

BOARD OF APPEALS
Enid Starr, Co-Chair
Jesse Geller, Co-Chair
Robert De Vries

Town of Brookline

Massachusetts

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Brookline, MA 02445-6899
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Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2011-0004

Petitioner, 81 Spooner Road LLC, applied to the Board of Appeals to seek relief from a decision of the Building Commissioner dated November 29, 2010.

On February 3, 2011, 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 3, 2011, at 7:15p.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 10, and 17, 2011, 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: 81 Spooner Road LLC
Owner: FREDERICK AND REBECCA VELANDER

Location of Premises: **81 SPOONER RD**
Date of Hearing: **March 17, 2011**
Time of Hearing: **7:30PM**
Place of Hearing: **Selectmen's Hearing Room, 6th. floor**

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

To consider an Appeal of the decision of the Brookline Building Commissioner dated November 29, 2010 relative to 81 Spooner Road

Said premise located in a **S-10 (single-family) residence** district.

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.

**Enid Starr
Jesse Geller
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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, Jesse Geller and Board Members Enid Starr and Jonathan Book. The Petitioner, was represented by Attorney Jeffrey P. Allen, Denner Pellegrino LLP, 4 Longfellow Place, 35th Floor, Boston, MA 02114.

This is an appeal of the decision of the Building Commissioner, dated November 29, 2010, declining enforcement action against the owners of 81 Spooner Road with respect to compliance of the Zoning By-laws.

Attorney Jeffrey P. Allen, of Denner Pellegrino LLP, 4 Longfellow Place, Boston, Massachusetts 02114, representing the applicant 81 Spooner Road LLC, waived the reading of the notice.

Zoning Board of Appeals Member Enid Starr stated that she recently had neck surgery, but believes she is both able and capable to sit and hear this case. She asked if anyone had any objections. Attorney Allen stated that neither he nor his clients had any objection. There were no further comments from anyone in the audience.

Attorney Jeffrey P. Allen stated that he represents 81 Spooner Road LLC which is the owner of record for 71 Spooner Road. Attorney Allen presented to the Zoning Board of Appeals a three-ring binder containing copies of various documents pertaining to this appeal. Chairman Jesse Geller accepted this three-ring binder as Exhibit One.

Attorney Allen stated that his clients had requested an enforcement action for 81 Spooner Road and it had been rejected by the Building Commissioner. Attorney Allen noted that most, if not all, of the operative facts in this case occurred while Commissioner Shepard's predecessor was in office. He added that Commissioner Shepard's only involvement is producing Exhibit 2 in the three-ring binder – the rejection letter. Attorney Allen stated that this case involves a confusing and ever changing by-law on Floor Area ratio (FAR). Attorney Allen stated that he believes Building Department staff made an honest effort to interpret that by-law. He added that although a mistake was made, we are not being critical of them. However, this mistake places his clients in an impossible situation. Attorney Allen stated that his clients sought and followed every directive of the Building Department, yet they are left with a legal morass that has resulted in law suits and a half-built house for several years. Attorney Allen noted that his clients had a building permit and they sought guidance from the Building Department and received that guidance, at every critical step. Attorney Allen directed the Board's attention to the November 29, 2010 rejection letter of the Building Commissioner. He stated that the first sentence of the second paragraph, which states "In fact, the recent Appeals Court decision makes it clear that it was the developers' actions that rendered the original lot and house at 81 Spooner Road non-conforming." is not accurate. Attorney Allen stated that he suggests that when the Zoning Board of Appeals understands the facts that they will come to the conclusion that sentence is wrong.

