Brookline Zoning Board of Appeals Hearing

420 Harvard Street Comprehensive Permit Application

420 Harvard Associates, LLC

December 28, 2016, at 7:00 p.m.

Brookline Town Hall

333 Washington Street, 6th Floor

Brookline, Massachusetts 02445

Reporter: Kristen C. Krakofsky
APPEARANCES

Board Members:
Jesse Geller, Chairman
Lark Palermo
Kate Poverman
Johanna Schneider

Town Staff:
Maria Morelli, Senior Planner

40B Consultant:
Judi Barrett, Director of Municipal Services, RKG Associates, Inc.

Applicant:
Victor Sheen, 420 Harvard Associates, LLC
Dartagnan Brown, Principal, EMBARC Studio, LLC
Bob Engler, President, SEB

Members of the Public:
Karen, Babcock Street
Sloat Shaw, Thorndike Street
MR. GELLER: Good evening, everyone. My name is Jesse Geller. We are continuing our hearing on 420 Harvard Street. Seated with me this evening is the very quiet Lark Palermo, Johanna Schneider, Jesse Geller, and Kate Poverman.

As people will recall, at our last hearing we reviewed the waivers requests. We fine-tuned that. We also reviewed a draft decision and, in particular, reviewed suggested conditions.

For tonight's hearing we will once again review the revised waiver list, and we will also pick up our discussion and review of the decision. There was circulated, both this morning as well as later in the afternoon, redline revisions to the decision, so hopefully people who are interested have had an opportunity to obtain that, and we'll continue our discussion about that.

I also want to note for the record that earlier today we did receive correspondence from Dr. Pat Maloney giving certain recommendations pertaining to trash removal, storage. And in the last iteration of the decision that was circulated
in draft form, there were incorporated into that

draft the recommendations that Dr. Maloney had made.

Maria, other administrative details?

MS. MORELLI: Yes. I just wanted to let

you know that we did ask -- the town did ask

MassHousing Partnership, which is the subsidizing

agency for this project, to look at the revised plans

now that there is an additional parcel -- a second

parcel that is included, and they've received a

letter. It was actually a copy of a letter to

Mr. Sheen and CC'd to the town dated December 28th

from MassHousing Partnership, David Hanafin.

And in summary, they have reviewed the

project. The letter they issued is to reaffirm and

update the project eligibility letter. That initial

letter was dated May 17, 2016. MHP has no problem

with the project consisting of two separate parcels.

And it's up to you if you want -- it's a two-page

letter -- if you want that read into the record. You

all have a copy of it in your packet.

MR. GELLER: Not necessary to read it.

Thank you.

I understand you also have correspondence

on calculation of the height.
MS. MORELLI: Yes. So we received today, December 28th, from the applicant's civil engineer, Brendan McKenzie, dated today, and he just clarified for the building commissioner how he calculated the height of the building and what methodology he used in the zoning code, that is Section 5.30.2A1.

And the building commissioner submitted a memo, also dated today, that confirms that that methodology is correct.

MR. GELLER: For the record, will you read in also Dr. Maloney's letter, which is relatively short, but I think is important.

MS. MORELLI: Yes. To the zoning board of appeals, December 28, 2016, from Patrick Maloney, chief of environmental health services, regarding 420 Harvard Street 40B. This is in regard to the proposed plans, rubbish and recycling.

"Please be advised that this department has reviewed the above-noted project plans and offers the following recommendations:

"For residential, the plans should upgrade to eight 96-gallon toters for the building's rubbish/recycling. The rubbish/recycling is proposed to be picked up on a weekly basis." And I clarified
that is once weekly. "Should it found that additional rubbish containment is needed, additional toters shall be acquired. This is preferred than increasing curbside pickup days, which can affect the neighborhood.

"For commercial, the plan should upgrade to four 96-gallon toter bins for handling commercial tenants' trash/rubbish. Should it be found that additional rubbish/recycling containment is needed, additional toters shall be acquired.

"The applicant has presented to the health department that the retail tenants will be mostly nonfood, office occupancy with the exception of a limited retail food/coffee shop. No food will be prepared on-site except coffee. This proposed establishment will also require a food vendor permit from the selectmen's office and a food permit from the health department. Additional reviews by these departments will occur at that time.

"Rubbish storage rooms for both environments must be maintained in compliance with state sanitary housing code requirements. The health department would request to revisit the issue of compliance when the property is 90 percent occupied
to ensure the approved measures are adequate."

MS. POVERMAN: I have a question. What is the capacity difference, if any, between the recommendation for eight 96-gallon toters and what was previously recommended in terms of the two cubic whatever.

MS. MORELLI: So for 40 Centre, 40 Centre has a trash compactor. Trash compactors actually require dumpsters. So what is spec'd there is actually a 3 by 6 by 3 1/2 foot high dumpster, and it can actually support a heavier load, because when you have compressed or compacted trash, it's going to be heavier. These toters are about 2 1/2 by 3 feet by maybe -- I'm not sure how high they are. I think 4 feet.

MS. POVERMAN: Are they like regular garbage cans, but bigger than we would have at our curbs?

MS. MORELLI: Those dimensions that I just gave you are the dimensions that I received from Patrick Maloney, the 2 1/2 by 3 1/2 by 4 feet high. They're going to be bigger than what we would have at a single-family home.

MS. POVERMAN: But do they carry the same
amount of waste?

MS. MORELLI: What he has spec'd is appropriate for the use that is proposed. The difference is that this particular project does not have a trash compactor.

MS. POVERMAN: I just want to point out that 40 Centre Street does not have a compactor for its recycling.

MS. MORELLI: They do have a trash compactor. It's in the decision. I wrote the decision. It's absolutely in there.

MS. POVERMAN: Oh, okay.

Okay. I just -- maybe this is not the time to mention it, but something we had previously discussed last week is that any trash generated by a cafe or whatever would be separately segregated and that's not provided in this --

MS. MORELLI: It is. In the revised decision --

MS. POVERMAN: Where is it in the decision?

MS. MORELLI: It is under Condition 15. It was -- this is something that we sent to you at 3:30 this afternoon, and the printout you have in front of you does reflect that addition.
MS. POVERMAN: Okay. I did not have a chance to go through --

MS. MORELLI: Understood. When we go through the redline, we'll actually catch that.

MS. POVERMAN: Okay, great. Thanks.

MR. GELLER: Okay. Thank you.

So we're going to take the waiver list first. Let me also note that when we get to the decision and conditions, my understanding is that the document has, at this point, been reviewed both by our consultant extraordinaire as well as by town counsel's office, and suggested changes have been inserted into that document consistent with whatever suggestions you and they had.

So on the variance list -- the waiver list -- if people would just confirm -- either raise questions or confirm that it's consistent with what your understanding was from the last hearing.

MS. POVERMAN: On the first page, I still don't understand No. 6, when a business district abuts a T district. Is that a full sentence? First page.

MS. MORELLI: Oh, right. I didn't finish that. That was a note to say that when a business
district abuts a T district, there are different requirements for the rear yard. I just wanted to note that.

MS. POVERMAN: Okay.

MR. GELLER: A.1 and 2?

MS. POVERMAN: Nothing.

MR. GELLER: C.1?

MS. SCHNEIDER: No.

MR. GELLER: D.2?

MS. SCHNEIDER: No.

MR. GELLER: E.1 and 2?

MS. SCHNEIDER: No.

MR. GELLER: F.2?

MS. SCHNEIDER: Fine.

MR. GELLER: G.1 and 2?

MS. SCHNEIDER: Fine.

MR. GELLER: H.1?

MS. SCHNEIDER: Fine.

MR. GELLER: I.1?

MS. SCHNEIDER: Okay.

MR. GELLER: J.1?

MS. SCHNEIDER: Fine.

MR. GELLER: K.1 and 2?

MS. SCHNEIDER: Yes.
MR. GELLER: L.2?

MS. POVERMAN: Do we want to specify that the relief is 18.83 feet for the amount of relief being given?

MS. MORELLI: Well, it's stated under what is -- in that column right before it, it states what the max allowed is, 40 feet. So you can either subtract it, or you specify it. It does make it clear how -- what the delta is.

MS. POVERMAN: Okay.

MS. SCHNEIDER: We're setting the maximum, right, so it wouldn't be any higher.

MR. GELLER: Right.

M.1 and 2?

MS. SCHNEIDER: Fine.

MR. GELLER: N.2?

MS. SCHNEIDER: Fine.

MR. GELLER: O.1 and 2?

MS. SCHNEIDER: Fine.

MR. GELLER: P.1 and 2?

MS. SCHNEIDER: Fine.

MR. GELLER: R.1 and 2?

