



Enid Starr, Co-Chair
Jesse Geller, Co-Chair
Christopher Hussey

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Town of Brookline
BUILDING DEPT.
TOWN OF BROOKLINE
Massachusetts

Town Hall, 1st Floor
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Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2012-0006

Attorney Neil B. Glick, whose professional address is Donovan Hatem LLP, Two Seaport Lane, Boston, MA 02210, representing The Trustees of the Sargent Road Trust, appealed the Building Commissioner's issuance of a building permit to Stumpo Development for a new house at 33 Sargent Beechwood. The appeal was taken to this Board.

On, January 12, 2012, the Board met and 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, March 1, 2012, at 7:00p.m. in the Selectmen's Hearing Room as the time and place of a hearing on the appeal. Notice of the hearing was mailed to the Petitioner, to his attorney (if any) of record, 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, February 9 and 16, 2012, in the Brookline Tab, a newspaper published in Brookline. A copy of said notice is as follows:

NOTICE OF HEARING

Pursuant to M.G.L. C. 39, sections 23A & 23B, the Board of Appeals will conduct a public hearing to discuss the following case:

Petitioner: Trustees of the Sargent Road Trust

Owner: T Five LLC

Location of Premises: 33 Sargent Beechwood (f/k/a 41 Sargent Beechwood)

Date of Hearing: March 1, 2010

Time of Hearing: 7:30 PM

Place of Hearing: Selectmen's Hearing Room, 6th. floor

A public hearing will be held for a variance and/or special permit from

To appeal the Building Department's issuance of permit #BP-2011-1765 dated December 5, 2011

Of the Zoning By-Law to CONSTRUCT (1) SINGLE FAMILY HOUSE. PLANS BY PAUL M. APKARIAN REG. ARCH. # 9129 11/28/.

at 33 Sargent Beechwood (f/k/a 41 Sargent Beechwood)

Hearings, once opened, may be continued by the Chair to a date and time certain. No further notice will be mailed to abutters or advertised in the TAB. Questions regarding whether a hearing has been continued, or the date and time of any hearing may be directed to the Zoning Administrator at 617-734-2134 or check meeting calendar at: <http://calendars.town.brookline.ma.us/MasterTownCalendar/?FormID=158>.

The Town of Brookline does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services or activities. Individuals who need auxiliary aids for effective communication in programs and services of the Town of Brookline are invited to make their needs known to the ADA Coordinator, Stephen Bressler, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2330; TDD (617) 730-2327.

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At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman, Enid Starr and Board Members Jesse Geller and Mark Zuroff.

Attorney Neal B. Glick, whose professional address is Donovan Hatem LLP, Two Seaport Lane, Boston, MA 02210, representing The Trustees of the Sargent Road Trust, waived the reading of the notice. Attorney Glick stated that this is an appeal of the issuance of a Building

Permit to Stumpo Development for the construction of a new house at 33 Sargent Beechwood. Attorney Glick stated that there are two grounds for the Trust's appeal. He stated that there is a violation of the Floor Area Ratio requirements. Attorney Glick stated that they have estimated that the house is approximately 9,550 square feet which is approximately 3,500 square feet over the allowable gross floor area. He added that it is effectively two houses on one lot. Attorney Glick stated that the second ground for the Trust's appeal is that one of the driveway's grade is in excess of 10% within 20 feet of the lot line.

Zoning Board of Appeals Chair Enid Starr accepted the hardcopy series of slides, submitted by the applicant, as Exhibit 1.

Attorney Neal B. Glick stated that the lot size is 40,153 square feet. He stated that results in an allowable gross square footage of 6,024 square feet. Attorney Glick then reviewed the history of the plans for the subject property. Attorney Glick stated the applicant originally submitted a set of plans, dated November 1, 2011, which showed square footage well over the allowable gross square feet. He noted that there were some questions as to how that was calculated but it was well over 7,000 square feet. Attorney Glick stated that the Building Commissioner quite properly rejected those plans which included an attic plan. Attorney Glick stated that after the rejection the developer submitted a new set of plans dated November 28, 2011 without an attic plan. He added that the two sets of plans show the same house with just a few minor tweaks. In his Power Point presentation, Attorney Glick compared the front elevations from both plans and stated that they are identical. He then compared the rear elevations and declared them identical as well. He stated that the gross square footage shrank in the second

plans, down to 6,022 square feet – just 2 feet below the limit. Attorney Glick stated the attic plan from the November 1, 2011 plan had been eliminated. He stated that November 1, 2011 plans for third floor had a 175 square foot suite with a dedicated stairway without doors going down to the second floor; two large rooms; a full bath; a closet area; three windows, two dormers in the front and a very large window at the rear. He stated that there is a notation on this set of plans that says “provide access to unfinished space.” Attorney Glick added that all three sections show knee walls, ceiling areas, and they show what would be the traditional attic space which is above the third floor which is 8 feet tall by 20 feet wide. Attorney Glick stated that there is no basement plan on either set of plans submitted by the developer. He noted that what is available is a foundation plan. This plan shows a full basement. He asked the Board to bear in mind that this area is all ledge so the developer had to chip out or carve out ledge to obtain this full basement. Attorney Glick stated that this basement has 8 feet 10 inch ceilings; 5 windows, 2 of which are in bays; it has a door to the outside; it has an arrangement of structural columns that clearly mirrors the floors above; it has a central corridor with rooms on each side; and there is an open stairway with no door leading down to the basement. Attorney Glick noted that this full basement was completely excluded from the calculations for square footage, save for 70 square feet that the Building Commissioner added in for the open stairway landing for the basement. He stated that the Trust’s calculations of the basement contains an additional 2,750 square feet. He noted that when it is all added There is a house that is approximately 9,550 square feet – 3,500 square feet over the FAR limit. Attorney Glick asked then why was this Building Permit issued for such an enormous house? He stated that it was issued because the entire third floor was deemed an unfinished attic and the entire basement was deemed inhabitable. Attorney Glick argues that is not the case.

Zoning Board of Appeals Chair Enid Starr asked what the height of the third floor was - floor to ceiling? Attorney Glick stated that the height is 8 feet as indicated in the sections.

Zoning Board of Appeals Chair Enid Starr asked how do you access the third floor? Attorney Glick stated that access to the third floor was from the stairway to the second floor.

Attorney Neal B. Glick stated that basements and attics are not excluded from gross floor area calculations if they are habitable and that includes spaces that have been decommissioned and are not considered habitable space. Attorney Glick stated that the definition of habitable space in the zoning by-law contains three independent clauses and there is only one of those three clauses that deal with finished or built out. He stated that the other two do not but they include such areas that are meant for living or otherwise used for human occupancy. He added that habitable space can include closets, all storage and utility space and similar areas. Attorney Glick stated that the by-law does define "occupied" which is designed, arranged or intended to be occupied. Attorney Glick stated that space that is designed, arranged or intended to be occupied is space that will be used for human occupancy - is habitable space and should be counted in gross floor area. Attorney Glick stated that this is consistent with what the Massachusetts Court of Appeals found in *Spooner*. He stated that the Court in *Spooner* looked at the exact same definitions that he just explained and sought to make a harmonious whole of the by-law and as such the disputed unfinished space was to be included in the gross floor area.