Attorney Allen stated that he wished to explain that there are two issues that are not in dispute this evening. The first is that the abutters claim that if you include the attic space as habitable space then it is over FAR, however, this matter is not before the Board. The second issue is the matter of infectious invalidity. Attorney Allen stated that the lot was subdivided with 81 Spooner Road being the only house. The tract of land was subdivided by an ANR. He stated that the second claim is that 81 Spooner Road has too much FAR for the lot it is left on, thus the subdivision rendered it non-conforming. He added that the lot created by the subdivision is infected with the invalidity and becomes an unbuildable lot. Attorney Allen stated that his clients claim that 81 Spooner Road should have been compliant and the only reason that it is not compliant is due to the actions of the purchasers, and they should be forced to bring 81 Spooner Road into compliance. Attorney Allen added that the Building Department ordered that and nothing ever happened. Attorney Allen stated that what his clients are asking is for the Zoning Board of Appeals to do what was ordered in 2006, thus removing the infectious invalidity.

Attorney Allen stated that this case has a long and sordid history. He noted that everyone refers to his clients as the developers. He stated that they are not developers. He stated that they are three individuals Alan Kaplan, Timmy Kelleher and Dennis Cronin. Two of the three have lived their entire life in the Town of Brookline - one is a plumber, one is an electrician and one owns a restaurant. Referring to Exhibit 5 in the three-ring binder, Attorney Allen stated that this matter began when his client's neighbor, Mr. Fogg, sent a letter, dated May 16, 2005, to the Building Department asking for enforcement of the zoning by-law. Mr. Fogg asked that the Building Permit that had been issued to his clients, be rescinded. Referring to the same exhibit in the three-ring binder, Attorney Allen noted that the Building Commissioner, in a letter dated May 31, 2005, denied the Fogg request. Referring to Exhibit 6 in the three-ring binder, the Zoning Board of Appeals, on November 2, 2010, issued a decision on the Mr. Fogg's appeal of the Building Commissioner's denial to rescind the Building Permit for 71 Spooner Road. Attorney Allen noted that the Zoning Board of Appeals upheld the decision of the Building Commissioner and dismissed the applicant's claim of infectious invalidity. Attorney Allen read

aloud the last two paragraphs on page 2 and the first paragraph, in part, on page 3 of that Zoning Board of Appeals' Decision to bring the Board's attention to this issue.

Attorney Allen then noted that the decision was appealed to the Land Court and that decision upholds the Board and the Building Commissioner on this issue. Attorney Allen stated that the Land Court concluded that the ruling of the Brookline Zoning Board of Appeals that a Building Permit would be allowable at 71 Spooner Road on the condition that all the interior finish on the third floor of 81 Spooner Road be removed. He added that the court goes on to say on this issue that the non-conformity was created by the division of 71 Spooner Road and, therefore, 71 Spooner Road is a non-conforming lot as a result of infectious invalidity. He added that 71 Spooner Road could be made conforming by the removal of all the interior finish from the third floor of the house at 81 Spooner Road and a Building Permit may be issued for 71 Spooner Road provided that such a condition is satisfied. He added, that the court's decision states "...accordingly the decision of the Brookline Board of Appeals is affirmed." Attorney Allen stated that the problem is the Velanders never removed the finish and, in fact, they completely built out the third floor without a Building Permit. He added that his clients may have to tear down their three-quarter-built house because their neighbors did not do what was required. He stated that something is wrong.

Referring to Exhibit 8 in the three-ring binder, Attorney Allen stated that the Land Court decision was appealed and that the Massachusetts Appeals Court affirmed, but noted under Footnote 32 that "71 Spooner Road could be made conforming by the removal of all interior finish from the third floor of 81 Spooner Road." Attorney Allen added that it doesn't end there. He stated that there is the issue of standing. Referring to Exhibit 9 in the three-ring binder, Attorney Allen stated that they have submitted an application for appellate review on the issue of standing before the Supreme Judicial Court. He noted that the Supreme Judicial Court granted the application and a copy of the order can be found as Exhibit 10 in the three-ring binder. He stated that the issue of standing will be decided in the not too distant future. Attorney Allen noted that the Supreme Judicial Court, since the acceptance of their application, has come down with

two substantial rulings on standing for Chapter 40A. It is an area of zoning law that has received a great deal of attention from the Supreme Judicial Court.

