had similar finish work, including recessed lighting and a bathroom, yet none of this work was ever approved.

Ms. Goldstein went on to note that in October 2006 the Commissioner directed the Developer to bring the house in compliance with the approved plans before a certificate of occupancy would be issued. In response the Developer removed both the plaster from the attic in the house and the plaster in the basement as well as a portion of the wainscoting in the basement. The certificate of occupancy was then issued on October 24, 2006. She felt it was important to note that she believes that Mr. Klein during this time and on his own volition raised the floors in the attics lowering the ceiling height to under 7'3". She stated that in mid-January 2007 workers began sheet-rocking the basements and so-called attics again. Inspector Walter White ordered the work to stop. Three weeks later work started again with some portions of the basements being framed-in and insulation added to the interior walls. She noticed that the work continued even after the certificate of occupancy was revoked. In February 2007 the certificate of occupancy was revoked and the Developer was notified he was in violation of the Special

Permit and the Zoning By-Law and ordered to comply with the zoning by-law. She wanted the Board to know that what the Developer did far exceeds finish work such as sheet rock and plastering permitted by the state code and reinforces that the Developer's intent all along was to create habitable space. These areas include central air conditioning, electrical outlets, recessed lighting, a bathroom in the basement, windows, dormers and a door. The drawings submitted do not show the house as it currently stands. This is evident from the listing specifications prior to the open house and revised after the basement and finishes were added. She pointed the Board to the attachments in her submission. Ms. Goldstein went over some definitions in the zoning by-laws. In her opinion, she believes the Developer is in violation of the by-laws and she encourages the Board to conduct a site visit before a decision is made.

Susan Whitman Helfgott of 432 Washington Street was the next speaker. She is appalled at the Developer's blatant disregard for the Town, the Board and its by-laws. She is opposed to the project and believes it does not fit in this neighborhood.

Kathleen MacLean of 26 Greenough Street was the next speaker. Her property looks out to the property at One Somerset Road. She believes the house is unattractive and too large for the lot. She hopes the Board will do a site visit.

Virginia LaPlant, Town Meeting Member, 58 Welland Road, submitted a letter from Doctor Sperber and his wife which the Board accepted and marked as Exhibit P. She stated that the house has grown and grown. She requested that the Board affirm what the Building Commissioner did because he was correct.

Steven Danker of 35 Weybridge Road a resident since 1959 was the next speaker. He noted that the project architect stated that he was a member of a group that preserved trees. When the construction started each and every tree on the property was cut down. He believes the property was developed in violation of the Planning Board's recommendations.

Arthur Conquest of 115 Tappan Street and Town Meeting Member from Precinct 6 was the next speaker. He indicated that he was asked to speak for some of the neighbors. He requested that the Zoning Board send out the information it receives on this case to all 15 Town Meeting Members so that they can be responsible to their constituents.

Frank Hitchcock of the Building Department spoke and noted for the record that the area of the 1st floor and the 2nd floor alone equals the maximum floor area allowed by zoning. In his opinion, any additional space is additional floor area. The question as he sees it is whether the floor area is habitable. Mr. Kaplan asked whether the building department has confirmed the height in the attic areas. Mr. Hitchcock stated the height in the attic is 7' and then slopes downward and the basement height is closer to 8'.

Ms. Gordon asked Mr. Hitchcock if he knew the height of the building. Mr. Hitchcock stated that the height was verified by the architect as under 35' and all the setbacks were met.

Mr. Klein then spoke. He states that he never made a statement that he had no intention of finishing or not finishing these spaces. Everything that was built that you see was approved and built according to the special permit and was approved by the Planning Department. He reiterated that he never stated that he wouldn't finish these spaces. Mr. Kaplan asked Mr. Klein whether it was his intention that these areas would remain uninhabitable even though they were finished and whether someone who buys the house would understand this. Mr. Klein stated that it was his understanding that he could paint and plaster the areas and that whoever lives in the house will need to understand the Town's by-laws. Mr. Kaplan stated that in his opinion if it really is not habitable someone buying the house would not know that these areas with this level of finish and recessed lighting and outlets could not be used.

Ms. Gordon asked whether the Hresko plans were accurate with respect to ceiling height in the attic showing 7'3". Mr. Hitchcock noted that the middle flat portion is 7-8' wide and then sloped down to the sides to zero. So he believes an average would be 5'. Mr. Fox stated that the height will be viewed during the site visit. In his opinion what is more important is what is habitable and what is not habitable.