Attorney Neal B. Glick stated that the plans for the third floor space show the developer's intent to make a suite out of the third floor. He noted that there is a permanent stair; eight foot ceiling height with dormers; several windows, one of which is very large; a floor load capacity that is the exact same capacity as the second floor; knee walls; and they have a stretch energy code report that shows seven bedrooms. Attorney Glick stated that we suspect that the seventh bedroom is located on the third floor. He stated that, as to the basement, there is evidence that this is not typical dead storage area. He noted the expense of chipping ledge the whole length of the house to the height of 8'10"; the columns and footings in the basement; the exterior door; the open stair from the second floor down to the basement; and there are five windows.

Attorney Neal B. Glick stated that the Court in *Spooner* elaborated on the purpose of Floor Area Ratio by saying that the by-law's FAR requirement protects against building density and seeks to prevent overcrowding of land. He noted that in this case before the Board is both of those factors. He noted that there is overcrowding of land, excess bulk and excessive density. He further noted that FAR creates a balance between bulk and mass. He stated that this house destroys that balance, adding, that this is too much house on too little land. Attorney Glick noted that the developer has gone ahead with the construction even after the applicant's appeal was filed. He noted that the appeal was filed on January 3, 2012 – well before any lumber was brought to the site and well before any foundations had been poured. He added that he sent the developer a letter on January 10, 2012 stating that he was proceeding at his own risk.

Attorney Neal B. Glick stated that the other problem is the steepness of the driveway, which exceeds 10% grade within 20 feet of the lot line. Attorney Glick stated that it is a clear

violation of the by-law and it should have been enough to stop the building permit. Attorney Glick respectfully requested that Building Permit #2011-1765 be revoked.

Zoning Board of Appeals Member Mark Zuroff asked if there are any mechanical plans on file for this property. Attorney Glick stated that no mechanicals were on file as of this past Tuesday.

Zoning Board of Appeals Member Jesse Geller asked Attorney Glick to explain briefly what the Sargent Road Trust is. Attorney Glick stated that Sargent Road Trust is the owner of all the private roadway locations in the estate. He noted that these roadways were designed by Olmstead and are 50 feet in width and includes plantings that date back to the 19th Century. He added that the Trust also owns the pond and are abutters in fee.

Zoning Board Member Jesse Geller asked Attorney Glick asked if he was accepting the notion that the space above the third floor is the attic space. Attorney Glick stated that he was. He stated that the by-law definition of an attic is the area at the top of the ridge line and the ceiling below – which is the ceiling of the third floor.

Architect Colin Flavin, whose professional office is located at Flavin Architects, 175 Portland Street #6, Boston, Massachusetts, representing the Trust, submitted several documents to the Board. Zoning Board of Appeals Chair Enid Starr accepted one set of schematics as Exhibit 2; another set of schematics as Exhibit 3; a letter, dated February 29, 2012, calculating the gross floor area of the subject property as Exhibit 4; and a letter, dated February 29, 2012,

outlining the issues raised after review of the plans for the subject property as Exhibit 5. Mr. Flavin, using a Power Point Presentation, reviewed what he believed to be the habitable portions of the basement. He noted that it excluded the garage, the door to the exterior and the open staircase. It was his opinion that the characteristics that render the basement habitable were the five windows; an 8'10" height; the probability of ventilation through the windows and most likely a mechanical system that is not included in the set of plans; the access to the space – the open stair and the door to the exterior; and the fact that it has a slab on grade giving it load bearing capacity for habitable space. He noted that the ceiling height permits traditional ductwork space for mechanicals and the structural columns set the basement up for perimeter rooms to be used in a variety of ways. Mr. Colvin stated that, according to the definitions found in the zoning by-laws, the habitable space in the basement is approximately 2,750 square feet. He noted that in his experience, in a house typically this size, you wouldn't expect to put a full basement under a house this size on ledge typically because of the extra costs. Mr. Flavin stated that the open stairwell arrangement is conducive to making the basement seem it has continuity to the house. As to the third floor, Mr. Flavin, in his Power Point presentation, indicated areas on the third floor that had a height in excess of seven feet. He noted that under the Building Code that is the minimal height for habitable space. He added that his calculations show there is approximately 1,400 square feet of habitable space, in excess of seven feet, on the third floor. In terms of light, Mr. Flavin stated that there are three sets of windows on the third floor. There are windows to the rear and the front. He noted that the windows to the rear are labeled as Type O casement windows and the windows to the front are labeled Type K and each are large enough, under the Building Code, to allow for emergency rescue. He added that if bedrooms were placed at those locations those windows would be sufficient under the building code. Mr. Flavin stated

that the stairway is an open stairway. He added that the floor joists on the third floor mirror the floor joists on the second floor and would carry the required loads for habitable space. Mr. Flavin also stated that the rear window produces light and appears to be less architectural but gives the appearance of a third floor residence.

Zoning Board of Appeals Member Mark Zuroff asked if the third floor plan had the potential for 1,400 square feet of habitable space. Mr. Flavin stated that it did.

Zoning Board of Appeals Member Mark Zuroff then asked if there were potential for more habitable space on the third floor. Mr. Flavin stated yes there was more potential for habitable space but he drew the line at a height of seven feet.

Attorney Neal B. Glick noted that you could build space for a traditional attic at far less costs. He added that he believes this shows the owner's intent to use this as habitable space.

Zoning Board of Appeals Chair Enid Starr asked if there was anyone present who wish to speak in favor to this appeal.

Neil Wishinsky, a resident of 20 Henry Street, Brookline, Massachusetts, and a Town Meeting Member from Precinct 5, stated that 11 of the 15 Town Meeting Members from Precinct 5 have signed a letter asking the Board to use the analysis set forth in the *Spooner* decision in determining this case.

Zoning Board of Appeals Chair Enid Starr asked if there was anyone present who wish to speak in opposition to this appeal.

Attorney Robert L. Allen, whose professional address is Law Offices of Robert L. Allen, 300 Washington Street, Brookline, Massachusetts 02445, who is representing the owner of this property, stated that it is important for the Board to understand the process leading up to tonight's hearing. He stated that the property was purchased on June 15, 2011 with the intention of demolishing the existing house and hiring Cindy Stumpo to construct a new and larger single family house. Attorney Allen stated that there was a public hearing on the significance of the dwelling on July 12, 2011 before the Preservation Commission. He noted that all interested parties, including Town Meeting Members, were notified. He added that the Preservation Commission made a rare finding and found it not significant and granted demolition without delay. He noted that the immediate abutter to the property came to the hearing in support of the demolition. He added that no Town Meeting Members appeared to express their concerns about the building of the new home and nobody from the Sargent Road Trust appeared to object. Attorney Allen stated that on October 9, 2011 the owner provided a copy of the proposed plans to Trustees Stampfer, Servison and Pasternack. Then on October 10, 2011 the owner received an email of thanks from Trustee Stampfer. Attorney Allen stated that plans dated November 28, 2011 were submitted and a building permit was issued on December 5, 2011. Attorney Allen stated that this has been a completely open and transparent process.