Attorney Allen stated that to understand this complicated matter we must go back to the Zoning Board of Appeals' decision based on the premise that the third floor space at 81 Spooner Road was uninhabitable now or was to be made uninhabitable. Attorney Allen stated that if it had been made uninhabitable or decommissioned, according to the Building Permit that was issued to decommission the space, then there would not be a problem. However, Attorney Allen noted, the Velanders built it out so no one can prove that it was uninhabitable – the evidence, so to speak, was destroyed. Attorney Allen added that there is no suggestion that these people were innocent. The Velanders knew of this issue when they purchased the house or that it could be an issue. Referring to Exhibit 12 in the three-ring binder, Attorney Allen stated that this rider to the Purchase and Sale Agreement, executed by the Velanders and his clients, indicates in paragraph 46 that the actual square footage of the living space may be reduced to meet FAR requirements. He added that in paragraph 33 of the Rider to the Purchase and Sale Agreement, a copy of which can be found at Exhibit 12, in capital letters, it authorizes the buyer to apply to the Building Department for a Building Permit to build out the third floor. Attorney Allen stated that his clients put the Velanders on notice and that there is no question about that. Attorney Allen stated that his clients did not reduce the area themselves because the Town of Brookline told them they did not have to. Referring to Exhibit 11 in the three-ring binder, Attorney stated that Building Inspector James J. Kirby, in sworn testimony, testified that he made that decision. Attorney Allen added that his clients, with extreme caution, had him go out to inspect 81 Spooner Road and that Mr. Kirby told them that the third floor was uninhabitable. Attorney Allen stated that after purchasing the house, the Velanders went to the Town for a Building Permit to remove the finishes on the third floor. He noted, despite that, nothing was done. In fact, Attorney Allen stated, despite the Building Permit to remove the finishes, Mr. Velanders did the exact opposite. Referring to Mr. Velanders' sworn testimony in Exhibit 14 of the three-ring binder, Attorney Allen stated that Mr. Velanders did not remove the finishes but instead he painted the area, installed electrical outlets, retiled the bathroom floor, installed a new sink, a new toilet, and new drywall. Attorney Allen stated that Mr. Velanders did this all without a Building Permit.

Referring to Exhibit 15 in the three-ring binder, Mrs. Velanders, on May 24, 2006, received both a notice of violation of the State Building Code and a notice of violation of the Zoning By-Laws from the Town of Brookline. Attorney Allen stated that nothing has happened as a result of these notices. Attorney Allen stated, for all this, without the action of the Zoning Board of Appeals or the action of the Supreme Judicial Court, his clients will have to pay a multi-million dollar fine. Attorney Allen stated that his clients did nothing wrong. He noted that when questions arose about FAR - they went to the Building Department. When they had to make a determination - they had the Building Department come out to 81 Spooner Road and tell them what was included and what wasn't. Referring again to Exhibit 11 in the three-ring binder, Attorney Allen stated that Mr. Kirby was asked if he had an opinion whether the third floor in 81 Spooner Road was habitable space. Mr. Kirby testified that it was uninhabitable. Attorney Allen stated that says it all.

Chairman Jesse Geller asked Attorney Allen isn't this matter subject to litigation that has already been decided. Attorney Allen stated that it wasn't. He said that this is a request for enforcement. Attorney Allen stated that his clients are saying that the Zoning By-laws should be enforced – the Velanders built the third floor illegally and they should take it out. He added that it is the existence of that third floor that makes his client's property invalid – unbuildable.

Zoning Board of Appeals Member Enid Starr then asked isn't this *res judicata* where every single one of these issues has been heard and litigated in the Land Court and affirmed by the Appeals Court. She stated that as to these factual issues that have been raised, they have already been litigated and your remedy is not for zoning relief but contractual relief or possibly fraud. She stated that she was at a loss why this is before the board.