MS. SCHNEIDER: Yes.

MS. POVERMAN: The maximum height is 40
feet, isn't it?

MS. SCHNEIDER: Yes.

MS. POVERMAN: So 40 feet plus 18.83 feet is 58 feet.

MS. SCHNEIDER: But that's the maximum height of the project.

MS. POVERMAN: Right. So it says the maximum development height -- the building height will be 56.10 inches.

MS. MORELLI: No. You have to look at what I handed out today because I updated the --

MS. POVERMAN: Okay.

MS. MORELLI: I'm sorry. What I updated and have before you -- just -- I noted in my cover note that I updated the waivers to reflect the height.


MS. MORELLI: There's a lot coming in at the last minute, so I do apologize.

MS. POVERMAN: Okay. Forget that.

MR. GELLER: Q.1 and 2?

MS. SCHNEIDER: Fine.

MR. GELLER: Q.1 and 2?

MS. SCHNEIDER: Fine.
MR. GELLER: R.1 and 2?

MS. SCHNEIDER: Fine.

MR. GELLER: S.1 and 2?

MS. SCHNEIDER: Uh-huh.

MR. GELLER: T.

MS. SCHNEIDER: Yes.

MR. GELLER: U.1 and 2?

MS. SCHNEIDER: Yes.

MR. GELLER: W.1 and 2?

MS. SCHNEIDER: Yes.

MR. GELLER: X.2?

MS. SCHNEIDER: Yes.

MR. GELLER: Y.1 and 2?

MS. SCHNEIDER: Yes.

MR. GELLER: Z.1 and 2.

MS. SCHNEIDER: Yes.

MR. GELLER: AA.2?

MS. SCHNEIDER: Yes.

MR. GELLER: BB.1 and 2?

MS. SCHNEIDER: Yes.

MR. GELLER: CC.2?

MS. SCHNEIDER: Yes.

MR. GELLER: And DD.1 and 2?

MS. SCHNEIDER: Yes.
MR. GELLER: Thank you.

All right. Let's take the decision. And again, the version that I understand to be the most recent was circulated today at approximately ten minutes to four -- 3:35. Okay. So this is a redline document.

Kate, I know you have lots of questions. I don't know whether they're general or whether they're specific to the conditions.

MS. POVERMAN: Some were typos, and I just blame it on the fact that I assume we just didn't have much time last time. But paragraph 3 --

MR. GELLER: Paragraph 3 of --

MS. POVERMAN: First page, paragraph 3, after "5,000," it says "square feet square feet," so let's take out one "square feet."

MR. GELLER: How about if we add a comma too.

MS. POVERMAN: Okay. Just stylistic. You have put in bold, "sheets and numbers, titles, architectural plans." You may want to do that with "comprehensive permit application or comprehensive permit plans." Or not. I will leave that to you.

So page 3, No. 5. Okay, so this may just
be something I don't know. "The applicant submitted a request for waivers from local bylaws and regulations and waivers key site plan." I'm not sure what "waivers key site plan" was.

MS. MORELLI: Well, it's actually -- it is a waivers key site plan. Maybe we can put a hyphen. It was a site plan that showed where there were rear yards, what was side yards.

MS. POVERMAN: How should it read?

MR. GELLER: So was it used for purposes of generating the waivers request?

MS. MORELLI: It just clarified what was considered the corner lot, where the rear yard was. So there were certain side yard --

MR. GELLER: Did the plan have a title?

MS. MORELLI: It's a waivers key site plan.

MR. GELLER: That's what it is called on the plan?

MS. MORELLI: I believe so.

MR. GELLER: Okay.

MS. POVERMAN: So would we add "a waivers key site plan," or "the waivers key site plan"?

MS. MORELLI: I would just put a hyphen and call it "waivers-key site plan."
MR. GELLER: Whatever the name is on the plan and whatever the date is on the plan, that's what you want.

MS. POVERMAN: And then 6, we just have to be consistent with "applicant" capital A or not? That's the last time I'm going to mention that.

Okay. Paragraph 12, in the part that says in red, "of town department heads and independent traffic peer reviewer," in addition we need to add, "and an independent site and building design reviewer," because we also relied on him.

And then after that, "in regard to matters of," -- add "site design, public health and safety, environmental," -- take out "and," -- "preliminary stormwater management plans, and other issues of local concern."

MS. MORELLI: Okay.


Under Findings, paragraph 2, first sentence, "The town has an ongoing, active program of promoting: Low and moderate income housing."

MR. GELLER: Can I disagree with you?

MS. POVERMAN: Well, no. Because you then
list a whole string of things: Promoting low and moderate income housing including inclusionary zoning, then it promotes financial and technical assistance. You can disagree with me, but you're wrong.

MS. BARRETT: I don't understand what the issue is.

MR. GELLER: Whether you need a colon.

MS. POVERMAN: Because you're listing all the things it promotes.

MS. PALERMO: It's punctuation. I think it could be argued both ways. I'm happy with whatever it says.

MR. GELLER: Leave it.

MS. POVERMAN: I'm not talking about all the commas that are missing either.

MS. PALERMO: I don't think that it's confusing, really, the issue.

MS. POVERMAN: 4, okay, just going through the sentence. "On October 19, 2016, the applicant submitted the project which proposes that at least 20 percent of the units would be available to households" -- add an S -- "earning at or below 50 percent."
Okay. This is a more significant one at paragraph No. 6. "The site is within the Harvard Street commercial district..." This is the first time that the phrase "Harvard Street commercial district" is used ever, as far as I can tell. I Googled it. And I do not think it's appropriate to use the term "Harvard Street commercial district" because I don't want it acting as any sort of precedent defining that that district extends from the Boston/Brookline town line through Brookline Village. I just think that it could be used in the future, for example, by a developer or somebody else to say, okay, this is a commercial district going from, you know, Allston to Brookline Village, and I don't think that's appropriate.

MR. GELLER: This is citation to Cliff's report. How did Cliff refer to it?

MS. MORELLI: So he referenced that the commercial properties are one-story tall. That was really his --

MR. GELLER: But did he have a euphemism for the area that he was looking at? I know he referred to it geographically, but --

MS. MORELLI: He talked about Harvard
Street. He was talking about the commercial properties, so it's either retail or commercial. But he was referencing those properties, not any residential --

MS. POVERMAN: There are residential properties on Harvard Street.

MS. MORELLI: Yeah. He was talking about the strong one-story retail streetscape.

MS. POVERMAN: Right. I don't want to use that phrase. I think this should more properly read, "Site is on Harvard Street. Harvard Street extends from the Boston/Brookline town line to the area known as Brookline Village and consists of structures mostly one story tall."

MS. MORELLI: But that's not accurate because you're only talking about retail that's one story tall.

MS. POVERMAN: Okay. So "retail commercial structures."

MS. SCHNEIDER: Commercial structures I think is the best way.

MS. POVERMAN: "Harvard Street extends from the Boston town line and consists of residential buildings" -- well, it's not just commercial
structures, so we can't say that. I mean, there are three-story, you know, townhouses. I just don't want --

MS. MORELLI: He was talking about the retail being one story. The whole point is the one story because that's what has a huge influence on how this project got redesigned to read more strongly as one story on Harvard Street with the residential setback. That's the whole point.

MS. POVERMAN: Okay. Then how can we find a way of modifying it rather than giving the impression that it totally consists of retail structures, mostly one-story tall? "Consists significantly" or --

MS. BARRETT: "Consistent part of commercial structures, mostly one story tall."

MS. POVERMAN: Okay. "Consistent part of --"

MS. BARRETT: " -- commercial structures that are mostly one story tall."

MS. POVERMAN: Okay. So just to go over it, "The site is on Harvard Street. Harvard Street extends from the Boston/Brookline town line to the area known as Brookline Village and consists, in
part, of commercial structures that are mostly one story tall."

And next, "The site extends into 'a' two-family district," not "the."

And paragraph 9, "The planning, Cliff Boehmer," you never said who he is, and I think we need to identify him.

MS. MORELLI: He's identified under, I think, procedural --

MS. POVERMAN: You list his name under 13 as an independent peer reviewer, so I think it would be clearer to the reader, instead of going back and figuring out who in the world is Cliff Boehmer, to say, "the independent site and building design reviewer." Because otherwise, it's kind of like, what?

MS. BARRETT: Well, he's the board's --

MS. POVERMAN: Right. The town's, yes.

MS. BARRETT: I would just make that clear.