Attorney Robert L. Allen stated that before he addresses the issues raised by the Trust he believes that the Board needs to address the issue of standing. He stated that standing is a jurisdictional prerequisite only a person aggrieved can seek relief from a zoning decision.

Attorney Allen, citing the *Spooner* decision, stated that a party may establish standing in one of two ways: first, they must prove that they are aggrieved – to do so they must either offer evidence demonstrating a plausible claim of a definite violation of a private right of the property interest or private legal interest and a party aggrieved must offer proof to show his or her injury is special and different from the concerns of the community at-large; and second, by establishing they have a presumption of standing such as being an abutter and if applicable, the presumption may be rebutted. Attorney Allen stated, after listening to the Trust's presentation, that there is no presumption of standing. He stated that the Trust is not an abutter within the meaning of MGL, C.40A, section 11. He stated that the Trust owns roadways, with its surrounding landscaping and the pond. He stated that the clear intent of the statute was to give those individuals or parties who live and own structures or homes in close proximity an opportunity to protect their interest where there is a real potential for injury. He stated that the Trust does not fit into that category.

Attorney Allen stated that the Trust was required to do a thorough analysis that they are a person aggrieved. He added that the Trust has made no argument nor have they identified any facts to show that it was aggrieved by the issuance of a building permit. He stated further that the Trust has not and cannot show that there has been any infringement of legal right by the issuance of a building permit. He noted that even if the Trust could establish the infringement of a legal right it would not be able to establish an infringement that was special or different from the injury the action caused to the community at large. Attorney Allen stated that as the owner of the roadways and the pond the Trust is hard pressed to show any evidence of injury that is special or different

than that sustained by the community at large. He added that it would be close to impossible for the Trust to establish evidence that the issuance of a building permit caused any special injury to the road, landscape or pond. Attorney Allen stated that a single family home with an existing curb cut and driveway is being replaced by a single family home with the same curb cut and driveway. Attorney Allen stated that the Trust lacks any standing to be heard before this Board. He added that there has been no claim before this board that the Trust has suffered any injury. He noted that the party claiming standing must put forth factual evidence that they are indeed aggrieved.

Zoning Board of Appeals Chair Enid Starr asked Attorney Allen if he would like to continue with his full presentation and then allow Attorney Glick an opportunity to rebut his argument on the issue of standing or would he prefer to have Attorney Glick rebut the argument now. Attorney Allen stated that he would like to complete his presentation first.

Attorney Allen presented two photographs of the subject property under construction to the Board. Chair Enid Starr accepted these photographs as Exhibit 6 and Exhibit 7.

Attorney Robert L. Allen stated that it is difficult to make an argument against the appellants when they are working off of a different set of plans. He stated that the appeal suggest that the basement is full and open with carefully placed structural beams. Attorney Allen stated that the appellant failed to mention that there are 32 of these structural beams every five to seven feet throughout the core of the basement. He stated that the appeal claims that there is an exterior door. He noted that the photo shows no exterior door in the basement.

Zoning Board of Appeals Chair Enid Starr stated that the photo shows an opening. Attorney Allen stated that is the first floor.

Attorney Robert L. Allen showed the Board one of the three windows that exist in the basement with a window well. He added that they do not provide adequate light and are certainly not up to code for habitable space. Attorney Allen stated that the only way in or out of the basement is the stairway that goes up to the first floor. He added that the appellants represented that it was an open stairway. Attorney Allen stated that it is not open and there is a door at the top of the staircase on the first floor. As to the third floor, Attorney Allen stated, in an attempt to address the concerns of the Trust, the two window dormers in the rear have been removed, so the only remaining windows left in the attic are the two single dormers in the front of the house. Attorney Allen stated that it is important to note that initially the owner did have in mind to have an au pair suite for the third floor. He noted that the Building Commissioner, rightfully so, rejected that plan and the owner had to redo it. He noted that is something that is not unusual.

Attorney Robert L. Allen stated that the difficult part in listening to the architect's presentation is that it is all conjecture and speculation. Attorney Allen stated that gross floor area does not include cellars, attics or unenclosed porches not used for human occupancy. He stated that the zoning by-law defines an attic as the space in a building between the roof raking and the ceiling beams of the rooms below and is not considered habitable space. Attorney Allen noted that the third floor meets exactly the this definition – completely unfinished with the rafters above and the ceiling below. Attorney Allen stated that the issue in *Spooner* was really whether

the unfinished space on the second floor above the garage was unfinished or exempt as an attic. He added that based on the Town's definition of an attic it was clearly not exempt. He further added that the space was built and finished to immediately convert it into a master bedroom making it readily apparent that this space should be counted in the FAR. He stated that the third floor rooms at Spooner Road consisted of finished walls and ceilings, full plumbing in the bath and included infrastructure for heating and electricity and was considered habitable space within the meaning of the by-law. Attorney Allen said that the Land Court stated that even though the third floor rooms are not completely refined, they are a far cry from bare joists, wall studs and roof rafters of an unfinished attic frame. Attorney Allen stated that this property is bare joists, wall studs and roof rafters – an unfinished attic frame. He noted that there are only two separate single widow dormers; no separate walls, no heat; no electrical outlets consistent with habitable space; and the ceilings are completely exposed. He added that there is no intent to use this space. Attorney Allen stated that it should be readily apparent that this is an attic. He noted that the fact that some day, ten years from now, that the then homeowner has the ability to seek a special permit to convert that space is really of no importance. He further noted that there is no guarantee that by-law will exist in ten years. Attorney Allen stated that the same logic applies to the basement where there are only three small windows. He said that it defies logic to reach the conclusion in its current status that anybody would be sleeping, eating or cooking or otherwise using this space as habitable. He stated that this space was built to be used as a basement and as an attic regardless of its size. He noted that the definition does not limit the size of an attic or the size of a basement. It basically says that if it looks like an attic and if it looks like a basement, then that's what it should be. Attorney Allen stated that the appellant makes assumption after assumption, followed by speculation, that a home in an S-40 District is larger than a home in an

S-25 District. Attorney Allen stated that is the reason why we have zoning districts. Attorney Allen stated that the Board is being asked to take a giant leap to assume that his client built an attic and a basement so that he could immediately, at significant cost and under the cover of darkness unlawfully convert this space to habitable space. Attorney Allen stated that this is very dangerous ground. He stated that if the Board follows the appellant's argument every single builder in Brookline should build a house with a flat roof and on a slab or at least a house with a crawl space in both the basement and the attic. He added that he didn't believe it was the intention of the by-law to bring back the ranch house and he knows that it is not in the best interests of the Town.