Attorney Allen responded by stating that he is asking the Zoning Board of Appeals to enforce the Zoning By-Law – that things can't be built illegally. Attorney Allen stated that the issue of whether or not 81 Spooner Road's third floor was properly built out has never been litigated. He added that if you read Footnote 31 (sic) in the Appeals Court Decision and if you

read Judge Trombley's decision, they both carve that issue out and say that it is not binding on 81 Spooner Road but the Velanders were not a party so it can't be *res judicata*.

Town Counsel Jennifer Dopazo Gilbert read the entire Footnote 32 of the Appeals Court decision aloud, stressing the last sentence: "This observation has no binding effect on the homeowners who were not a party to this action." Town Counsel Gilbert also stated that while Building Inspector James Kirby had an opinion on whether the third floor of the original house was habitable or not, Judge Trombley didn't agree with that testimony, in fact, he stated in his decision that prior to the sale to the Velanders the third floor of the house contained two bedrooms, a bathroom and some unfinished space. Town Counsel Gilbert stated that Judge Trombley went further by stating that "[e]ven though the third floor rooms may not have been completely refinished, they are a far cry from the bare joists, wall studs, and roof rafters of an unfinished attic frame. Moreover, reasonable minds may differ on the interpretation of habitable space, and therefore, the board's interpretation must prevail. Accordingly, the finished rooms of the third floor are not an attic, within the meaning ofthe Brookline Zoning By-Law..." Town Counsel then emphasized that the non-conformity was in existence at the time the parcel was sub-divided. She stated that she believes that Attorney Allen stated that the only reason that 71 Spooner Road was non-conforming was because of the actions of the Velanders when, in fact, both courts have found that the lot was non-conforming when subdivided. She directed the Board's attention to Footnote 31 of the Appeals Court decision, which refers to the *Alley* decision, which finds for a local Building Inspector who refused to issue a permit for a new lot that became non-conforming when sub-divided.

Attorney Allen stated that he respects the opinion of Town Counsel but noted that Town Counsel is adverse to his clients since she represents the Town of Brookline. He added that she has done a great job but she has proven my point that this is not *res judicata*. Citing Footnote 32, Attorney Allen stated what the court is saying is that once you remove the finishes it becomes a buildable lot. He added that it can't be *res judicata* since the Velanders were not a party. He further added that where he does agree is that the Supreme Court's Decision could make this moot.

Zoning Board of Appeals Member Enid Starr asked Attorney Allen if he disagreed that every single factual matter raised by him this evening has been heard and adjudicated by the Land Court and the Supreme Judicial Court. Attorney Allen stated that he absolutely disagrees. He stated that the Zoning Board of Appeals based their decision on the premise that they were decommissioning the space – thus the Zoning Board of Appeals has never heard this matter. Attorney Allen stated that what his clients are seeking, which hasn't been sought anywhere, is the removal of the finished third floor at 81 Spooner Road. Attorney Allen added that his clients had every reason to believe it would be done because of the Town's citations. He further added that the Town has cited the Velanders for that illegally built space and it is that space that is causing the infectious invalidity. Attorney Allen stated that it doesn't matter what the judge said because the Velanders did the exact opposite on what the Building Permit allowed. It is clearly illegal. Attorney Allen noted that Mr. Velanders stated, under oath, that he called the Building Department and he was told to just go ahead – that he did not need a Building Permit. Attorney Allen added that given the number of permits and citations issued by the Building Department, he finds that hard to believe.

Attorney Allen stated that there are two remedies. First an order requiring the removal of the third floor finishes and enforcement of the by-law or the Velanders seek zoning relief for their third floor. Then the zoning issue will have to be addressed. Attorney Allen stated that his clients may not resist at that time. Attorney Allen added that his clients will go bankrupt, noting that one has already lost his home because of this matter, because they can't pay the taxes and they can't pay their taxes because they listened to the town. Attorney Allen noted that when that happens the Velanders are going to cure their problem by either buying his clients' land or by seeking relief. Attorney Allen stated that there is no question that space was illegally built, that it exceeds the FAR and that it violates the Zoning By-Law. He stated that he doesn't understand why we are here this evening because the citation for the violations for the third floor have already been issued. Attorney Allen stated that this is a travesty and what has happened to his clients is unbelievable.