MS. POVERMAN: Going to the last line on that page, "structure was incongruous with architecturally coherent Harvard Street commercial 'buildings,'" instead of "district." Does everyone agree with that?
MS. SCHNEIDER: Judi, is that an issue from a 40B perspective in that we often talk about the overall context? Not just buildings, but -- I mean, I thought that defining this --

And, Kate, I understand your point. I'm just wondering if by changing it to "district," which I think implies, like, a contextual area to buildings, if we're somehow talking something that we --

MS. BARRETT: I would actually refer to "area," not "district," because this is a permit, and one could interpret that to mean a zoning district, which it is not. So I would just say "commercial area." I mean, that's, I assume, what it is.

MS. SCHNEIDER: Kate, are you comfortable calling it an area as opposed to saying "building"?

MS. POVERMAN: "Architecturally coherent Harvard Street" -- I don't want to say that all of Harvard Street is commercial. I just don't want to commit the board or Brookline to that.

MS. BARRETT: "Incongruous with the architecturally coherent commercial area on Harvard Street."

MS. POVERMAN: "Commercial building on
Harvard Street," or "commercial architecture on Harvard Street."

MS. MORELLI: I think what's coherent about that street are the commercial properties.

MS. POVERMAN: Right. So "architecturally coherent Harvard Street commercial properties."

MS. BARRETT: "Commercial properties on Harvard Street." If you're trying not to say Harvard Street's a commercial area, then I think what you want to say is "commercial properties on Harvard Street."

I guess I'm not really sure what the issue is here, but --

MS. SCHNEIDER: I'm just asking if there is an issue.

MS. BARRETT: I think it's fine to describe the area because it's all part of why there was this extended kind of effort to bring the project down to make it sit better in the neighborhood. So, you know, I think it's fine.

I worry when we get into this -- don't take this the wrong way -- this kind of wordsmithing, that there may be unintended consequences to the wording. And I just generally don't think it's a good idea to
try to get this editorial.

MS. POVERMAN: That's exactly my concern about using "commercial area." It's being used too broadly. Whereas if you make sure it's very specific, then it can't be -- 

MS. BARRETT: Is there a commercial area on Harvard Street?

MS. MORELLI: Its zone is L. It's a local business district. Those properties are zoned, you know, as L-1.0. What we're driving home is, actually -- we're saying it's even more restrictive. What you're doing is you're being less exclusive by talking about all the different variations. We're trying to drive home that it's a one-story commercial area.

MS. POVERMAN: Well, let me ask you this: Is it L-1 all the way down Harvard Street?

MS. MORELLI: I don't have my atlas map here to just -- I don't know if there's, like, a general business district that gets interwoven.

MS. BARRETT: Why don't you just say "the small-scale commercial buildings on Harvard Street"?

MS. POVERMAN: Yeah. That would be fine.

MS. BARRETT: It's incongruous with the
small-scale commercial buildings on Harvard Street.
I think that's all you need to say.

MS. POVERMAN: How about "the small-scale
color of commercial buildings on Harvard Street"?

MS. BARRETT: "Character" is -- that's a
loaded -- "small-scale commercial buildings." I
don't know why that would be a problem, but, you
know, you know the area much better than I do, so I
sort of defer to the board. I'm just trying to help
you come up with --

MS. PALERMO: Kate, what is it in
particular that you're worried about?

MR. GELLER: She's worried that a
developer, down the road, will come back and say,
see, it is a commercial district. You said it's a
commercial district, and therefore I can put up this
big --

MS. PALERMO: I'm not familiar with a case
where a developer has used an opinion in a 40B case
to circumvent zoning. The only way a developer
circumvents local zoning bylaws --

(Multiple parties speaking.)

MS. PALERMO: This is not a court. This is
a decision involving --
MS. POVERMAN: It's a judicial body, and there's no telling when your words are going to be used against you.

MS. PALERMO: I actually disagree, respectfully. I don't think it's necessary to go to this level of wordsmithing. But in any event, we'll go on.

MS. BARRETT: I think the concern was this big building doesn't fit in this area because it's so different from the buildings around it. I think that was the point. Right? I would just say that and move on, because I don't think --

MS. POVERMAN: Okay. How about just, "architecturally coherent Harvard Street"?

MS. BARRETT: Well, I don't think that was what he meant.

MS. MORELLI: "The planning board; Clifford Boehmer, independent design reviewer; and local residents expressed in written and oral comments during the public hearing that the original project was too massive and its site configuration and parking infeasible, and architectural style and building typology of the six-story apartment structure was incongruous with the small-scale
commercial properties on Harvard Street and that the
original project had inadequate setback to the
abutting single- and two-family homes."

MS. POVERMAN: Thank you.

Paragraph 13, there was a comment on the
applicant's version.

MR. GELLER: Add a space between paragraph
11 and 12.

MS. POVERMAN: So on No. 16 it refers to
Mr. Ditto's letter. And I can't remember if he gave
oral testimony as well or if it was just a letter.

MS. MORELLI: I read his letter into the
record because he was not present that evening.

MR. GELLER: Let me just add my pet peeve,
and that's when you have written submittals using the
word "stated."

MS. MORELLI: Okay.

MR. GELLER: He's providing.

MS. POVERMAN: "Providing that the Fuller
Street driveway, as designed on the October 28, 2016,
plans." And I think it's superfluous to say, "in
conjunction with his recommendations to the board
presents" -- eliminate "no safety hazard to
pedestrians."
MS. MORELLI: So what is superfluous?

MS. POVERMAN: "In conjunction with his recommendations to the board."

MS. SCHNEIDER: Why do you think that's superfluous? Because I think that we're building in conditions to this decision that reflect -- which modify or enhance the plans.

MS. POVERMAN: How about plans -- well, where would you put them?

MS. SCHNEIDER: After "plans" and after "recommendations."

MS. POVERMAN: In conjunction with recommendations. I would still take out the S after present -- "presents no safety hazard."

MS. SCHNEIDER: But it's the Fuller Street driveway that presents no safety hazard.

MS. POVERMAN: Oh, okay. Thank you. You're right. That changes it. Thank you.

Paragraph 19, four lines down -- well, start at three lines down with the sentence starting "Eliminating." "Eliminating the lot line would trigger new noncompliance with zoning and make other waiver requests" -- add an S to request -- "not applicable."
And No. 20 just --

MR. GELLER: 20 is the first substantive comment.

MS. POVERMAN: Yeah, okay. All right.

Let's go.

MR. GELLER: So I think, conceptually, the notion is that the use that would be allowed would be soft food sales, which is to say that there can be no cooking, venting, preparation on-site. The sole exception being they can prepare coffee. Okay? So that, conceptually, is what we're looking for, and that should consistently be applied. You can either define it as a specific term and then repeat it, okay, "nonintensive cafe use," if you want -- whatever you want --

MS. SCHNEIDER: And I think in the conditions this is spelled out in a little bit more detail, and maybe we just want to import that language to this paragraph.

MS. BARRETT: Cross-reference it here, see condition whatever.

MR. GELLER: So the idea is they can sell food products that have been prepared off-site.

MS. MORELLI: So if we were to put a period
after "production" and delete "including restaurants and excluding cafes," that would get to the point.

MS. POVERMAN: "Establishments such as cafes that serve but do not prepare refreshments shall be permitted."

MS. SCHNEIDER: But I do -- and again, I don't mean to get too in the weeds on this, but I guess this is a question for the applicant. I mean, there are a lot of cafes where they'll heat a croissant for you or they will, you know,

microwave --

MR. GELLER: That's not production.

MS. SCHNEIDER: But that's food preparation, isn't it?

MR. GELLER: No.

MS. SCHNEIDER: No? Okay.

MR. GELLER: No. You sort of break it into -- there are two kinds of the food retail establishments. One is where there is food preparation where they are cooking and venting, and the other is the Dunkin' Donuts model, which is they don't do anything. They hit the buttons on a microwave.

MS. SCHNEIDER: Right, right. I just want
to make sure that we are not being overbroad in using the words "food preparation" here.

MR. GELLER: I don't think so.

MS. SCHNEIDER: Okay.

MS. POVERMAN: Okay. Number 21, so what's stated is irrelevant. "The applicant," then cross out "stated that parking on the site," so that it reads, "The applicant will not" -- take out "be" -- "will not provide parking to customers of the commercial spaces."

MS. SCHNEIDER: But I think -- but that's a condition, which comes later. I think this section -- I think it's hard to keep them straight, but I think this section is about findings, so it's about things that came out in the course of the proceedings.

MS. POVERMAN: Oh, okay.

(Multiple parties speaking.)

MS. SCHNEIDER: -- conditions, which are, I think, more mandatory.

MS. POVERMAN: Got it. Thank you.

MR. GELLER: 22, anything?

MS. POVERMAN: No.