As to the driveway issue, Attorney Allen stated that there is no second curb cut being proposed. He stated that the current driveway entrance is a pre-existing non-conforming condition and the remainder of the driveway is conforming. Attorney Allen stated that he has two separate scenarios available this evening that have been prepared by the owner's engineer Vern Porter. However, he added that on December 12, 2011 an email was received from Trustee Stampfer stating that nothing can be done to any planting, or grading of Trust property without the permission of the Trustees. Attorney Allen added that it is really the Trust who is preventing this entry way from becoming conforming. Otherwise we can continue to use it as a pre-existing non-conforming entrance way.

Vern Porter, whose professional address is 354 Eliot Street, Newton, Massachusetts, is a Land Surveyor/Civil Engineer retained by the owner of the subject property, stated he designed the driveway that was proposed in the original site plan that was approved by the Brookline

Engineering Department. He stated that the first ten feet off of the roadway is actually Trust property and the driveway and grading we proposed started at the property line and on one side it was a little bit tighter than 10%. Subsequently we submitted two new alternatives for the driveways. He stated that the first alternative shows the grading starting at the edge of the roadway and continuing at 10% the entire way until it flattens out near the house. He added that the second driveway comes from the edge of the property at a much lesser grade – approximately 7.5%. He noted that these two alternatives are dependent on the Trust allowing the owner to use its property.

Zoning Board of Appeals Member Mark Zuroff asked how far from the property does the roadway begin. Mr. Porter stated it is approximately 10 feet.

Zoning Board of Appeals Member Mark Zuroff asked if the grade irregularity on the Trust's property. Mr. Porter stated that it was.

Alex Tepperman, a resident of 32 Woodland Road, Brookline, Massachusetts and the owner of the subject property, stated the plan that was presented by the applicant is not the plan that the builder is using. He also stated that he and his wife like the looks of a hip roof and not a flat roof. He also noted that there was just a little bit of ledge under the ground and not the large amount that was implied in the presentation.

Zoning Board of Appeals Chair Enid Starr asked Attorney Glick if he wished to address the issue of standing.

Attorney Neal B. Glick stated that this standing argument has come out of the blue. He added that he doesn't feel that he is properly prepared to address in full the standing issue. He added that he would like to have the opportunity to also submit documentation on the issue as well. Attorney Glick stated that he emailed Attorney Allen just the other day and he gave him no indication that there could be a standing challenge. He noted that the appeal was filed on January 3, 2012 and no one ever raised the standing issue. Attorney Glick stated that there is no question that the Sargent Road Trust is an abutter. He added that the Sargent Road Trust, by its terms, requires the Trustees to preserve and protect the careful designs of those roadways and plantings handed down by Dr. Sargent and Frederick Law Olmstead.

Zoning Board of Appeals Chair Enid Starr asked Attorney Glick in what way does this house impede on the private right of the Trust to preserve the roadway locations, the narrow winding roads and the plantings along the roadway – a particular right as opposed to a general right. Attorney Glick stated that this house would dominate in such a way where it would create visual and other forms of infringement on that roadway. He noted that without having the opportunity to review the issue it is clear that a house that is 50% over the gross floor area ratio would infringe upon that roadway. He added that the Trust also has a fiduciary responsibility to the beneficiaries of the Trust by preserving the scale of their neighborhood.

Zoning Board of Appeals Chair Enid Starr asked who are the beneficiaries of the Trust. Attorney Glick stated that every lot owner – and there are approximately 48 – are the beneficiaries are the Trust. Chair Starr then asked if these beneficiaries make any contributions

to the roadway locations and the plantings. Attorney Glick that they do contribute through their assessments, which are based in part by their frontage and that the Trustees are elected by the beneficiaries to protect and preserve the roadway locations, pond and plantings.

Zoning Board of Appeals Member Mark Zuroff asked if there are any provisions in the Trust that allude to preserving the neighborhood from massing. Attorney Glick stated that there are specific references to on-going development in their efforts to protect and preserve the roadway locations, the pond and the plantings.

Zoning Board of Appeals Member Mark Zuroff asked if there were any building or design restrictions in the Trust. Attorney Glick stated that there were none but that the Trust relies upon the Town to protect it from over-massing.

Attorney Neal B. Glick stated that there were so many things that came up in Attorney Allen's presentation that he would like to clarify. He first stated that the process on the preservation issue has nothing to do with this appeal. He stated that having a demolition permit and permission from the Preservation Commission does not give one license to violate the zoning by-law.

Zoning Board of Appeals Chair Enid Starr stated that she wanted to hear from Attorney Glick on Attorney Allen's comments on no door in the basement; that there is door to the staircase going downstairs; and the windows. Attorney Glick stated that he used the November 28, 2011 set of plans that were used for the issuance of the building permit. He noted that you

can see Building Commissioner Michael Shepard's own notations on the plans. He noted that he used the November 1, 2011 set of plans only to demonstrate their intent. Attorney Glick stated that I have no idea what they are building. He stated that it sounds like, from what Mr. Tepperman and Attorney Allen stated that they going ahead and doing whatever they want to do. He added they are not building according to their building permit and they do not have the right to do that.

Zoning Board of Appeals Member Jesse Geller asked if that issue wasn't a factual question. Attorney Glick stated that he didn't raise the factual question. He showed the actual permit and read from it stating that all work shall conform to the application and stamped plans. He stated that these are the plans that we appealed on and these are the plans that were submitted to Mr. Shepard's office. Attorney Glick stated that they don't have the right to change their plans. He noted that there is a basement door shown on these plans.

Zoning Board of Appeals Chair Enid Starr asked if it weren't entirely possible that that they have modified their plans. Attorney Glick noted that he did receive the two alternatives that Mr. Porter proposed from the Building Department. He added, however, that neither were endorsed or stamped. He added that if there have changes made to the plans he didn't receive them. He added that he feels sandbagged by this. He further added that he feels this is trial by surprise and it is also this notion that we can build whatever we want – it's not fair.

Attorney Glick stated that he believes that Mr. Porter undercut Attorney Allen's standing argument when Mr. Porter raised the notion that they had to go through the Trust's property to

get their driveway. Attorney Glick stated that Mr. Tupperman testified that there was only one day of chipping ledge.

Sam Pasternack, a resident of 46 Sargent Crossway, Brookline, Massachusetts, stated that he commutes on foot and has walked by the subject property for 36 years. He stated that the chipping away of the foundation went on for two weeks. He noted that it went the full length of the foundation.

Attorney Neal B. Glick stated we are not engaging in speculation. He stated that the zoning by-law, by its terms, deals with habitable space created by the intent or the design to create habitable space. He stated that Attorney Allen can call it speculation but we call it following the by-law. Attorney Glick stated that we have a record here of people trying to game the system in any way they can. Attorney Glick stated that what we know, as a matter of fact, is that third floor is designed for habitable space. He stated that if the Board takes Attorney Allen's argument to its logical conclusion we have seen what that creates – it creates Spooner Road. Attorney Glick referenced a house that was not built on Sargent Road and which was approved by the Building Commissioner. He stated that this is what happens when you allow the fantasy that a full basement carved out of ledge with an 8 foot ceiling is not going to be used as habitable space. He added that this is what happens when you allow the fantasy of a third floor to be called an unfinished attic when it is designed, intended and shown, on the first set of plans, as a finished occupied au pair suite. He noted that this does not require speculation but an analysis of the intent.