Ms. Gordon expressed the Board's concern, because the Planning Board report gives some pause, because it appears the crux of their recommendation relies upon the attic and basement remaining unfinished. She believes some people in opposition may have relied on this as well. Polly Selkoe believes that the fact these areas would remain unfinished was important to the Planning Board as well as those people present. Ms.

Gordon believes it may explain why there were not so many people in opposition at the Board's hearing on the special permit.

Ms. Gordon and Mr. Kaplan stated that perhaps the areas could be finished, however they can't be used. The Board will refer the question to Town Counsel with respect to which version of the zoning by-law would apply.

The Board continued the hearing to May 24, 2007 at 7:30. A site visit was scheduled for May 10, 2007 at 8:30 a.m. Town officials were invited to attend.

### **May 24, 2007**

Ms. Gordon greeted all those present and announced that this evening was a continuation of the prior hearing. Present were Diane Gordon, Chair, Members Jesse Geller and Lawrence Kaplan as well as Polly Selkoe, Assistant Director for Regulatory Planning, Michael Shepard, Zoning Administrator and Jennifer Dopazo, Town Counsel. Ms. Gordon stated that the site visit was conducted on May 10, 2007.

Town Counsel was then asked to give her opinion on whether the Developer can avail himself of the so-called zoning freeze provided in G.L.c.40A, s.6. Town Counsel submitted a written opinion to the Board dated May 19, 2007 which was accepted by the Board and marked as Exhibit Q. In her opinion the Developer can not avail himself of the zoning freeze for the simple reason that the original building permit did not include finishing the basement and/or the attic, and therefore another building permit would be required. She noted that under the current by-law the Developer would need relief from the floor area ratio requirements in order to finish the spaces and make them habitable.

The next public speaker was Ruth Ann Schneider, 30 Perry Street, Town Meeting Member Precinct 6. She noted that she has a similar case on Brook Street that will be coming before the Board. She hopes that the Board will uphold the Town's zoning by-laws. She informed the Board that she went through a permitting process for her porch and gutters and she hopes others will follow the proper building process and rules and regulations. She requested that this Developer not get any privileges.

Mark Levy, resident of Brookline, 17 Kensington Circle was the next speaker. He stated that he has known Jeffrey Klein for a long time and has been a business partner of

his. He spoke of his character and requests that the Board give him some consideration because he did not try to deviate from anything intentionally.

David Holmstrom of 9 Greenough Street was the next speaker. He was at a prior hearing where the Developer requested relief in order to put a dormer on the third level. He and his neighbors opposed the dormer because they thought it would provide the ability to use this level as habitable space. At that time Mr. Klein stated it would not be used as habitable space, rather his architect had made a mistake and did the staircase wrong. He noted that a Board member at the time suggested Mr. Klein put in a pull-down ladder. Mr. Klein said he couldn't do that because he may have to live there in the future and he would need to have access to bring his wheelchair and other equipment up. Then there was the pathway/entrance on Greenough Street to the basement. The neighbors objected to this as well. Again, Mr. Klein said he needed this entranceway in case he lived there and needed access for his wheelchair. Mr. Holmstrom noted that this seemed odd since none of the other areas of the house were accessible. He feels like Mr. Klein has been less than straightforward in this process. He opposes issuing the certificate of occupancy.

Arthur Conquest, Town Meeting Member requested to speak again. He stated he had nothing new except that he was present at the site visit. He does not understand all the requirements with respect to height. However, he is flabbergasted about the attic space because it certainly appears as livable space. Once the property is sold the Building Department would have a tough time getting in to inspect whether someone will be living on the 3rd or 4th floor.

Steve Blumstein of 123 Aspinwall Avenue was the next speaker. He spoke in support of Mr. Klein as an honest and straightforward person.

Attorney Fox spoke in response to Town Counsel's Memorandum. He stated that there were some things he disputed in the memorandum, however, he stated that even if the 2006 version of the by-law applied that at the site visit it was clear that the height of the ceilings in the attics is less than required by the state code, and therefore excluded as habitable space under the by-law. He stated that there are numerous reasons why people sheetrock and plaster other than making it habitable space. For example, people may

sheetrock and plaster for safety and other reasons that will be explained by Walter Adams.