Chairman Jesse Geller asked if there was anyone present who wished to speak in support of this application. There were none.

Zoning Board of Appeals Member Enid Starr suggested that counsel for the Velanders should reply now.

Chairman Jesse Geller asked Building Commissioner Michael Shepard and Attorney Jeffrey P. Allen if they objected to hearing from the counsel for the Velanders now. Neither Building Commissioner Shepard nor Attorney Allen objected.

Attorney Jacob Walters, whose professional address is Goldenberg & Walters, 7 Harvard Street, Brookline, Massachusetts, representing Frederik and Rebecca Velanders, owners of 81 Spooner Road, Brookline, Massachusetts, stated that it is important to talk about the history of this property. Attorney Walters stated that the owners prior to the applicants lived in the house for many years and there were bedrooms on the third floor which had been occupied at least since 1946. Attorney Walters added that a portion of the third floor became an artist studio when the children moved away. Attorney Walters stated that when the Velanders bought 81 Spooner Road the third floor was perfectly habitable. He noted that the owners prior to his clients, the applicants, when they sought sub-division informed the Planning Board that the attic would be decommissioned. Attorney Walters stated that his clients came along and purchased the property in 2005. Attorney Walters produced three affidavits, one each from the real estate agent, the closing attorney and the Velanders who were the purchasers. Attorney Walters stated that each of these affidavits, as well as the listing sheet submitted in a memorandum to the Board from Attorney Wagner, clearly show that this house was marketed as having three floors. He added that both the sellers and the broker were aware that the Velanders would use that third floor.

Attorney Walters stated that the Building Permit is an issue of concern. Attorney Walters stated that his clients did obtain a Building Permit but no record of it can be found at the Building Department. He noted that the electrical inspector had signed off on the work. Attorney Walters also stated that the applicants never came to his clients to tell them they had to

decommission the third floor. Attorney Walters said that his clients really didn't want to be a part of this but they find themselves embroiled in it anyway. He said that it is outrageous for his clients, who have paid a lot of money for this house, to reduce the space that has always been used as a third floor. Instead, Attorney Walters stated, that the applicants told the Zoning Board of Appeals that it was an attic being decommissioned. Attorney Walters noted that at no time did the applicants come to his clients and tell them they had to decommission the third floor – it never happened. He added that to even suggest, after paying a lot of money for this house and then to reduce it by a third – is laughable. Attorney Walters noted that while there is language in the Purchase and Sale Agreement, portions of that agreement do not survive the closing. He stated that his clients had no idea that this was an issue going forward – it was never discussed with them.

Attorney Walters stated that he has great respect for the Building Department but there are two major concerns. The first is the testimony that was given to the court by Building Inspector James Kirby. Attorney Walters stated that he is being charitable when he says that Mr. Kirby's testimony was wrong. Attorney Walters also noted that in May 2005, a couple of months after his clients purchased the property, Mrs. Velandar, at Mr. Kirby's request, signed a blank Building Permit application. He noted that nobody told her that this application was to decommission of the third floor. He noted that why would the Zoning Board approve an FAR permit based on something that would occur in the undetermined future – it is just not believable. Attorney Walters stated that in 2006 his clients received a notice of violation and appealed immediately. He stated that at the Zoning Board hearing they were told that this matter was in litigation and there will be resolution one way or another in the near future. He added that it only seems appropriate that we wait until all this litigation is over before his clients seek relief.