Zoning Board of Appeals Chair Enid Starr asked Building Commissioner Michael Shepard for a clarification on the plans. Building Commissioner Michael Shepard stated there are two sets of plans. One is dated November 1, 2011 and the other is dated November 28, 2011. He stated that the November 28, 2011 plans were the ones used to issue the building permit. Commissioner Shepard noted that once the building permit is issued people are not allowed to add things but are generally allowed to eliminate things. He noted that it is a lovely neighborhood and the houses in the immediate area are all about the same. He noted, however, that there is no getting around the fact that this is a big house. He stated that the original site plan did show two curb cuts. He noted that the one to the south east was the new one. He stated that the plan was to knock off the original driveway, go across the front of the house and come out of the new driveway. He stated that one we absolutely did miss the grading and he takes full responsibility for it but they decided not to do that. He added that the original curb cut is a pre-existing non-conforming condition, where any change to it would have to be approved by the Engineering Department and the Trust. He added that he was comfortable with the existing driveway. Commissioner Shepard stated that he has no idea what their intent is with the use of the basement. He noted that the windows are cellar sash and not casement. He added they were required to conform to the Town's new Stretch Energy Code By-Law. They had to perform an engineering study and that study's calculations were based on seven bedrooms – probably based on the November 1, 2011 plan. Commissioner stated that he has no idea what the intent is for the basement. He noted that the windows in the basement are cellar sash and not casement and it appears they are not intending to heat either the attic or the basement. Commissioner Shepard stated that the Building Department is vigilant about enforcing the use of non-habitable space and referenced a house on Woodland Road, formerly owned by a Red Sox player, that

languished on the market for more than two years for lack of a home theater. Commissioner Shepard stated that the court, in *Spooner*, correctly assumed that the space in question should be counted as habitable space. He noted that comparing *Spooner* to this case grates on him. He noted that there have been a lot of changes to the by-law since *Spooner*. He noted that we now have a definition of what an attic is; we now have a new definition of what decommissioning is; and we have a new definition of gross floor area. The Commissioner briefly described the history of the *Spooner Road* case for the Board. He stated that while the by-law was strengthened to prevent another *Spooner Road* he also believes that the intent of the ten-year rule in the by-law is not to penalize the people who own the property. Commissioner Shepard stated that the Building Department requires as built foundation plans for Sargent Beechwood and this property meets all setback requirements. He added that the Building Department requires certified height plans that are measured personally by him and that this property meets all the height requirements. Commissioner stated that all building plans are immediately put on line and that every attempt is made to ensure they conform to zoning. He added that while communication has improved he doesn't have a crystal ball to determine what their intent is.

Jean Berg, a resident of 50 Sargent Beechwood, Brookline, Massachusetts, stated that the crux of the problem here is the ten year provision. Ms. Berger stated that it encourages developers to build larger and larger. Ms. Berg stated that Sargent Estates is a group of houses that pay taxes to the Town of Brookline.

Attorney Neal B. Glick briefly addresses the issue of section 5.22 of the zoning by-law. Attorney Glick stated that the ten year rule has nothing to do with this case. He stated that this

section does not allow a developer to build habitable space in anticipation of the by-law's ten year conversion – in fact it speaks to the conversion of non-habitable space into habitable space. He noted that the space in question is habitable space now and in ten years will continue to be habitable space. Attorney Glick stated that Section 5.22 is completely irrelevant in this case.

Attorney Robert L. Allen stated that he believes the argument that this property would cause injury to the pond and the road is a bit disingenuous. He noted the size of the Henry house on the old McCourt property and the fact it did not injure the road or the pond. Attorney Allen stated that you could fit this house inside the Henry house.

Zoning Board of Appeals Chair Enid Starr stated that she is hesitant to make a decision without looking at the property and suggested to the Board that they take a site visit.

Zoning Board of Appeals Member Jesse Geller stated that he would like to have a site visit and that it may be beneficial for Attorney Glick in order to prepare something for the Board on the standing issue.

Zoning Board of Appeals Member Mark Zuroff stated that he had visited the site today but did not have a chance to inspect the interior. He stated that a site visit was certainly appropriate and would definitely help.

Zoning Board of Appeals Chair Enid Starr stated that she would like to continue the hearing so that the Board can set up the site visit and provide Attorney Glick an opportunity to

present a brief on the issue of standing. Chair Starr stated that at the continued hearing the Board would conduct its deliberations.

Zoning Board of Appeals Member Jesse Geller stated that the site visit is solely for a site visit – to see what we have discussed. We will not be taking any testimony.

Zoning Board of Appeals Chair Enid Starr stated that she would like to have the attorneys present and any design professionals present in order to point out to the Board whatever the attorneys feel is relevant. Chair Starr stated that the site visit will occur at the property on Friday, March 2, 2012 at 3:00 P.M. She also stated that the hearing would be continued to Thursday, March 8, 2012 at 7:00 P.M. for deliberation only. Chair Starr stated that the attorneys have until Wednesday, March 7, 2012 to submit briefs on the standing issue.

Roger Servison, a resident of 59 Codman Road, Brookline, Massachusetts and a Trustee of the Sargent Trust, stated that Attorney Allen alleged that the Trust selectively enforced the FAR. He stated that was not the case. Mr. Servison stated that it was another house on Sargent Road that the Trust contested. He noted that the Trust did not contest the Henry house because it was on nine acres.

The public hearing was ADJOURNED at 9:15 P.M.

March 8, 2012

At 7:00 P.M. the public hearing of the Zoning Board of Appeals was called to order by Chair Enid Starr. Zoning Board of Appeals members present were Chairman Enid Starr, Board Members Jesse Geller and Mark Zuroff.

Zoning Board of Appeals Chair Enid Starr stated that at the requests of both parties, the hearing is re-opened for the purpose of continuing the hearing until April 12, 2012. Chair Starr also stated that a second site visit will be conducted on April 10, 2012. Chair Starr noted that at the hearing scheduled for April 12, 2012 no testimony will be taken and that the Board will only hear arguments on the issue of standing.

The hearing was ADLOURNED at 7:03 P.M.

April 12, 2012

Zoning Board of Appeals members present were Chair Enid Starr, Jesse Geller and Mark Zuroff. Zoning Board of Appeals Chair Enid Starr stated that this is a continuance of an appeal that was last heard on March 8, 2012. She stated that the evidence is closed and the Board is only considering the issue of standing which has been briefed by both parties. Chair Starr noted that the Board has conducted a site visit to the property in question. She noted that if the Board gets beyond the issue of standing then they will discuss the site visit and then deliberate on whether or not the appeal should be granted or denied. She noted that the appeal is predicated on two issues. The first is the issue of excessive FAR and the second issue is the pitch of the driveway. Chair Starr stated that, as to the issue of standing, the Sargent Road Trust has a presumption of standing as an abutter and that presumption is subject to rebuttal. She stated that the owner of the

premises has raised the issue that the Trust does not have standing. Chair Starr noted that case law is consistent, that once the issue of standing has been raised, the plaintiff, in this case the Trust, has the burden of going forward on the issue of standing. She added that the plaintiff has that burden at the outset and the burden does not change. Chair Starr asked Attorney Neal B. Glick if he wanted to discuss anything beyond what he presented in his brief.