MR. GELLER: Now, when you're referring to
"professional kitchens," again, I think -- right -- use of the commercial space will be mostly nonfood, office occupancy with the exception of limited retail food, coffee shop. No food is prepared on-site except coffee.

MS. MORELLI: I'm just going to borrow language from Dr. Maloney's letter.

MR. GELLER: Exactly.

Okay. Conditions.

MS. POVERMAN: Wait.

MS. BARRETT: No. You have the big controversy, remember.

MS. POVERMAN: 23, "The board" --

MS. BARRETT: 24 through 27.

MS. POVERMAN: Here's what I would do to 23: "The board heard concerns of the town staff, boards, commissions, and residents and weighed them against local needs. The board finds that the project, as conditioned below, is consistent with local needs as that term is defined."

Does anybody have a problem with that change?

MR. GELLER: Do it again.

MS. POVERMAN: The second sentence, put
"The board finds that the project, as conditioned below, is consistent with local needs."

MS. SCHNEIDER: I'm fine with that.

MS. POVERMAN: Okay. And 24 --

MS. BARRETT: Why don't I just jump in?

MS. POVERMAN: Okay.

MS. BARRETT: I was actually amazed when I heard that these four conditions caused any sort of consternation at all because I've been putting these conditions in comprehensive permit decisions for years. They were in the decision I wrote recently in Sturbridge where Mr. Engler was the representative of the developer. I wrote them in a decision in Boxborough when Mr. Jacobs represented the developer. These are not unknown conditions to any of the players involved in this project.

Essentially, what they get at is the balancing test that Chapter 40B is all about. And if we don't grasp that balancing test, I think we're missing the point of the law.

What these conditions say is that, first of all, the board has imposed some conditions on the project which, you know, may make the project uneconomic. But if they do, those conditions are
justified because the local -- there are other local concerns that outweigh the regional need for affordable housing.

By the same token, the board has granted certain waivers which some people may not be happy with, but those waivers are essential, that they outweigh the local concerns because the regional need for affordable housing -- pardon my redundancy -- outweighs those local concerns. That's the whole premise of these conditions.

And I think if the board is going to grant a comprehensive permit, you need to kind of get beyond the simple findings, if you will -- don't take this as insulting -- the simple findings of what was said in the process and assert that you've applied the law to the facts at hand and reached a conclusion. And that conclusion must be about the balancing test of the regional need for affordable housing and the protection of local concern.

So if you're going to approve the decision, put language in it that says, we're going to stand by this because we've actually applied the law in a logical and appropriate way.

The other two conditions simply
MS. POVERMAN: Which two conditions?

MS. BARRETT: 26 and 27, just taking these in order -- that people had concerns and that the board weighed those concerns. And, of course, in some cases those concerns have been addressed in whole or in part, and that as far as the board is concerned, the project has gone as far as it can to address those concerns.

And also, at least what I heard when I was here, is that some of the concerns that were raised are about conditions that already exist in the area. And you can't -- whether it's this kind of project or any other permit -- make an applicant responsible to cure conditions that exist because the town essentially has allowed them to endure.

So that's all these conditions are about. I really was amazed that there was any controversy about them because they're so -- the first two, in particular, 24 and 25, are just so anchored in what is this law about.

MS. SCHNEIDER: Where is the controversy on these?

MS. BARRETT: I heard --
MS. POVERMAN: Why don't we discuss what problems I have.

MS. BARRETT: That's fine.

MS. POVERMAN: Because I totally agree with what you're saying.

(Multiple parties speaking.)

MR. GELLER: You've got to let Kate talk.

So these were raised in the context of 40 Centre Street on which Kate and I are two of four members who are sitting. And Kate and another member raised concerns they had with these additions. I don't believe any of the other members sitting on that case had issues.

MS. POVERMAN: So let me go through them. And I'm not saying -- I mean, I totally agree with you about them. So in 24 --

MS. PALERMO: Wait, Kate. If you agree --

MS. POVERMAN: Let me please go through because it's not going to be obvious until I go through what it is I agree with and what I don't agree with. Okay?

So 24, I have no problem with the first sentence, and I agree with the spirit expressed by it: "The board finds that the conditions imposed in
this decision are necessary in order to address local
concerns."

I have a problem with the second sentence:
"The board finds," because we made no such findings.
We have no such evidence that such conditions will
not render the project uneconomic. We've heard no
evidence relating to the economic feasibility of the
project. No evidence related to it. And I think it's
inappropriate to consider or state anything relating
to whether or not the project was economically
feasible.

MS. SCHNEIDER: But let me just ask the
question about where we are procedurally because I
think we're about to deliberate the merits of this
decision. I think we're looking at these conditions
as potential conditions for the board to adopt, and
we are launching into our deliberative process. We
haven't necessarily made that finding yet, but I
think that's coming in the board's deliberations
before we adopt this as a decision. Maybe I'm off
base about where we are procedurally, but I think --

MS. POVERMAN: We have no evidence.

There's no evidence --

MS. BARRETT: Actually, you do, because the
applicant hasn't said, what you're asking me to do would make my project uneconomic.

MS. POVERMAN: That's not evidence.

MS. BARRETT: Absolutely, that is --

MS. PALERMO: I think you may have a misunderstanding about -- and I have no voice -- but you see us as a judicial body.

MS. POVERMAN: We are --

MS. SCHNEIDER: We are not.

MS. PALERMO: It's not a trial. It's not the equivalent of a trial. But if a word such as "a district" as opposed to "an area" is included in one of our decisions, it's not going to be used as a case that will then be argued later: This body used the word "district" as opposed to "area," and lawyers will go and make hay out of this difference in words.

This is a zoning board of appeals, and we don't have that kind of weight, and our decisions don't have that kind of weight. We will be reviewed and our decision will be reviewed if the applicant appeals our decision, and the applicant has given us, I would say, strong evidence that there is not going to be an appeal of our decision. So I wouldn't be so cautious about every single word we say. I think
it's critical, as has been pointed out to us, that our decision be grounded in the law behind 40B, and that is exactly what Judi is advocating for.

It's a very different way of approaching than when you're litigating, and I say that having clerked in the Superior Court and Supreme Judicial Court before I became a real estate lawyer. This is not a court of law, and I don't think it's appropriate to treat it that way. We are not in an antagonistic relationship with the applicant. We are here representing the town, and we are here to make sure that the town gets the best it can get out of this project. It's a very different world.

MS. POVERMAN: Lark, I have to disagree. And just because we may not be in conflict with the developer does not mean that this case will not be contested. I think we have to be very -- as a litigator with more than 30 years of experience, I am very careful about what something says. And this is an opinion. It is a decision. So let me tell you, I -- if we take out "The board finds that," I would have less of a problem with "to the extent that the conditions imposed may render the project uneconomic, the boards finds that" --
MS. SCHNEIDER: It's almost that we have to make this finding in order to --

(Multiple parties speaking.)

MS. BARRETT: There's nothing in the law that says you have to review a pro forma. There's nothing in the statute that says you have to do that.

MS. POVERMAN: But why do we -- there's nothing for us --

MS. BARRETT: Because it's in support of a decision that you are asserting.

MS. PALERMO: Can I ask a process question?

MS. BARRETT: Sure.

MS. PALERMO: You were discussing the fact that we're going through these findings, and then we're going to talk about -- I assume, having -- this is my first time going through this on this side of the table. I assume that we're then going to go through the rest of the decision and talk about what support or opinions we have about it.

So rather than getting into the weeds on this language, can we move on? Is that a reasonable thing to do? And then come back and have this discussion?

MR. GELLER: I don't know that they are --
I don't know that you need to go through -- this is our third time looking at this. I don't know that you need to go through the conditions.

MS. PALERMO: This is the first on this language. Okay.

MR. GELLER: Right. But I don't know that you need to go through the conditions before you go back to these because I think that including these within the findings are part of the underpinning of our decision. Whether they are pronounced or not, these are the assumptions we make when we are making the decisions and inserting the conditions. I think we're --

MS. SCHNEIDER: This is a necessary predicate to get into the conditions, which is that we are finding that if we impose the following conditions on the project, it makes the project consistent with local needs and also --

MR. GELLER: We're simply logically laying out the basis for the decision and the conditions.

MS. PALERMO: No. I do understand that, and I'm just assuming that if we think about what the conditions are, it sort of leads back to the findings.
MR. GELLER: I'm not sure that that's going
to be as crystal clear as you might like it to be to
support the findings. I think the findings can
independently be reviewed.

I mean, I don't have an issue with any of
the recommended findings. Because if I look at each
one of them and if I look at them and break them into
each specific sentence, is it, for me, a true
statement of what is the underpinning for a decision
that I would make? Okay? So I don't have an issue.
I don't think it is a false statement. So the issue
about, how can we say that? We haven't been provided
any testimony about the financial condition, or -- I
don't think that's what you should be focused on.