Walter Adams addressed the Board. He noted once again his experience in several other communities where he enforced the local by-laws and reviewed plans for compliance. He reviewed the plans submitted by Klein. In his opinion those plans do not indicate that these spaces would remain unfinished. In fact, where there is no notation on plans it is his opinion that one can assume they will be finished. Areas are finished to reduce dust and for energy management. In fact, he stated that there are two sections of the state code that require finishes for fire rating purposes. The issue here is that the Commissioner revoked a certificate of occupancy that was previously issued. The certificate was revoked due to finishes. There is nothing in the by-law or the decision of the Board to prohibit wall and ceiling finishes. Notwithstanding the Commissioner's best efforts, it is his opinion that he should not have revoked the occupancy due to finishes. He noted that some people appear concerned that the Building Commissioner will not be able to enforce the by-law if these areas are occupied, however, that is not true. In his opinion the Commissioner does have the right to enter in the event he thinks there is a violation of the by-law or the state code. All three of the spaces at issue meet the zoning definition of non-habitable space and the Commissioner erred by determining that adding finishes was a violation. If people habited those spaces in the future then the Commissioner could take action, but he does not feel the Commissioner can take the type of prospective action that he did here. He requested that the Building Commissioner's decision be overturned and that the certificate of occupancy be reinstated.

Mr. Kaplan stated that he has two problems with what Mr. Adams said. First, he said the Commissioner could go in and inspect to see if the areas were habited in the future, however, all someone has to do is put some window treatments in the attic and no one will ever know if it is being used. Second, Mr. Adams spoke about finishing these areas with plaster and paint. However, this is far more than plaster and paint. These finishes include electrical outlets ready for use. The areas have been set up for occupancy. If you want to talk about sensibility and common sense and go around the town and look at attics you won't find attics that are not habitable that look like the attic

the Board saw at this property. There would be no real way to enforce the by-law if the areas are left in their present condition.

Jesse Geller reiterated Mr. Kaplan's comments and noted that there are outlets every six feet in these areas. Mr. Fox stated that there is a mechanism of enforcement to check on violations. There are attics in Brookline that are illegally occupied. The mechanism of enforcement exists for all properties equally. In his opinion, this property should not be singled out.

Mr. Kaplan stated that the Board must deal with the matter now in front of it. The Board can assume that there are other properties that exist similar to this property and it is known that in all communities work is done without building permits, however, this does not mean the Board should allow this violation to continue.

Ms. Gordon stated that there is a pattern here. The Planning Board's report is clear that Mr. Klein represented that these areas would be unfinished. The fact that Mr. Klein represented that these areas would remain unfinished weighed heavily on the Planning Board's recommendation to this Board. She noted that Polly Selkoe gave her the minutes of the two Planning Board meetings and it appears that Mr. Klein represented to the Planning Board that these areas would remain unfinished. It was something relied upon heavily by the Planning Board and although she did not sit on that Board she believes there was probably a strong presumption that these areas would remain unfinished, and it was probably part of the "package" presented to the Board and to the neighbors. The sales brochures for the house changed from 3 bedrooms to 4 bedrooms and from 2,200 square feet to 4,000 square feet. All of these factors indicate a pattern of deception that make her wary of the intentions of the Developer.

Ms. Gordon did not intend this to be a personal attack on the Developer but noted the difficult situation the Developer and this Board are now in. This is not about just what the state building code says; it is also about the history, the representations made and the zoning by-law. She believes there is something offensive here that makes this different from other cases referred to. There is also the issue of whether the building permit covered the detailed finishes with wainscoting and recessed lighting, outlets and the additional bathroom. There is a pattern of events that make her uncomfortable about this project.

Walter Adams stated that Ms. Gordon was not accurate to state that Mr. Klein has done anything that violated the zoning by-law, the special permit or the building code. The Board had the opportunity to impose any condition it wanted in the special permit and it did not.

Ms. Gordon asked Mr. Adams about the basement bathroom. Mr. Adams stated that if that were the issue then the bathroom could be removed. He noted that he met with Commissioner Nickerson about the finishes and prepared a letter for Mr. Nickerson. Mr. Nickerson believed that the Board's decision implied that the areas were to remain unfinished, but the decision does not state so. If there are areas like the bathroom that would result in an excess of square footage then the bathroom can be removed. He asked the Board to find a way that the house can be completed and sold. Klein reiterated that he has not been deceitful. Ms. Gordon stated that she would amend her comments and call it "misrepresentations".