Attorney Walters stated that his clients did absolutely nothing wrong at every stage of the process. He noted that the habitable space in the third floor was always there and that all his clients did was clean it up, paint it, and add some lights and it was properly inspected by the Building Inspector and the Electrical Inspector. He added that much of the work didn't require a permit. Attorney Walters added that the bottom line here is that while his clients are being told

one thing, the Board is being told something different. He added that his clients did nothing wrong and that taking a third of their house away in order to solve somebody else's problem is an unacceptable solution. Attorney Walters stated that the definition of the attic is clearly not the habitable space on the third floor that his client's children have been occupying since they bought the property. Attorney Walters urged the Zoning Board of Appeals to take no action on this application. Attorney Walters then produced three letters in support of his clients' position.

Attorney Jeffrey P. Allen, rising for a procedural issue, stated that the attorney for the Fogg's has every right to speak when the hearing is opened up to the public but he is not a party to this proceeding and shouldn't speak before Commissioner Shepard.

Zoning Board of Appeals Member Enid Starr stated that it was her suggestion that Attorney Wagner speak before the Building Commissioner testified simply for context. She stated that she believed that it was easier for the Board to hear three arguments in a row.

Attorney Allen stated then if that is the case he would like to respond briefly before the Board opens the hearing to the public.

Zoning Board of Appeals Chairman Jesse Geller stated that he would like to hear from Building Commissioner Shepard at this time.

Attorney Allen requested a brief three minute recess.

At 8:18 P.M. Zoning Board of Appeals Chairman Jesse Geller granted a short recess.

At 8:21 P.M. Zoning Board of Appeals Chairman Jesse Geller called the hearing back to order. Chairman Geller stated that the three affidavits, submitted by Attorney Walters, were accepted by the Board as Exhibits 2A, 2B and 2C and that the letters of support he submitted were accepted as Exhibits 3A, 3B and 3C. Chairman Geller also stated that the Board would like

to keep this hearing to a reasonable time and if it were not resolved by 9:00 P.M., that the Board would reconvene the hearing to another day.

Building Commissioner Michael Shepard stated he cannot represent that anyone did anything right nor can he represent that anyone did anything wrong. He added that if certain practices of the Building Department occurred in the past – they are not practiced now. Commissioner Shepard stated that on its face this is not entirely a zoning issue. There are some civil law issues here that probably need to be resolved. He noted that historically, we had decommissioned attics by simply putting a lock on the door but added that we don't do that anymore. Commissioner Shepard stated that now decommissioned space counts towards FAR as there have been many changes to the Zoning By-law. Commissioner Shepard stated that he has no direct evidence that anything was untoward by the Building Department. He noted that it is a sad thing for the Velanders, the builders as well as the Town of Brookline. Commissioner Shepard noted that the concept of infectious invalidity appeared to be a foreign concept in Brookline when he first became Building Commissioner. He noted that we have had two or three cases since this one regarding subdividing and building on the newly created lot. He added that one of those cases was not more than 100 feet away from this property. Commissioner Shepard stated that Attorney Walters was correct in terms of permitting. He stated that the only work on the third floor at 81 Spooner Road, that may have required a Building Permit, was the drywall installation. He added that he doesn't know whether a Building Permit was issued for this work or not. Commissioner Shepard ended by stating that this problem was caused by the sub-division of the land. He noted that the Planning Board when they grant an ANR plan they do not look at these zoning issues, only whether it has access on a way and lot size. He added that while the Planning Board endorses the plan they state that it may not necessarily meet all the zoning requirements.

Zoning Board of Appeals Chairman Geller asked the Board if they had any questions. There were none.