MS. POVERMAN: Well, the way -- this would
make me happy, although I know you guys would see it
as splitting hairs. If we simply said, "To the
extent the conditions may render this project
uneconomic, the board finds that the local concerns
outweigh the potential benefits of affordable units."
I just find it -- I do not see us as having been
presented with any economic information, so I
personally find it improper to say that the board
found anything --
MS. SCHNEIDER: Well, I'm prepared to make that finding right now, if that would make you comfortable, and we can all talk about it. I mean, typically in 40B -- and I don't know how things have gone on 40 Centre, but if you are proposing to an applicant --

And, Mr. Engler, you and I had this conversation about another project the other night. You can feel free and back me up on this if you want to. If the board is looking at imposing conditions on a project that the applicant believes is going to render it uneconomic, you better believe that Mr. Engler is going to be hopping up and down and saying, we're going to go to pro forma review --

MS. BARRETT: He has done it before.

MS. SCHNEIDER: -- because it is our position -- the applicant's position -- that the conditions that you are imposing are rendering this project uneconomic.

MR. GELLER: Which was Judi's point.

MS. SCHNEIDER: Right. We are now in our third round of review of the conditions to this project, and we've not heard a peep out of the applicant's team trying to go to pro forma review or
otherwise objecting to any of the proposed conditions as something that's going to render the project uneconomic or otherwise unbuildable.

So the hearing is still open. We can ask the applicant if they are intending to assert you uneconomic conditions here.

MS. POVERMAN: Well, actually, if we just ask the applicant, does he think the project is economically feasible, that will be fine, as long as we have something on the record.

MS. SCHNEIDER: I mean, again, I feel like based on the way the proceedings have gone, we can infer that and I would be very comfortable saying that in this decision and also defending that in court if we have to.

MS. BARRETT: The project must be economic because the subsidizing agency found that it is.

MS. POVERMAN: No. It cannot -- the agency that has to find that is the one that actually funds it, and it has to find that at the time of funding, not at the time of giving a PEL.

MR. GELLER: The absence of the applicant's objection allows the board to infer from that -- because we are not the ones who say, no, that renders
the project economically --

MS. SCHNEIDER: That's their role to say --

MR. GELLER: So the absence of --

MS. POVERMAN: I see I'm out-ruled, but I
do not see the absence of an objection as inferable.
But I will give you that.

Moving on to 25, I would eliminate the last
three lines starting with "... especially given the
project changes the applicant has agreed to make,
specifically the redesign of the building and
improvements to the site layout in direct response to
the concerns of the board and other parties in
interest." I don't see why that's necessary at all.

MS. BARRETT: Did the applicant not make
changes in response to concerns that were raised?

MS. POVERMAN: Why is that necessary?

MS. BARRETT: Because that's part of what
the board is finding in order to conclude the
granting of the permit subject to the following
conditions is appropriate.

MS. PALERMO: I think it also sort of
acknowledges what I was trying express, and it is the
difference between litigation and what we're doing.
And what we are doing, again, is not adversarial.
Our role is not to be adversarial. Our role is to represent the town and try to work with the developer to achieve a common goal. It's a very different situation. And in this instance, we are acknowledging that this developer tried to work with the community and with us to achieve a common goal of having a good project that provides affordable housing in Brookline.

It may not be the case with many other developments, but it is with this one. And I personally believe it's reasonable and perfectly appropriate to acknowledge the fact that this developer made significant changes to the design of the project in order to accommodate the desires and needs of the neighborhood and us. And that's all this is doing.

MS. POVERMAN: Well, I think this has nothing to do with local concerns. And although -- and I think we have voiced multiple times our appreciation for the work that the developer has done. I don't think it has any position being here. And my concern is that if we put it in there, we're going to find other developers who have absolutely not been cooperative.
MS. SCHNEIDER: Then we wouldn't put it
that statement --

MS. PALERMO: We wouldn't put the
language --

MS. POVERMAN: I just don't see it as
necessary. I'm not going to jump up and down and
scream. I just do not see it as necessary.

MS. SCHNEIDER: I think, Kate, the only
think I would add -- and I think this is some of
what --

Lark, just raise your finger.

-- is that it is a balancing that we're
supposed to be doing. And I think if you look at
what that sentence is trying to convey, there were
concessions made for local concerns. Maybe not all
local concerns were fully satisfied, but the
balancing did occur.

MS. POVERMAN: What concerns me about this
is to say that the local concerns do not outweigh the
need for affordable housing, especially given what
the developer has given us. Local concerns and the
balance of affordable housing should have nothing to
do with what concessions we've been given by the
developer. Those balances exist regardless of what
those concessions are. Why should it be affected?

MR. GELLER: Because what the developer
does is attempt to ameliorate the effects on local
concerns. And in this case, that's what the
developer did, so we're simply reciting that.

MS. POVERMAN: Okay. Actually, I agree
with that. You're right. I agree.

MR. GELLER: That's all we're saying.

MS. POVERMAN: I agree. That makes sense.

MR. GELLER: Anything else?

MS. POVERMAN: That's it.

MR. GELLER: Okay. Let's go to conditions.

Paragraph 1, just add a comma after the
5,000 -- 5 comma 000.

Paragraph 2, instead of referring to
"retail and office tenants," shouldn't we be
referring to "the commercial space"?

MS. MORELLI: Yes.

MR. GELLER: Paragraph 3, I don't want to
get too caught up in the method of how people acquire
the right. So whether it's by license, lease, or any
other method --

MS. SCHNEIDER: Do you want to just say
"provided"?
MR. GELLER: Yeah.

MS. POVERMAN: I have two more parking issues, and one is based on the notes I took at the last meeting, which is that we specify that parking at 49 Coolidge is to be used only by office employees.

MS. MORELLI: So if I were to say "Parking at 49 Coolidge should be used solely by employees of the project," is that too general?

MS. POVERMAN: Who's going to be working -- is it the applicant's employees who will be working in 49 Coolidge?

MR. SHEEN: So there are four -- the question has been asked about the four spaces -- tandem spaces at 49 Coolidge. The intention of that is for the employees of the commercial space --

MS. POVERMAN: Okay. "So retail employees only"?

MS. SCHNEIDER: "The commercial space."

MR. GELLER: I don't want to characterize it necessarily as --

MS. POVERMAN: Good point. Yeah.

MS. BARRETT: You could just say "nonresidential space."
MS. SCHNEIDER: Even better.

MS. POVERMAN: And at the last hearing, the applicant specified that three parking spaces shall be provided at no cost to affordable housing tenants on a first-come, first-served basis? Didn't you specify that?

MR. SHEEN: The way the -- the way that the -- our understanding of the affordable rent, if the affordable rents were to include a rental parking space, that the affordable rent will be reduced accordingly. So whether it's --

MS. POVERMAN: I'm not following that.

MR. SHEEN: So, for example, if one -- if an affordable unit is charged $800 for the rent, it reduces by the utility allowance as well as parking charges if that unit rents a parking space. So effectively it has no bearing on the affordable rent because it's --

MS. BARRETT: What the tenant is paying is the same.

MR. SHEEN: Yes, exactly.

MR. ENGLER: Well, there's a little aspect of that -- first of all, the subsidizing agency decides. And if parking is -- the only option for
parking is under the building and you're charging for it, that's going to come off their rent. If the tenant has other parking options, like outside space or on the site, and chooses to pay underneath the building, that's their call and it doesn't come off the rent. But that's up to the subsidizing agency to review the final plans and decide how the affordability rents are set and how parking works into that or not. So in this case, if there's no other parking available, it's very likely that it's free in your mind because it's really being deducted from the rent.

MS. POVERMAN: Okay. Because, realistically, if someone's paying $500 in rent, to pay $250 to park someplace else is not --

MR. ENGLER: Correct. I wouldn't say it's free, because that's an option that may not be the way it's worded. It's taken care of in the affordable rent.

MS. POVERMAN: How would we deal with that, if at all, in this --

MS. SCHNEIDER: I don't think it's a town thing. I think that's the subsidizing agency.

MS. POVERMAN: Okay.
MR. GELLER: Paragraph 5, "The open space on the site shall be used for" -- you've got the word "quiet."

MS. SCHNEIDER: That's Lark's.

MS. PALERMO: I said "quiet enjoyment."

MR. GELLER: I don't know what "quiet enjoyment" is, but okay.

MS. PALERMO: Well, it's a typical term used, and it is quiet enjoyment.

MR. GELLER: " -- solely by the residents of and employees of commercial tenants of the project." Are you referring to the leasing phrase quiet enjoyment?