Mr. Klein stated that he originally purchased the house for himself but then he changed those plans because of what the Planning Board was looking for to appease the neighbors. He requested that Frank Hitchcock be the inspector assigned to this project. He stated he knew he could count on Frank to do more inspections than usual. Before anyone discussed the interior of the house the Board in the special permit case deleted the reference to the floor plans. Mr. Fox stated that the Board specifically deleted reference to the floor plans on page two of their decision and he believes that was because that Board did not want to be the arbiter of finishes.

Mr. Klein stated that he never said he would not finish the basement or the attic. He did not try to fool Frank Hitchcock that the space in the attic was a mirage. He stated the spaces had been built for quite awhile and both he and Mr. Hitchcock agreed that because it was under 7'3" it was not habitable, so it did not count toward floor area ratio. He claimed Polly Selkoe also agreed with that. There were many inspections by Mr. Hitchcock. Commissioner Nickerson asked to inspect the house. The basement was permitted. An occupancy certificate was issued with the basement and bathroom there. He stated that he is not deceitful. He noted that he has lost thousands of dollars because a neighbor thinks sheetrock does not belong in an attic. This has been going on for three years. Jim Nickerson would send me a letter of denial and he would disagree and then

Commissioner Nickerson would issue another letter. That is when he hired Walter Adams. He is very resentful that he is being made out to be a sneak. He believes Commissioner Nickerson revoked the certificate of occupancy because of an e-mail from an abutter that she saw sheetrock going into the attic.

Mr. Kaplan asked whether any of the work was done without a building permit. Mr. Klein stated that he believes a building permit was not required for putting sheet rock in an attic and nowhere on the plans does it indicate that these areas were to be unfinished. Not one of the sets of plans said anything about the areas being finished. Ms. Gordon stated that the question is whether there were permits for this work. Mr. Klein acknowledged that he tried to get permits after the fact.

Mr. Kaplan asked if the attic is not habitable why he would spend all that money for the finishes that were there. Klein stated because the zoning by-law allows it. Mr. Kaplan stated that the area is finished to the extent that someone can come in and occupy and use it. Mr. Klein stated that he believes that it was all permitted because the ceiling height was under 7'3".

Mr. Fox stated that it was Mr. Klein's belief that he was operating under the prior by-law when he began finishing these areas. Under the current by-law it may be occupied in ten years, so there is some benefit perhaps to having it finished and ready for occupancy in ten years. He noted that Mr. Klein might agree to remove the bathroom.

Mr. Kaplan asked about the rest of the basement area. Mr. Fox stated that the basement will remain as is. He noted that the area where the fire wall was constructed was a requirement of the building department and this area does not have windows so it does not meet the requirements of the state building code with respect to light for a habitable space. Attorney Fox read from G.L.c.40A, Section 1A which allows for regulation of the use or occupancy of land and buildings not the level of finishes. Section 3, the so-called Dover Amendment prohibits a town from regulating the use of materials or methods of construction. He believes that zoning can not regulate the finishes at issue in this case.

Ms. Gordon stated that she appreciates what Chapter 40A says, however, she is looking at the totality of the situation. She believes mistakes were made by both parties. She feels it is very important to uphold the by-law and look at the entire picture. She

hopes the Board can look at this with some Solomon-like wisdom so that the house is not destroyed nor are the by-laws so that people can rely upon them.

Mr. Geller stated that the credibility of the process as well as the credibility of the by-law is at stake in this case. Mr. Kaplan believes that the basement bathroom should be removed. Members Geller and Gordon agreed. Ms. Gordon was uncomfortable with getting involved with the level of finishes. She would leave the attic as is, because the building department does not have the staff to police this. She feels put upon because it was done without a permit. However, she feels other than ordering that it not be occupied, she is not sure that the Board can tell the Developer what finishes need to be ripped out. Mr. Kaplan noted that the prior Board decision does not seem to have a condition prohibiting the finishing of these areas.

Ms. Gordon thinks the comment that the Board deleted reference to the floor plans was simply which set of floor plans would pertain and did not speak to finishing or not finishing the areas. Mr. Kaplan questioned whether it was within the Board's purview to order certain finishes to remain and others to be removed. Ms. Gordon thinks the house is doing no one any good vacant.