Zoning Board of Appeals Chairman Geller then asked if there was anyone present who wished to speak in favor of the decision by the Building Commissioner. Attorney James Gray Wagner, whose professional address is Conn, Kavanaugh, Rosenthal, Peisch & Ford, Ten Post Office Square, Boston, Massachusetts, representing Frances K. Fogg and George P. Fogg III. Attorney Wagner stated that this case actually starts in 2004. He noted that in 2004 the only ones involved in this case were the developers and the neighbors – the Foggs. Attorney Wagner stated that the reason he mentions that is because that it has been represented that nobody knew that this was going to be a problem and did not understand infectious invalidity. Attorney Wagner stated that in 2004, before there was a sub-division and before there were zoning decisions, both he and Mr. Fogg stood at 81 Spooner Road and told the developers what would happen if they didn't decommission the third floor. Attorney Wagner stated that they had that option and they chose not to do it. He stated that they are not an innocent party that was uninformed, they knew it was coming. Attorney Wagner stated that Attorney Allen said that the only way to cure this problem is to decommission the third floor at 81 Spooner Road. Attorney Wagner noted that decommissioning space is no longer allowed under the by-law and that remedy no longer works.

Attorney Wagner stated that the concept of infectious invalidity says that it is not the old existing house that suffers the consequences of the subdivision but it is the new house. He noted that the case law is clear on this matter and was cited to them back in 2004.

There was an outburst from the audience directed towards Attorney Wagner. Attorney Jeffrey P. Allen apologized for the outburst from one of his clients, noting that this client has lost his house over this issue.

Attorney Allen asked if he could respond briefly to Attorney Wagner's remarks. Chairman Jesse Geller stated that he wished to save Attorney Allen's rebuttal to the end.

Roger Blood, a resident of 69 Cleveland Road, Brookline, Massachusetts and a Town Meeting Member from Precinct 13, stated that he has lived near this property for over 36 years. He stated that his daughters were friends with the Blakely's children, who owned this house

before being sold to the developers. Mr. Blood stated that the third floor was in use back then. Mr. Blood stated that all he wants to see is the enforcement of the law and the end of the misinterpretation of FAR.

Zoning Board of Appeals Chairman Jesse Geller asked if there was anyone else present who wished to speak in favor of the Building Commissioner's decision. There were none.

Rosemary Kelleher, spouse of one of the applicants, asked to address the Board. Chairman Geller asked Building Commissioner Michael Shepard if he had any objections to Ms. Kelleher speaking. Commissioner Shepard said that he did not object.

Rosemary Kelleher, stated that her husband applied for a building permit, which was approved by the Town of Brookline and did everything in compliance with the Town of Brookline. She stated that the Velanders were made aware through the Purchase and Sale Agreement that some remedy might need to take place before they signed the contract. She added that they were clearly made aware that there was an issue. Ms. Kelleher stated that it is preposterous that these applicants did everything by the Town of Brookline's standards and now they have paid for it dearly. Ms. Kelleher stated that she personally had two conversations with Mr. Fogg and that his response, to the first conversation, was that he met with my husband and that he told him that there would be consequences for not having done what he told them to do. Ms. Kelleher stated that during the second conversation she had with Mr. Fogg he asked her if she had lost everything and had she lost her home yet. Ms. Kelleher stated that she believes that it is outrageous that a Building Permit for decommissioning has not been enforced. She noted the exact opposite has happened without a Building Permit. Ms. Kelleher stated that everything that was done by the applicants was done with permits and according to the rules of the Town of Brookline and the outcome has been personally horrific. Ms. Kelleher stated that this whole process has been atrocious and outrages and asks the Board to put an end to this obnoxious waste of time, because one man told the applicants that if they didn't do what he told them to do that "I will bury you".