Attorney Neal B. Glick, whose professional address is Donovan Hatem LLP, Two Seaport Lane, Boston, MA 02210, representing The Trustees of the Sargent Road Trust, stated that he very much disagrees with the Board's characterization of who has the burden and stated that he believes the case law is the exact opposite and is crystal clear. Attorney Glick added that there is no question that the Trust is an abutter.

Chair Enid Starr stated that it is clear that the property owned by the Trust namely the roadway and the shoulder abuts the property in question. Therefore, the Trust is an abutter.

Attorney Neal B. Glick stated that we do enjoy the presumption of standing. Attorney Glick noted that presumption is the first test in a three part test in standing analysis. He added that they are not cumulative – if you survive any of the three parts in the test then you are in. Attorney Glick stated that in order to rebut the presumption of standing the developer has the burden to produce evidence warranting a finding to the contrary of the presumption. It is the developer's burden, not just to raise the issue but they have to come forward with evidence proving such a charge.

Chair Enid Starr stated that she didn't just make up with her comment, reading from *Spooner*, Chair Starr states that the presumption of aggrievement conferred on abutters does not shift the burden of proof on standing.

Attorney Neal B. Glick stated that case does not hold what the Chair is saying. The burden always rests with the appellant. He noted that the presumption satisfies that burden. Attorney Glick stated that once the presumption is established, it is the other party that has to come forward with credible evidence to knock us off our perch of presumption and *Spooner* does not argue that. Attorney Glick noted that the developer can shift the burden back but to do so, they have to produce credible evidence. Case law tells us that it has to be expert affidavits to knock us from our perch of presumption. He added that the cases also say that the evidence has to be credible and affirmative evidence. Attorney Glick noted that such evidence should have been offered on March 1, 2012 when the developer first raised the issue. Attorney Glick stated that the developer essentially brought a motion to dismiss and he offered no evidence then, credible or otherwise. Attorney Glick stated that should be the end of the inquiry. The developer had his chance and he did not take advantage of it. Attorney Glick added, that even assuming that the Board would give him a reprieve, until he filed his paperwork on March 30, 2012, the developer still utterly failed to challenge the Trust's presumption with any creditable evidence. Attorney Glick stated that the developer gave us an affidavit from a real estate broker. He questioned the expertise of a real estate broker in connection with a zoning matter concerning FAR and driveway grade. He added that he could understand such an affidavit if this were a value case but there is nothing in the real estate licensing exam or in a brokerage practice which deals with zoning. They have no relevant expertise. Attorney Glick raised the issue that there

was no attached Exhibit 1 to his affidavit - plans which the broker claimed to have reviewed and the fact that the broker is from Newton and not familiar with the area. He stated that all the broker does is opine that the Trust will not be impacted by the project and offers no evidence for support. Attorney Glick stated that affidavit does nothing to knock the Trust from its perch of presumption of standing. Attorney Glick then stated that the Trust meets the third test and that is they are aggrieved persons. He noted that case law states that the term "person aggrieved" is not to be read narrowly. *Spooner* states that all the abutter has to do is make some general allegations of aggrievement. In the *Spooner* case all the abutter said was that the house was too big a house on too small a lot; it ruins a view; it would cause traffic and congestion; and the house does not fit into the neighborhood. That was all they claimed and they achieved standing. Attorney Glick stated that the Trust, in this case, has submitted an affidavit to the Board with all of those same allegations with much more specificity. They go into traffic, they go into density, they go into congestion far more than *Spooner*. Attorney Glick stated that if the Board wanted the Trust to go beyond the *Spooner* requirement then they should consider the issue of infrastructure. Attorney Glick stated that the Trustees own Sargent Beechwood, both above ground and below ground. On the ground they have to maintain the roadway, pave it, they have to deal with shoulders, they have to control speed, control curb cuts, patrol it with a private security force, deal with surface run-offs and field complaints from beneficiaries if their property is flooded eroded from the run-off from the roadways. He then stated that below the ground they have seven catch basins on Sargent Beechwood alone and a significant storm drain. The trustees have the obligation to maintain this storm drain. Attorney Glick stated that these are not *de minimus* matters. The Trustees spend hundreds of thousands of dollars regularly on these matters. He noted that in the Trustees affidavit a recent estimate on Sargent Beechwood alone was over \$200,000. He added

that these are matters unique to the Trustees. They and they alone are responsible to deal with these issues. Attorney Glick stated that these matters are directly related to floor area ratio. Simply put he said, the bigger the house the more impact on drainage, traffic and density. He added that the bigger the foundation the more water is going to be captured in the foundation drains shown on the plans and sent directly to the Trustees catch basin just opposite the property and then into the storm drain. Attorney Glick stated that there is no question that there is a direct link to the unique responsibilities of the Trustees. Attorney Glick stated that the Trustees have direct responsibility for the safety of their roadways. They can't have blind entrances and cars skidding on excessive grades onto their property. He stated that the grade of the driveway uniquely and significantly affects the safety of the roadway and uniquely affects the Trustees. Attorney Glick stated that the developer and the Building Department both admitted that both driveways exceed the 10% grade. He added that both the developer and the Building Commissioner want to say that one of the driveways is a pre-existing non-conforming condition. Attorney Glick stated that there is no such thing. He stated that you have a pre-existing non-conforming structure in the by-law and a pre-existing use in the by-law and both of those terms – use and structure – are specifically defined in the by-law. He added that you cannot have and you do not have a pre-existing non-conforming condition. He further added that a driveway is neither a structure nor a use. Attorney Glick also stated that there is nothing existing of the driveway. He stated that the developer took down the former house and the driveway – there is nothing left. If you tear it down you no longer have pre-existing status. Attorney Glick stated that there is another issued raised in the Trustees' brief and that deals with the Trust's truly unique and intrinsic values. He stated that these are the values that are associated with the historic design of Sargent Estate by Charles Sargent and Olmstead; the values associated with the historic

plantings on the roadways, some of which date back to the 19th Century; the values of the size and scale of the roadways that are required to be preserved under the terms of the Trust; the values of recreational walking or driving on the narrow country-like roadways; and generally preserving the ambience that makes Sargent Estate so unique. He noted that the estate has been recognized as unique and is on the National Register of Historic Places. Attorney Glick, in arguing that these values are more than just intangibles, stated that in 2001 the Trust sought an abatement of real estate taxes. He stated that the Town of Brookline argued that these intrinsic values could actually be quantified in a dollar value and the Town won the appeal. He added that anything that disturbs these values reduces the value of the Trust, and therefore, the Trustees are uniquely threatened by this development.