Upon motion by Ms. Gordon, duly seconded, the Board voted unanimously to order the bathroom in the basement removed and that the certificate of occupancy to issue after an inspection by the building department that the bathroom has been removed.

#### **June 21, 2007**

Diane Gordon, Chair introduced the members of the Board, Jesse Geller and Lawrence Kaplan. She indicated that all three members received a letter dated May 31, 2007 from Jim Nickerson requesting reconsideration of the Board's May 24, 2007 vote and to reopen the hearing to allow the Commissioner to present further information. A copy of the letter was marked as Exhibit R and is incorporated herein by reference.

Notice of the hearing was published in the TAB and all interested parties were notified in accordance with the requirements of G.L.c.40A, s. 11.

Ms. Gordon stated that the first order of business was to determine if there was a basis to reconsider the May 24, 2007 vote and reopen the hearing for the limited purpose of allowing the Commissioner to submit further information. The Chair believes that the

Board may reconsider its vote and may reopen the hearing if there is newly discovered evidence that is material and substantial or if they were misled in the initial proceedings. The Chair opined that first the Board should hear from the Commissioner in order to determine the basis for reopening the hearing. The Commissioner indicated that he believes he has something new to offer to the Board to consider.

The Chair stated that the Board could first hear from the Commissioner and then vote or vote to open and reconsider. Mr. Kaplan stated that he believes that the Board should vote to reopen and hear from the Commissioner and then determine whether or not to reconsider its vote.

Town Counsel stated the Board has two procedural matters before it. First, whether to reconsider its vote and second whether to accept additional evidence from the Commissioner. She also made a public disclosure that she noticed that her first cousin was in the audience and lived on Greenough Street near the subject property. She noted that she had not spoken with her cousin about this project and had not spoken with him at all in quite some time. She did not know his position in the matter, but thought it appropriate to make a public disclosure even if a cousin did not fall within the definition of family in the Conflict of Interest Law.

Members Geller and Kaplan thought there should be an opportunity for Attorney Fox to present some argument and for Town Counsel to respond prior to the Board making a decision on the reconsideration.

Mr. Fox spoke in opposition to the Board reconsidering its May 24, 2007 and reopening the hearing. Attorney Fox submitted a memorandum of law dated June 21, 2007. His letter to Town Counsel dated June 5, 2007 as well as his memorandum dated June 21 were marked as Exhibits S and T and are incorporated herein by reference. Attorney Fox opined that the Board had closed the hearing when it voted unanimously on May 24, 2007 and that the hearing was closed on that date. Attorney Fox believes the Board has no discretion to reconsider its vote of May 24th or reopen the hearing. He believes the Board's May 24th vote was final and binding on the Board. In support of his position Attorney Fox cited two cases; Hughes v. Moriarty , 2006 WL 1522606 (Mass Land Ct) and Milton Commons Assocs. v. Board of Appeals of Milton, 14 Mass. App.Ct. 111, 115 (1982) as well as the Board's regulation Article G, Section 6, which he opined

prohibited the Board from reconsidering its vote all as set forth in his Memorandum of Law dated June 21, 2007. He also discussed his opinion of the distinctions that should be made from the cases relied on by Town Counsel in her June 19, 2007 letter and the present case. He also pointed out that the Building Commissioner had an opportunity to be heard at the previous proceedings and the sixty days between the filing of the application and the Board's May 24th vote. Attorney Fox believes that there is undue political pressure being placed on the Board of Appeals to reconsider this matter and that the Board should not set a precedent by reconsidering its prior vote.

Town Counsel addressed the Board. She noted that on June 19, 2007 she had responded in writing to Attorney Fox's June 5, 2007 letter opposing the Board's reconsideration in this matter. She provided the Board with a copy of her letter which was marked as Exhibit U and is incorporated herein by reference. In her opinion, the Board could reconsider its vote because the vote of May 24, 2007 was not final until it was recorded by way of a written decision filed with the Town Clerk. She noted that nothing had been filed yet with the Town Clerk. In addition, the statutory 100 days in which the Board must act had not expired. The hearing on the request to reconsider and reopen the hearing was advertised in the local newspaper for two consecutive weeks and all interested parties were notified in accordance with G.L.c.40A, s.11. Town Counsel noted that there was precedent to reopen a hearing to submit newly discovered evidence and that happened during the Board's recent hearing on the Longyear Project. Town Counsel briefly went over the cases cited by Attorney Fox as well as those mentioned in her June 19, 2007 letter as well as some additional case law that supported her opinion that the Board may in its discretion reconsider its vote and reopen the hearing. Town Counsel referred to two sections of the Board's regulations. First, Section 11 of Article F of the Board's regulations requires the Board to render its decision within the statutory time period. Town Counsel noted the Board will comply with this section. She also noted Article G, Section 3 allows the Board to consider whether there was false or misleading information provided to the Board. Town Counsel opined that if such information is presented by the Commissioner the Board may in its discretion consider that evidence. Finally, with respect to Article G, Section 6 Town Counsel's opinion is that the Board's vote on May 24, 2007 was not final, and, therefore, the Board could