MS. PALERMO: I am.

MR. GELLER: I'm not sure you can use it in this manner the way it's meant in others, but okay. I'm fine with it.

MS. PALERMO: I used it as a legal term that most people would understand.

MR. GELLER: Yeah. I think it means something else.

MS. PALERMO: So residents who live outside of our project have something to hang their hats on if there are wild parties going on.
MR. GELLER: I'd suggest that using it in this context is a nonlegal phrase because it doesn't mean what it means.

MS. SCHNEIDER: Are you -- and I don't -- never mind.

MR. GELLER: The neighbors just don't want to hear noise coming from the canyon, is basically the bottom line.

MS. SCHNEIDER: Well, I think that Lark's point was more that the people who live there don't -- this is supposed to be, like, a passive recreation --

MR. GELLER: That was my point.

MS. PALERMO: Yes.

MR. GELLER: Okay. It's passive use.

MS. PALERMO: Passive use.

MS. MORELLI: Any changes?

MS. SCHNEIDER: Do you want to change it to "passive use"?

MS. PALERMO: If it will make everyone happy.

MR. GELLER: I think it means what Lark is really saying.

MS. PALERMO: That's fine.
Paragraph 9, if nobody has anything before that.

Mr. Geller: Yes.

Ms. Poverman: In the third line -- because we're talking about prior to the issuance of the building permit, which will be reviewed for consistency with the plans listed under Item 4.

There are multiple plans listed under Item 4 with several dates, so I would specify it as the site plans, the defined terms, and the architectural plans, both of which are defined in terms referring to the ultimate ones that were approved. And it does not include the landscape plans, since that does not seem to be included in this one -- in this particular paragraph.

Ms. Morelli: This is in another paragraph.

Ms. Poverman: Right. So it doesn't apply here to the color of windows and other things being reviewed. It's not design.

Ms. Morelli: So the applicant shall submit final floor plans and elevations, so it's specifying the kinds of plans that the assistant director would have purview --

Ms. Poverman: Right. So in this instance,
site plans and architectural plans.

MS. MORELLI: So why do you want me -- do

you want me to say, "for consistency with" and

describe those plans? Because we've already

described them in the first sentence.

MS. PALERMO: Alternatively, could you just

end it with saying "for consistency with the plans

listed under Item 4 in the decision," and then just

put a period there? Because the building

commissioner is going to review consistency of any of

these applicable plans to what he's looking at.

MS. BARRETT: Sometimes the easiest

shorthand is to refer to them as the approved plans.

You just refer to them as the approved plans.

MS. MORELLI: So for consistency with the

approved plans.

MS. BARRETT: Yeah. And then back earlier

when you list then -- or wherever you're listing them

say, you know, these are basically the plans of

record -- the approved plans for this decision.

MS. PALERMO: That's a good idea.

MS. POVERMAN: Paragraph 11, just

capitalize "building permit."

Paragraph 12, last sentence, "any proposed
removal of street trees shall be pursuant to."

MS. SCHNEIDER: "Shall be subject to."

MS. POVERMAN: Yeah.

MR. GELLER: And before that, "construction
and planting additional street trees."

MS. MORELLI: I'm not following.

MS. SCHNEIDER: Second-to-last line of 12,
planting instead of plant.

MR. GELLER: And then at the end of that
same line, "town arborist with all costs related to
performance thereunder borne by the applicant."

MS. BARRETT: You actually can just refer
to Chapter 87 as the "Shade Tree Act."

MS. POVERMAN: 14A, the end of the second
line, it should be westbound -- "southwestbound side
of Fuller Street between the Fuller/Harvard Street
intersection."

Subsection B, three lines down, prior to
the issuance of the building permit," capital P.

MR. GELLER: 15B, just swap out "retail and
office space" for "commercial development."

MS. SCHNEIDER: Do you want to do that on
15I as well?

MR. GELLER: Yes.
K, "No food shall be prepared within the
commercial space."

MS. MORELLI: Oh, that's right.

MR. GELLER: I think the applicant might be
concerned if we remove the kitchens from the
residential units.

And then "prospective retail tenants" --

MS. SCHNEIDER: I'm sorry. Can we back up
for a second? Is it selectmen's office, or is it the
board of selectmen?

MS. POVERMAN: Board of selectmen.

MR. GELLER: So in the line before that,
"Prospective retail tenants shall require local
licensing and other approvals related to sale of food
and beverage products as required by local authority,
including, without limitation," and then you
continue on with your language.

MS. SCHNEIDER: That's good, Jesse.

MS. MORELLI: Can you just read it again?

MR. GELLER: I can try. "Prospective
retail tenants shall require local licensing and
other approvals related to sale of food and beverage
products as required by local authority, including,
without limitation" -- and then it picks up.
MS. POVERMAN: And then "building permit" capitalized.

MR. GELLER: Okay. In 19, third line, "building departments, certificate of occupancy process as verified by," because that sort of picks up conceptually what's going on.

MS. MORELLI: -- "the director of engineering."

MR. GELLER: -- "as verified by the review and approval of."

22, since we have acknowledged the possibility of multiple COs, do we really mean prior to the issuance of the first CO, the earliest CO?

MS. BARRETT: Sometimes you do. Depends on the project, but sometimes you do.

MR. GELLER: In this case --

MS. BARRETT: If there are conditions you want in place before anybody moves and then before the project is done, yeah.

MR. GELLER: So I think you need to say, "First C of O."

MS. POVERMAN: 25 is capitalized, the building permit again.

I do have a question about 27. Where,
Maria, you had a question about whether or not -- so you say, "When 50 percent of the certificates of occupancy are issued, the applicant shall demonstrate to the building commissioner that the project complies with the town noise bylaw. Pursuant to the issuance of the final certificate of occupancy, the applicant shall demonstrate that it complies with the noise bylaw."

What percentage -- is it total occupancy that the final certificate of occupancy is --

MS. MORELLI: Yes.

MS. POVERMAN: My concern about that is this: We don't know exactly what's going to happen in the housing climate. And let's say the last apartment isn't filled for a year. Then the noise review wouldn't be done for a year. So can we have it at another percentage?

MR. GELLER: Well, let's back up a minute. Because I think you raise a very good point, but you're also -- the other issue is, again, if there are multiple COs, then you're going to have separate -- there are separate requirements for commercial versus residential space. Therefore, the logic of residential space is, like our discussion on...
40 Centre Street, as the building commissioner said, 50 percent is a good point at which to take your first look.

Now, in this case, there may also be a relevant point to look at the commercial space because we don't know the order in which they're going to be producing this stuff.

MS. POVERMAN: Good point.

MR. GELLER: So in terms of triggers, you may want separate triggers, one for commercial, one for residential.

MS. SCHNEIDER: I understand your point. But I guess I'm thinking that given the size of the commercial space relative to the retail space in this project, I'm not sure that having a separate milestone for the commercial --

MR. GELLER: Well, the issue is noise. Let's assume that they come online in August.

MS. SCHNEIDER: Right.

MR. GELLER: And their commercial tenants move in first.

MS. SCHNEIDER: Right.

MR. GELLER: Therefore, their condensers are functioning for their commercial tenants.
Now, yes, it is a fairly limited amount of square footage, 5,000 square feet, but you still have noise issues or potential noise issues. So the question becomes, should that be a trigger point for the building commissioner to test for dampening or should it simply float off of whenever he gets 50 percent, 70 percent occupancy in the residential. It's about noise.

MS. SCHNEIDER: Right. But we're really talking about rooftop mechanicals; right?

MR. GELLER: You're talking -- in this case, you're talking about rooftop mechanicals.

MS. PALERMO: Instead of timing to 50 percent of the COs -- because you don't know how many COs they're going to get. They may get one, they may get two.

MR. GELLER: But that's the suggestion of the building commissioner. That was what he had suggested.

MS. PALERMO: Well, I was going to say -- but it's hard to know what they're going to do.

MS. SCHNEIDER: And they may not know now.

MS. PALERMO: And they may not know.

And as far as occupancy, they're going to
get a CO even if they don't have a tenant for an
apartment. They're not going to hold off on getting
their CO because their lender won't let them, so
that's not a way to do it.

But possibly, if you did it with square
footage, you could say, you know, prior to the
issuance -- maybe prior to the issuance of a final
certificate of occupancy, that they'll have to
demonstrate that it complies. And that means they
won't get the final C of O, and it may be the only
C of O they go for.

MR. GELLER: Let me make a suggestion. I
think that this is something that Dan Bennett should
really look at and respond. And point out to him the
possibility in this case, unlike, for instance,
40 Centre Street, there is a possibility that the
commercial spaces are in use before the residential
spaces.