Chair Enid Starr stated that we are not taking anymore testimony and respectfully requested of Attorney Glick to wrap his remarks about standing. Chair Starr stated that his brief was very thorough and the Board has visited the site twice.

Attorney Glick stated that the intrinsic values that have been assigned a dollar value by the Town and are unique to the Trustees have been uniquely impacted if there is a floor area ratio violation.

Chair Enid Starr stated that the Board is not taking any more arguments on habitable space or FAR. Chair Starr stated that these issues were argued fully at the last hearing. She noted that we agreed that this hearing would be completely confined to the issue of standing and you have briefed all this.

Attorney Glick responded by saying that he hadn't briefed the Board on what he was about to say and begged the Board's indulgence. He stated that the bulk and the density of the situation matters concerning standing. What we do care about is that if you allow the footprint to be larger...

Chair Enid Starr asked Attorney Glick to stop. She stated that we are dealing with floor area ratio as defined and we are not dealing with the bulk of the building. She asked Attorney Glick to finish his presentation.

Attorney Glick asked if it was the Chair's position that floor area ratio doesn't deal with bulk?

Chair Enid Starr stated that floor area ratio is defined in our by-laws and we are going to follow our by-laws.

Attorney Glick stated that the by-laws, as interpreted by this Board of Appeals and its previous decisions and by Town Counsel, agree that floor area ratio is to restrict the size of single family homes and to regulate bulk and density. In Summary, on standing, we meet all three levels. We have the presumption of standing and the time to rebut that has passed, and that we have also met the "person aggrieved" standard on the issues of infrastructure, safety and intrinsic value.

Chair Enid Starr asked for a brief recess.

The public hearing was called back to order and Robert L. Allen, whose professional address is The Law Offices of Robert L. Allen, 300 Washington Street, Brookline, MA 02445, addressed the Board. Attorney Allen stated he relies heavily on his brief for the argument on standing but he noted that while the evidence is closed he heard for the first time this evening why the Trustees were aggrieved. He stated that he is concerned that they are now trying to bring in evidence. Attorney Allen stated that when the building permit was issued no homeowner appealed. He added that notice was sent and again no homeowner appealed. He noted that the house next door, that the Board saw on its site visit, was built in 2002, was the same bulk and on a similar lot and no one appealed that permit. He added that according to the Town's records there hasn't been one issue regarding to density, drainage or traffic. Attorney Allen stated that in preparing his brief he was trying to figure out how the Trustees were aggrieved since they failed to put in their initial pleading why they have standing. Attorney Allen noted that under MGL, Chapter 40A, section 11, "parties in interest" are entitled to presumptive standing. He suggested that the Board should read "parties in interest" literally. He stated that the chapter states that "parties in interest" shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within 300 feet of the property line of the petitioner. He noted that the petitioner in this case is the person pulling the building permit – in this case his client. Attorney Allen argued that if abutter was to be construed the private street in front of it you wouldn't need the language "owner of land directly opposite". He stated that the language is very clear and that there isn't much need to get into too much debate. He argues that the language did not intend for a private way to be an abutter. Attorney Allen stated that the

real estate broker was the best person at the time to provide an affidavit without having understanding of how the trust was aggrieved since they failed to note it in the pleading. He ended by stating that he would rely on his brief for the remainder of argument.

Attorney Neal B. Glick stated that MGL, Chapter 40A, section 11 has nothing to do with standing. He noted that standing is a case law or common law concept. Attorney Glick stated that Attorney Allen has some bizarre notion of who is a petitioner under Chapter 40A, section. Attorney Glick stated that section is about who receives notice of a zoning proceeding before this Board. He added that the Trust does not need notice since they brought the matter before the Board. Attorney Glick stated that case law does not define abutter "as defined by Chapter 40A, section 11." He stated that it is an absurd notion to incorporate an Assessor's record, mentioned in Chapter 40A, section 11 in a standing issue. Attorney Glick stated the Chair had remarked that the Board would not be accepting new evidence and he question what was that. He stated that Attorney Allen had given evidence of the house next door, the evidence of no appeals of the building permit. He argued that if that isn't new evidence he doesn't know what is.

There was a comment from the audience and Chair Enid Starr stated that the Board is not accepting new testimony this evening.

Zoning Board of Appeals Member Jesse Geller stated that he doesn't believe that there is a significant question concerning standing. Mr. Geller stated that he believes that the Trust does have standing; that they are an abutter; that they have significant interests in landscaping; and it is clear that those interests are unique. He stated that the Trust is not your vanilla, run of the mill

organization of property owners. He stated that they are charged with maintaining the roadways and maintaining a certain suburban charm with the landscaping. Mr. Geller stated that he doesn't see the argument that because the Trust has no structures that they lack standing.

Zoning Board of Appeals Chair Enid Starr stated that she doesn't think that there is any question that the Trust is an abutter. Chair Starr stated that she believes, however, that the Trust has to show special injuries. She stated that the special injury, in their capacity as an abutter, deals with the road and the landscaping of the shoulder. Chair Starr stated that she personally finds it a stretch to say that the FAR issue is a special injury to the trust which has standing as an abutter. She added that the FAR issue may be a special injury to the house next door but the house next door is not a plaintiff in this case. She stated that *Spoooner* addressed the special interest of the property owners on either side of the offending building which affected the view of one property owners. Chair Starr stated that she is hard put to see how the Trust's interest's in the roadway affects their view on the issue of FAR. She added that she does see the Trust's interest in the roadway being affected by drainage from a zoning violation of the driveway. That provides a nexus.

Zoning Board of Appeals Member Jesse Geller asked the Chair if she didn't believe that the Trust was charged with maintaining a certain ambience. Chair Starr stated that she doesn't believe that she finds that in the zoning by-law.

Zoning Board of Appeals Member Mark Zuroff stated that he also believes that the Trust has standing as to zoning issues. He added that he also agrees that the FAR does not affect the

roadways but that the roadways are affected by the drainage issue from the grade of the driveway and believes that the Board can deal with that issue within the requirements of the zoning by-law.

Zoning Board of Appeals Chair Enid Starr stated that she is comfortable giving the Trust standing from that point of view. She added that she would have to be convinced that excessive FAR, if it is excessive, affects their special interest in the roadway. She added that the landscaping of the shoulder is not affected by any house on the roadways. She further added that the shoulder is only ten feet and she questions whether the house in question or any other house in the estate impedes on that ten feet – which is the limit of the Trust's interest.

Zoning Board of Appeals Member Mark Zuroff stated that the Board is only dealing with the building permit and whether or not it has been properly issued. He added that we are not dealing with the effect of the drainage. He stated that issue is left to the determination of the Building Department and if they determine that the drainage is sufficient then that wouldn't necessarily affect the roadway.

Zoning Board of Appeals Chair Enid Starr stated that she has difficulty tying in the FAR to the drainage. She stated that she can visualize more of a problem with a ranch house that has more impermeable foundation than a larger house with two or three stories.