reconsider its vote, especially where statutory notice to do so was provided to all interested parties. She opined that G.L.c.40A, s.15 speaks to the finality issue and requires the Board's decision to be filed in writing with the Town Clerk. She discussed the case law and cited from several cases in support of her position.

Mr. Kaplan stated that the cases cited by Attorney Fox, in particular Hughes v. Moriarty, appear to be dealing with an open meeting law issue. In this case the hearing was readvertised and the reopening is part of a public hearing. Mr. Kaplan agreed with Town Counsel that in the present situation the Board had the authority to proceed.

Walter Adams, the applicant's building code consultant then alleged, without any supporting evidence, that Town Counsel was providing legal advice to both the Board and the Building Commissioner, and it was his opinion this was inappropriate.

Mr. Geller stated that where there is fraud or misrepresentation he thinks the Board can reopen the hearing. Ms. Gordon agreed with Mr. Geller and wanted to hear from Commissioner Nickerson. She would also hear from Attorney Fox and members of the public on this narrow issue. Ms. Gordon opined that they should take a vote to reopen the hearing.

Mr. Klein requested to be heard prior to the Board's vote and was allowed to do so. Mr. Klein stated that there has to be something new or misleading or fraudulent for the Board to reopen the hearing. In his opinion there was nothing new because Commissioner Nickerson already sent him five letters and they are in the record. In his opinion the Board already has all the information it needs in the record. He questioned how Town Counsel could support reopening the hearing when she didn't know what the Building Commissioner had to offer the Board.

Upon motion, duly seconded, the Board unanimously voted to reopen the hearing to hear from Commissioner Nickerson.

The Board then heard from the Building Commissioner. The Commissioner thanked the Board and stated that he asked the Board to reopen this case in order to make sure that the Board received all of the necessary information. He stated that in the Developer's application and presentation to the Planning Board on February 3, 2005, it was stated that the third floor attics would be unfinished, including the attic over the garage, and the basement would be unfinished. He stated that at this time both attics are

finished. On December 21st, 2005 he wrote a letter to Mr. Klein stating that the building being built at 1 Somerset Road must be built as approved by the Board of Appeals and told him that no Occupancy Certificate would be issued unless it was built according to the plans approved by the Board of Appeals.

On October 10, 2006 the Commissioner made an inspection at 1 Somerset Road in order to issue the Certificate of Occupancy. At that time he found that the attic and basement spaces were finished. He then wrote another letter directing Mr. Klein to remove the finishes in these rooms in order to obtain an occupancy permit. He noted that Mr. Klein added additional flooring to bring the height in the attic from 7'3 to 7'2 thus putting him below the Building Code height requirement at that time. The Commissioner noted that he met with Mr. Klein at the property at least eight times to discuss the attic and basement areas.

He noted that Mr. Klein did remove the finishes in the attic and in the basement as he had directed. At that time another inspection was made and he verified that the finishes were removed. An Occupancy Permit was issued on October 24th, 2006.

The Commissioner stated that after he issued the certificate of occupancy Mr. Klein reinstalled the finish in the attic and the basement. On January 22, 2007 he sent Mr. Klein a letter and revoked his occupancy permit and ordered him to remove the finishes in these spaces or return to the Board of Appeals for relief from Section 5.20 Floor Area Ratio. Again he met several times with Mr. Klein at his home to discuss his occupancy of the attic and basement. He met with and heard from several code consulting officials on Klein being able to finish the attic and basement. He noted that Mr. Klein appealed his decision to revoke the occupancy at 1 Somerset Road to the Board.