MS. MORELLI: I want to make a distinction
here. They don't have to be in use. If he wants to
have the building tested and have it all --

MR. GELLER: But I don't know what point he
wants that testing to be.

MS. MORELLI: But he clearly made the
1 distinction between certificates of occupancy and
2 actual occupancy. We're not saying 50 percent
3 occupied. We're 50 percent of the C of Os.
4 MR. GELLER: Right. Because he's using
5 that as the leverage to make them --
6 MS. MORELLI: Right. So that's -- you're
7 withholding something really valuable. It could be
8 the dead of winter. He's going to want all the
9 condensers fired.
10 MR. GELLER: But which point? What is the
11 point at which he wants to do this test?
12 MS. MORELLI: I don't understand.
13 MS. PALERMO: Well, I'm still not clear as
14 to why simply saying that they're going to withhold
15 the final C of O isn't enough.
16 MS. SCHNEIDER: Why does he need the 50
17 percent?
18 MR. GELLER: But that was his -- that's
19 what he prefers, and I don't have a compelling reason
20 to say to the building commissioner that the logic
21 doesn't work. So if that's what he prefers, I'm okay
22 with that piece. The only piece that I question is
23 50 percent of C of Os is a residential analysis.
24 MS. PALERMO: Well, it's also, as I said,
assuming there's going to be multiple C of Os, and
there may not be, so I think we are trying to help
the building commissioner get to where he wants to
be.

MR. GELLER: Right.

MS. PALERMO: So I think the final C of O
is certainly enough of a threat to make sure that the
building complies with noise requirements. If he
wants a test prior to that, then we could perhaps
include some obligation on the part of the applicant
to demonstrate to the building commissioner at
50 percent -- or after installation of all mechanical
equipment. I mean, he just wants a test point prior
to -- it sounds like that's what the building
commissioner wants.

MS. MORELLI: He wants to make sure that
all the mechanicals --

(Multiple parties speaking. Interruption
by the court reporter.)

MS. MORELLI: The building commissioner's
point is that all mechanical equipment has to be
tested before the final C of O is issued.

MS. PALERMO: Well, he has the right to.

MS. MORELLI: Absolutely. He's pretty much
saying the entire building has to be compliant. In order for the entire building to be compliant with the noise bylaw, all of that equipment has to be run. And it can be the dead of winter. All of the AC units are going to be run.

MS. SCHNEIDER: I think the issue, though, is the 50 percent --

MS. MORELLI: We can take that out. It's really a vestige of another case, and there's a reason. There was another case that doesn't have blanketing condensers, so we're just being extra cautious. We can take that out, and we can just start with prior to the issuance --

MS. SCHNEIDER: I think that's a great idea.

MS. POVERMAN: What are we taking out?

MS. SCHNEIDER: We're taking out the "50 percent."

MS. POVERMAN: I disagree. I really disagree. I don't see any problem with the "prior to 50 percent." I think it's protection for the neighbors. I mean, I'm not saying I don't have faith in the developer. I'm not saying that at all. But you don't want, you know, a really horrible noise
system or whatever -- protection in place while full certificate of occupancy is being -- you know, until it's not required yet. I think you want to have --

MS. MORELLI: Let me make it clear. They're not asking for a waiver from the noise bylaw, so it doesn't matter at what point the building is constructed. If it makes any noise and people complain, they're going to get -- they are going to get an inspector out there and they're going to get cited because they will be in violation.

MS. PALERMO: Well, not only that. They won't get their C of O, which means they won't be able to put the tenants in the building, which means their lender will foreclose. That is huge. As long as they build a building that does not comply with the noise requirements, they can't use --

MS. MORELLI: I really have to step in here and say we have a process and we have regulations and we know how to run the town. We don't have to reinvent the bylaw. And let's just say that the conditions don't take the place of our regulations.

MS. POVERMAN: I fully understand that.

MS. MORELLI: Okay.

MS. POVERMAN: Two things are driving me.
One is that it was the building commissioner's suggestion; and two, the fact that the neighborhood is not necessarily going to know when the noise level is exceeded.

We have an incredibly noisy, you know, building a block and a half away from us, and it is outrageous at times. I've never called up, because I'm like, well, maybe it's violating or not. So I don't think we want to put the onus on the neighbors to know when the noise violations are being exceeded.

MS. MORELLI: Is there any objection to leaving 50 percent? I don't understand what the objection is. Does the applicant have an objection? Does it create confusion?

MS. SCHNEIDER: I think it does create confusion only because I think it's -- in any project I think it's hard to figure out what the 50 percent point is and whether there even will be a 50 percent point at which it could be tested. You know, sometimes -- you know, sometimes a project, as Lark said, will just go for one final C of O at the end, so what does that mean about the 50 percent requirement if you're only pulling one C of O for the whole project?
MS. MORELLI: Because of the affordable
units, there is like a -- for every four units,
market rate, that's -- so the building commissioner
is going to be giving out certificates piecemeal.

MR. GELLER: This is what the building
commissioner wanted, and therefore, let's just ask the
building commissioner.

MS. BARRETT: Can I make a suggestion?

MR. GELLER: Sure.

MS. BARRETT: Just say, "The applicant
shall demonstrate to the building inspector that the
project complies with the town noise bylaw no later
than the issuance of the final certificate of
occupancy or sooner as determined by the building
commission."

MR. GELLER: That's fine with me.

MS. SCHNEIDER: Or we can just leave it as
is.

MS. BARRETT: Let the building commissioner
do his job.

MR. GELLER: That's fine with me if that's
all he was trying to achieve by this language,
because this is his language.

MS. BARRETT: Let him figure it out. He'll
know when -- they actually -- I don't think the board
needs to regulate this. That's my humble opinion.
Let's make it clear that it has to comply, and the
test point will be no later than the issuance of that
last certificate of occupancy or sooner if the
building commissioner determines it needs to be done.
Are you all right with that?

MR. GELLER: Out of respect for the
building commissioner, alert him to that changed
language. This is, again, his suggestion.

MS. POVERMAN: I think we should just leave
it.

MS. SCHNEIDER: We can also just leave it.
I think we were just trying to simplify it.

MR. GELLER: He then has to deal with the
issue of the ambiguity of 50 percent.

MS. SCHNEIDER: Exactly. That was the
concern, trying to remove that ambiguity,

MR. GELLER: Okay. My next comment is in
31.

MS. POVERMAN: Yeah. That doesn't belong
with this project.

MS. MORELLI: That's not true. So whenever
there is a project that is getting state funding or
permitting or licensing, it's up to the subsidizing agency to send a project notification form to the Mass. Historical Commission, and the Mass. Historical Commission will determine if there are any state-registered properties in the area that could be adversely affected by --

MR. GELLER: That wasn't actually what I was referring to. It's the question at the end that needs to come out.

MS. MORELLI: I just didn't delete that because I didn't want to edit his comments.

MR. GELLER: My next question is in 32. So we've added TAP language, but why are we not also -- you know, one of the provisions that typically is utilized is that commercial tenants -- it will be included in leases that they will incentivize the use of passes.

MS. MORELLI: I think that's an excellent thing to add.

MS. POVERMAN: So where are we putting that?

MR. GELLER: It will be one of the little Roman numerals.

MS. MORELLI: So included in the leases for
the commercial spaces --

MR. GELLER: Correct.

MS. MORELLI: And could you just finish that? What do you want to include?

MR. GELLER: I want to include -- I'll find the language. I have to find it. But it's essentially requiring commercial tenants to subsidize MBTA passes.

MS. MORELLI: Okay.

MS. POVERMAN: My comment on 32 -- are you done with 32?

MR. GELLER: Yes.

MS. POVERMAN: So my comment on 32 is, again, "building permit" capped.

And then three lines down it says -- sentence started, "In accordance with the Transportation Access Plan guidelines of the town" -- see number -- "of the" -- should it be the town --

MS. MORELLI: The town.

MS. POVERMAN: Specify town. And it's -- well, plural, "bylaws"; right?

MS. SCHNEIDER: No. Singular.

MS. POVERMAN: Oh, it's a particular bylaw.

Okay.
And then I know we have a disagreement with the applicant as to the percentage of subsidies to be provided for the employees' transit cost.

MS. MORELLI: I think he's saying that it would be a total --

What was your understanding? Providing -- instead of 50 percent subsidy?

MR. SHEEN: I mean, that just seems a bit arbitrary. We don't know --

MR. GELLER: I don't care about his employees. He's got maybe two employees.

MR. SHEEN: I've got two guys.

MR. GELLER: Seriously, I'm more concerned about the commercial tenants.