Zoning Board of Appeals Member Jesse Geller stated that he doesn't necessarily see a link between FAR and drainage.

Zoning Board of Appeals Chair Enid Starr stated that as to the driveway, she believes that it is a pre-existing driveway. She added that, under the by-law definitions, use is defined as the purpose for which land or building is arranged, designed or intended or for which either land or building is either occupied or maintained. She stated that it seems to her that a driveway which is on land or a formation of land and is paved over, qualifies as a use. She added, if that driveway was a pre-existing use that should be something we should consider under Section 8.02. Chair Starr stated that as to the roadway and drainage issues the Trust has standing.

Zoning Board of Appeals Member Mark Zuroff agreed with the Chair that there is sufficient evidence that the Trust has standing along with the fact that they are an abutter and, therefore, the Board has the right to opine on it.

Zoning Board of Appeals Chair Enid Starr stated that she would go along but she is unsure the Trust can show a special interest in order to get standing.

Zoning Board of Appeals Member Jesse Geller stated, forgetting for the moment whether this exceeds FAR, the Chair is raising a separate issue whether it fails on the secondary requirement for standing. Mr. Geller stated that it is his view that they have standing.

Zoning Board of Appeals Chair Enid Starr stated that we should talk about FAR and see if we need to have a whole esoteric legal argument on whether they have a special interest. Chair Starr stated that she believes that the Board can stipulate that the building meets the height

requirements, open space and all the set-back requirements. She added that she is willing to take the position that the driveway and its excessive slope is a pre-existing condition or use under the Town's by-law.

Zoning Board of Appeals Member Mark Zuroff stated that he doesn't disagree with that but noted that originally there were two driveways.

Zoning Board of Appeals Chair Enid Starr stated that plans change all the time. She stated that it seems to her that it is not anything sinister. Plans change all the time to avoid violations.

Zoning Board of Appeals Member Jesse Geller stated that should this Board determine that there is no FAR violation then it is incumbent on the owner of the property to file an amended plan – whatever it is they are building. He stated that it seems whatever they are building there is not on file with the Building Department.

Zoning Board of Appeals Chair Enid Starr agreed and added that she doesn't think it is that unusual to amend the plans as they move forward. Chair Starr stated that the Trust's own architect, based on his calculations, stated that if the attic and the basement are not habitable then the building meets the FAR requirements.

Zoning Board of Appeals Member Mark Zuroff stated that the Building Department's own calculations have confirmed this.

Zoning Board of Appeals Chair Enid Starr stated that it is up to this Board to decide whether the attic and the basement are habitable or not. She stated, based on the site visit, that the basement is not habitable. She added, the way it is presently constituted, that the attic isn't habitable either. She stated that in the attic you have ducts in the middle of the floor and you have two small windows. She added that what they may do six years from now or even ten years from now, this Board cannot be expected to know. She added that this is a totally different situation from the *Spooner* house. In that instance it was obviously going to be a finished room.

Zoning Board of Appeals Member Jesse Geller stated that it is clear that the basement is not habitable space. He stated that what was constructed down there appears to him as intent not to use the basement as a habitable space. He noted that the mere fact that somebody decides to excavate out a basement or to create a high ceiling is not, in and of itself, a disqualification. He added that, assuming it meets FAR standards and assuming there is no indication that there is intent to use it as habitable space and circumvent our FAR requirements, we would not want to promote a Town where every structure has a slab and a flat roof. He stated that having seen the windows and lack of proper secondary egress in the basement in particular, he saw no intent for habitable space. Mr. Geller stated, with respect to the attic, he didn't see the same issues at this property that he saw in the *Somerset* case which he also sat on. *Somerset* was two steps up to a large open space. He did, however, emphasize that he was not convinced by the staging of the ductwork in the attic at this property and is discounting all of that but that the fact there are only two dormers in the attic tends to suggest that the space is not intended for habitable space – regardless of the original intention.

Zoning Board of Appeals Chair Enid Starr stated that she agrees. She noted that there are no light fixtures and no plumbing.

Zoning Board of Appeals Member Jesse Geller stated that it is early in the construction and that he can't use that as a basis for his conclusions.

Zoning Board of Appeals Member Mark Zuroff stated that he believes it was their intent, when they designed the size of this space, was to make it habitable. He added that as it stands now it is not habitable. Mr. Zuroff also stated that the staging and the placement of the ductwork was a little offensive. He noted that it clearly it was temporary and he wasn't fooled by it. Mr. Zuroff stated that the occupancy permit will be issued, or not, based ultimately on what is built.

Zoning Board of Appeals Member Jesse Geller stated that he wanted to address a question that was raised by Attorney Glick and that is what we saw was the attic or whether or not there was something above that space.

Zoning Board of Appeals Chair Enid Starr stated that she believes it doesn't make a difference. Chair Starr stated that because you have such a high-peaked roof where you floor it off to create an air space above it – essentially creating an attic over an attic.

Zoning Board of Appeals Member Jesse Geller stated that he believes the question is relevant, particularly if the height level in this space is 9 feet above what we saw. Mr. Geller

asked Chief Building Inspector Michael Yanovitch if there was an attic definition in the Building Code. Mr. Yanovitch stated that there is no definition in the Building Code just a minimum of access to a space which it is anything over 30 inches in height or 30 square feet.

Zoning Board of Appeals Chair Enid Starr stated that the issues in this case are very different from *Spooner* or *Somerset* – they were shams.

Zoning Board of Appeals Chair Enid Starr stated that it is the consensus of the Board that the Trust has standing as to the issue of drainage affecting the roadway and the catch basins. She added that the Board did not make a decision as to whether or the Trust has standing based on a special injury based on FAR. She added the reason this decision was not reached was because the issue was moot based on the Board's own observations during the site visit. Chair Starr stated that the Board determined that neither the basement nor the third floor were habitable space as defined under our by-law. She added that they should thus be excluded from the computation of FAR. She further added that the calculations by both the architect of the Trust and the Building Department concluded that the FAR of this building does not exceed the requirements of our zoning, as long as the basement and the attic are not habitable space. Chair Starr, referring to the slope of the driveway where the Trust did show special injury, stated that the Board has determined it is a pre-existing non-conforming use and, therefore, no changes to the driveway need to be made.

Upon motion made and duly seconded, it was UNANIMOUSLY

VOTED: To deny the appeal of the Trustees of the Sargent Road Trust of the Building Department's issuance of Building Permit #BP-2011-1765, dated December 5, 2011 for 31 Sargent Beechwood.

The public hearing was DISSOLVED at 9:25 P.M.

Unanimous Decision of
The Board of Appeals

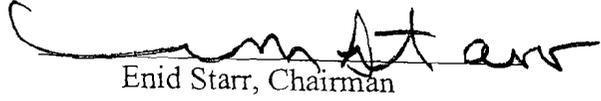
RECEIVED
TOWN OF BROOKLINE
TOWN CLERK

8:00
Filing Date: June 01, 2012

True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeals



Enid Starr, Chairman