Commissioner Nickerson noted that as of April 1, 2007 the 7th edition of the State Building Code went into effect. The 7th addition under 780 CMR 5305 CEILING HEIGHT has been changed and now the ceiling height is 7 feet. He stated that if the Board orders the occupancy returned then the finished spaces would be permitted and the floor area would increase more than double, from the 2,184 square feet built and approved to 4,668 square feet.

The Commissioner asked that the Board uphold his decision to revoke the Certificate of Occupancy. In his opinion, to allow these areas to remain finished would

require Mr. Klein to seek a variance from the Gross Floor Area requirements of the by-law. The Commissioner presented the following calculations with respect to the gross floor area of the property:

As Built	1st floor	1,110 Sq Feet
	2nd floor	1,074 Sq Feet
	Total =	2,184 Sq Feet

Additional Finished Spaces:

Attic, 3rd Fl	1,074 Sq Feet
Attic 2nd Fl	400 Sq Feet
Basement	1,010 Sq Feet
Total	2,484 Sq Feet

The Commissioner stated that the total for the house would be 4,668 square feet with the attic and basement areas finished. He noted that the Lot Size is 6,240 square feet in an S-7 District which would allow only 2,184 square feet of floor area. The Commissioner submitted a memorandum with attachments that the Board accepted and marked as Exhibit V, a copy of which is incorporated herein by reference

Ms. Gordon asked if there were questions for the Commissioner. Mr. Geller asked when he ordered the finishes removed. The Commissioner stated that he ordered the finishes removed in October 2006. Mr. Kaplan asked whether the Commissioner knew when Klein put the finishes back in. The Commissioner was not sure.

Mr. Fox stated that all this information was available at prior proceedings. In his opinion the Commissioner did not present any new information.

Walter Adams stated that on April 1, 2007 a new edition of the state building code was published for 1 and 2 families which make it available for permits issued subsequent to that date. However, there is a six month grace period as part of that new building code. In his opinion, were someone to get a permit today they would have every right to use the prior edition of the code. In his opinion, the fact that the state code has changed is not relevant to Mr. Klein's situation. In his opinion, there is no legal basis for the Board to change its earlier vote.

Mr. Fox opined that there were no extenuating circumstances or newly discovered evidence and therefore, the Board should not reconsider its vote. There are other avenues of relief and rights of appeal under c.40A. He believes it would not be appropriate to hear any public comment at this time.

Mr. Kaplan stated that he thinks the Board must decide now as to whether there is a basis to reconsider the May 24th vote. Mr. Geller stated that it is not just newly discovered evidence. Ms. Gordon agreed and stated that this is just one test the Board may consider. The Board may also consider whether there was misleading evidence.

Mr. Kaplan stated that it was his memory that Mr. Klein at prior proceedings represented that Inspector Frank Hitchcock was present and performed all the inspections and never had any problem with any of the work or said there was anything wrong. Mr. Kaplan does not recall anyone telling the Board that Commissioner Nickerson inspected the property and instructed Mr. Klein to take out the finishes in the attic areas and the basement or no certificate of occupancy would issue, and that after he took it out he put it back in. Ms. Gordon agreed that was new to her although there may have been some mention of it at the site visit.

Mr. Geller stated that there was a suggestion to that effect but it was not verified or substantiated by the Building Department and that is a critical piece of information as is whether it rises to fraudulent conduct or misrepresentation. Mr. Kaplan stated that the question is whether the conduct and information would change the Board's vote with respect to the attic areas. Ms. Gordon believes it is not a high level of scrutiny and that it is newly discovered information or misleading or fraudulent. It is not a heavy burden for the Board to make that decision. She feels misled. It is clear to her now that the Commissioner was involved in the inspections and ordered the attic and basement finishes removed. Had that been clear to her previously she would have never voted the way she did on May 24th.

Mr. Kaplan stated that he was influenced in his prior vote by what Mr. Klein said at the prior proceedings with respect to Inspector Hitchcock seeing all the work and approving it or not objecting to it. Now it is clear that Commissioner Nickerson ordered the finishes removed, Mr. Klein removed them got the certificate and then put the finishes back in.

Ms Gordon stated that in addition, the fact that Mr. Klein raised the floors in the attic areas just to get around the building code's definition of habitable space is telling and something the Board hadn't heard in the prior proceedings except by way of hearsay. This is also misleading information. Mr. Kaplan agreed.