Attorney Jeffrey P. Allen, in rebuttal, stated that if the Board reads only one thing, then read Mr. Velanders's testimony, because everything represented to you this evening is 100 percent contrary to his testimony. Attorney Allen stated that in Mr. Velanders's testimony there was no mention of a blank Building Permit. He added that he testified that he was aware of the FAR issue and that he discussed it with his lawyer and that his lawyer told him not to worry about it. Attorney Allen stated that the Building Commissioner didn't tell his clients that the third floor had to be decommissioned but, in fact, that it had already been decommissioned. He stated that you have Mr. Kirby's testimony. Attorney Allen also stated that Attorney Wagner is wrong. Attorney Allen stated that we still have a Building Permit for 71 Spooner Road and that it has not been rescinded – we voluntarily stopped work. Attorney Allen stated that even if the Board rules in his clients' favor we still have to remove a portion of 71 Spooner unless we win at the Supreme Judicial Court. Attorney Allen added that at some point the Velanders will have to get zoning relief or deal with those outstanding citations if they do not get that zoning relief. He added that if the citations don't solve the problem then we come back to where we are right now and by then the SJC will have ruled. Attorney Allen asked why don't the Velanders seek the necessary relief before his clients are dead. He stated that they tried to accomplish that before they brought this action and were unsuccessful. He suggested that perhaps we could adjourn to allow the Velanders to apply for this relief. He stated that if the relief is granted then there is no more infectious invalidity. Attorney Allen stated that nobody wants a draconian result for either the Velanders or his clients. He noted that unless they win at the SJC his clients will suffer a draconian result because a portion of 71 Spooner Road will have to be ripped out. Attorney Allen stated that option is a pragmatic, fair and open process to deal with this zoning morass. He urged the Board to consider that option. Attorney Allen stated that he cannot begin to find the words for what this case has done to his clients. He stated that three lives have been ruined. He added that they are the victims of a political battle over a zoning by-law that doesn't work. He stated that FAR is a concept that is antiquated and doesn't work.

In deliberation, Zoning Board of Appeals Member Jonathan Book stated that it is unfortunate that there are a lot of innocent people that have been adversely affected. He stated that the trouble he is having is that he doesn't think that this is the right forum. He stated that the

relief that is being requested isn't going to make this situation better and it is not really the problem. Mr. Book stated that he is not quite sure why the Board is being asked to overrule the Building Commissioner to require this space to be decommissioned space since it is not going to solve anything. He added that it just doesn't seem to be the right relief that is being asked for. Mr. Book stated that it seems this issue should be dealt with in the courts between the parties.

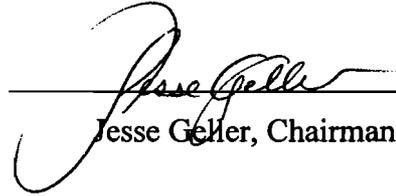
Zoning Board of Appeals Member, Enid Starr, agreed with Mr. Book. Ms. Starr stated that this is a very sad situation and very unfortunate. Ms. Starr stated that counsel has done a terrific job with their representations and that there are no real bad guys in the room nor are there any real good guys in the room. She stated that this simply is not the right forum. Ms. Starr stated that if representations or agreements were made, this is not the proper forum to settle those. She added that certainly representations and warranties made in a Purchase and Sale Agreement do not survive and that is pretty good law. Ms. Starr stated that she personally does not believe that this is a zoning issue and that the Zoning Board of Appeals should affirm the Building Commissioner's ruling.

Chairman Jesse Geller stated that he agrees with what both members have said. Chairman Geller pointed out that Attorney Allen's presentation was excellent but that he agrees with the other members that this is a private contract issue. Chairman Geller stated that he read the excerpt of the Purchase and Sale Agreement, that Attorney Allen provided and he can't tell you what it says. He stated that he has drafted and read thousands of purchase and sale agreements, and he doesn't know what the meaning of that language is. Chairman Geller stated that this is not an issue for the Zoning Board of Appeals to decide – rather this is a matter of the parties to decide in litigation.

Upon motion made and duly seconded, it was UNANIMOUSLY

VOTED: To deny the appeal of 81 Spooner Road LLC and affirm the decision of the Building Commissioner dated November 29, 2010 as recorded in BOA#2011-81 Spooner Road.

Unanimous Decision of
The Board of Appeals



Jesse Geller, Chairman

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Patrick J. Ward
Clerk, Board of Appeals