Mr. Geller stated that the combination of raising the floors to circumvent the intent of the state code and the by-law and putting back in finishes that were ordered removed and in fact were removed and then putting the finishes back in after the certificate was issued rises to a level of suspicion and is misleading. Ms. Gordon stated that she was disappointed that the Board did not know this information at its prior proceedings.

Ms. Gordon believes a certificate of occupancy should not issue until Commissioner Nickerson is satisfied that the finishes are removed and floors are not raised in order to play with the code requirements. She stated that the Developer needs to be honest with us and the Town. She is unhappy with the procedure as to how this information got to the Board, however, the Board needs to act on it. The house should be lived in, but it should be the house that was approved two years ago. There are two levels that can not be habitable.

Mr. Geller questioned whether the Board can impose a deed restriction. However, Mr. Kaplan does not think that it is within the Board's purview to impose such a condition, because it is not a special permit application, rather it is an appeal of the Building Commissioner's decision.

Upon motion by Mr. Kaplan, duly seconded, the Board unanimously voted to reconsider its vote of May 24, 2007.

Mr. Kaplan agreed with Ms. Gordon's prior comments that the decision should include removing whatever was removed before as a condition to getting the original certificate of occupancy and that it shall stay that way. Ms. Gordon stated that the work should be to the satisfaction of the Building Commissioner.

Mr. Kaplan stated that he thinks the Board should uphold the Building Commissioner. The conditions imposed on May 24th were to remove the bathroom in the basement and to keep the attic and basements areas as uninhabitable space. He felt that the Board did not know that Mr. Klein had already been ordered to remove these

finishes and had removed them and then put them back. Mr. Geller questioned whether the state code allowed these areas to be finished at all and Ms. Gordon stated she believed it did.

Mr. Kaplan opined that in order that our zoning by-law be upheld the Board needs to uphold the Commissioner and order the removal of the finishes. Ms. Gordon stated that the prior vote ordered the bathroom removed and the areas in the basement and attic to remain uninhabitable space. Now we should add to that that the finishes be removed to the extent they were removed prior to the certificate of occupancy being issued.

Mr. Klein asked that he be permitted to speak to his character and integrity and the allegation that he was misleading. Mr. Klein stated that he had discussed these issues about the finish with the Commissioner at length and they were addressed in his correspondence. Mr. Klein stated that the Commissioner knew everything that went on at the property. Mr. Klein stated that he never did anything behind anyone's back or anything deceitful. He had reason to believe he could put the finishes back.

Ms. Gordon asked Mr. Klein what those reasons were after he was ordered to remove the finishes. Mr. Klein stated that he believed that this work was part of his original application and he thought he convinced Mr. Nickerson that sheet rock could go in these areas so he put it back. Mr. Nickerson was given the key to the house so he had a chance to see everything.

Commissioner Nickerson stated that he had the code to the door so that Mr. Klein would not have to come down in his wheelchair. He noted that he did go into the house and saw the finishes were put back in again. He felt Mr. Klein was convinced he had the right to put the finishes back in. He spoke to numerous code officials and he agreed that finish could go in areas that were not habitable, however, he believes that these areas were not shown as finished in the plans, were represented to the Planning Board as remaining unfinished and in his opinion violated the special permit as well as the work was done without permits.

Ms. Gordon asked the Commissioner if he ever told Mr. Klein he could put the finishes back in and the Commissioner responded that he did not.

Upon motion by Mr. Kaplan seconded by Ms. Gordon the Board voted unanimously to uphold the Commissioner's February 22, 2007 decision to revoke the certificate of occupancy and ordered that the basement bathroom be removed; and the basement not be used as habitable space; and that the finishes in both the attic areas and basement be removed as previously ordered by the Building Commissioner as a condition for issuing the certificate of occupancy. Upon completion of the work the Commissioner shall inspect the Property and if the work has been performed to the satisfaction of the Commissioner he may then issue the certificate of occupancy.

Unanimous Decision of  
The Board of Appeals:

*Diane Gordon, Chair*

Diane Gordon, Chair

*Lawrence Kaplan, Member*

Lawrence Kaplan, Member

*Jesse Geller, Member*

Jesse Geller, Member

Filing Date: July 02, 2007

A True Copy:  
ATTEST:

*Patrick J. Ward*

Patrick J. Ward  
Board of Appeals