MS. POVERMAN: Okay. But it's the same issue, though, I mean, whether or not we're promoting public transportation and requiring subsidies. So shouldn't he be required to give some sort of subsidy?

MS. SCHNEIDER: Well, I think we are requiring him to provide some sort of subsidy. We're just not specifying the amount.

MS. POVERMAN: Okay. And then the bicycle racks, I agree that 40 is too many, even if that was
what was provided on the plans.

MS. MORELLI: I'm just saying -- it's just a reminder to myself. It's because of the conflict of the plan. I just want to update the plans, and I might ask the developer to update the plans to be consistent --

MR. BROWN: We'll go to 30.

MS. MORELLI: That's all I'm saying.

MS. POVERMAN: Okay, 34. So starting the sentence, "The affordable units shall be dispersed throughout the project and shall have the same bedroom ratio or mix as" -- instead of "the other units," say the "market-rate units."

MS. POVERMAN: 40 is just a question of who monitors the reports with distributor of community development.

MS. MORELLI: Sorry. What number?

MS. POVERMAN: Number 40. "For the period in which the project is being monitored by the subsidizing agency, upon the town's request the" --

MR. GELLER: It should be the owner.

MS. POVERMAN: Do you want to capitalize "building permit" again in paragraph 44?

MS. MORELLI: Yeah. I've made a note of
the styling.

MS. POVERMAN: Okay. I'll stop mentioning it, then.

MR. GELLER: My next one is 51B.

MS. POVERMAN: Hold on a second.

Okay, 46. "Fire safety: Prior to the issuance of a building permit, the fire chief or his designee shall review and approve the final site plan." Get rid of, "including without limitation," because it doesn't make any sense there -- "to ensure the fences and landscaping."

MS. SCHNEIDER: Do you want to get rid of "including without limitation," or do you want to move it to after "ensure"?

MS. POVERMAN: "To ensure, including without limitation" -- yeah, sure.

Okay, 47, the last line above "building and fire codes," it says, "direct alarm notification to the fire department designed in accordance with the latest versions" -- add an S -- "of the building and fire codes."

Okay. On to more excitement, 51C.

MR. GELLER: I'm going to B.

MS. POVERMAN: Oh, okay.
MR. GELLER: The second line, "lighting plans and compliance with the site plan review checklist," which is what 19 is really about.

MS. POVERMAN: What? The site plan review checklist?

MR. GELLER: Uh-huh.

MS. POVERMAN: Okay. Ready for C? "It has paid all fees and funded all improvements required pursuant to Condition 14 and, if applicable, Condition 12." Condition 12 relates to the street tree, so I don't think it's applicable.

MR. GELLER: It refers to cost, in that section, that would be borne by the applicant. That's what it's referring to.

MS. POVERMAN: Okay. Got it.

MR. GELLER: 51G, "The chief of environmental health has reviewed and determined compliance with the rubbish and recycling plan."

MS. MORELLI: Well, it's not compliance with the plan. It's actually approved -- it's in compliance with the city's sanitation code. I mean, they're presenting a plan in 15, but he's going to be reviewing that and he can certainly change his mind if he finds for any reason that it's noncompliant.
MR. GELLER: Well, here's what 15 says:

"Prior to the issuance of a building permit, the applicant shall submit a rubbish/recycling plan schedule to the chief of environmental health for review and determination of compliance with town regulations."

MS. SCHNEIDER: Right. But then he's going to approve that plan, which is what I think Maria is saying in this -- in F -- I'm sorry, G.

MR. GELLER: Okay. But I think he's also determining compliance.

MS. SCHNEIDER: Right. But I think he's not going to approve a plan until he's made a determination of compliance.

MR. GELLER: I assume that's correct.

MS. SCHNEIDER: Right.

MS. POVERMAN: Paragraph 52 talks about, "During construction, the applicant shall conform with all state and federal laws regarding air quality, etc."

Second sentence, "The applicant shall at all times use reasonable means to minimize inconvenience to residents" -- add "and businesses" -- "in the general area."
In 53, three lines down in parentheses, it says, "The condition of pavement surfaces of such routes before and after construction to be documented." That is contained in paragraph 57, so I think it's not necessary.

57 says, "Prior to commencement of construction, the applicant shall provide the director of transportation with a report and photographs of the condition of paved surfaces along truck routes before construction commencement and then again prior to issuance of a C of O to ensure construction traffic does not adversely affect the pavement."

MS. MORELLI: Okay.

MS. POVERMAN: Okay. And survey -- next, "survey of existing trees on the site and measures to ensure tree protection," I believe that's also covered someplace else because the arborist consultant --

MS. MORELLI: What number?

MS. POVERMAN: 53, directly following the "condition of pavement surfaces," and after "construction to be documented," there will be "a survey of existing trees on the site and measures to
ensure tree protection during construction."

MS. MORELLI: So what was mentioned is street trees, so I'm not sure what you're referring to. There's a difference between street trees and trees on the site. What this is talking about is a survey of existing trees on the site.

MS. POVERMAN: Oh, okay.

MS. MORELLI: And there's no other survey except for the street trees.

MS. POVERMAN: Okay. Good point.

Oh, and 55 I had a question. So "The applicant shall keep in optimum working order any and all construction equipment that makes sounds." Do we want to add that the applicant will make sure that the construction equipment conforms with all applicable noise bylaws?

MR. GELLER: No.

MS. POVERMAN: No? Okay. That's all I have.

MR. GELLER: That's all I have.

Anybody else?

MS. SCHNEIDER: No.

MR. GELLER: Does the applicant have anything to add?
MR. SHEEN: No.

MR. GELLER: Maria, anything anyone else?

MS. MORELLI: No. I do want to just acknowledge that the applicant is going to contribute $10,000 towards the upgrade of a traffic signal at Harvard and Fuller Street. Even though we got a fairly low bid, he's still committed to contributing $10,000 for that, which may cover most of the cost, and DPW just wanted to acknowledge that and thank the applicant.

I think the -- I wanted just to also point out that you do -- in addition to Exhibit 1, which is the waivers, that you have Exhibit 2, which is the terms for the replacement regulatory agreement. You do need to update those cross-refs.

MR. GELLER: And that's been reviewed by town counsel?

MS. MORELLI: It has, correct.

And then Exhibit 3 is the notice of the hearing.

MS. POVERMAN: Okay. One typo -- sorry -- on the terms to be included in the replacement regulatory agreement. Number one, under "Subsidizing regulatory agreement," one, two, three, four, it
1 says, "The project which, inter alia, will set" -- I think it's "forth" instead of "set for the certain restrictions."

MS. MORELLI: So in terms of next steps --

MR. GELLER: I was just getting there. So it seems to me -- obviously, there needs to be another cleanup of the decision. We're fine, I think, subject to a vote on the waiver requests.

Let me suggest to the board that we are at a point in this hearing where I think we can close the testimony portion and move on to the 40 days to clean up the decision. So in my quest for democracy, I just want to make sure everybody is all right with that.

MS. SCHNEIDER: Yes.

MS. POVERMAN: Yes.

MS. PALERMO: Yes.

MR. GELLER: So what we're going to do is we're closing the hearing portion --

MS. BARRETT: Closing the public hearing.

MR. GELLER: -- closing the public hearing portion. And what this means -- for those of you who are familiar with 40B, or for those of you who are not -- is that we will no longer be able to take
testimony from any source, and the board will have a 
period of 40 days to deliberate and finalize the 
draft that we've been talking about.

KAREN: I have a question.

MR. GELLER: Is it for our expert?

KAREN: Yes.

MR. GELLER: Karen of Babcock.

KAREN: Yes. I'm always put in the middle 
of things, and I really don't want to be there. My 
income has declined and the 40B promise --

MR. GELLER: Karen, this does not pertain 
to the topic at hand.

KAREN: I don't see the promise of being 
included as a low-income tenant.

MR. GELLER: Karen, thank you.

Do you have a question that pertains to the 
process?

MS. SHAW: Before we close this topic, I 
just want to bring up the point of the coffee shop 
that's across the street.

MS. SCHNEIDER: I'm sorry. Could you just 
provide your name and address?

MS. SHAW: I'm Sloat Shaw, Thorndike 
Street.
And there's a coffee shop that's right across the street from the project that hasn't been able to get seats for its area the entire time it's been there. It's a neighborhood beloved coffee shop. And listening to the 40B get space for its food space doesn't seem accurate, it doesn't seem fair. They're just coffee and they bring in sweets. And I wondered about that kind of equity because they've been denied because they're, like, conflicting with Kupel's outdoor seating and other coffee shops in the area. So that's something that I wanted to bring up to this point. I thought it was applicable because it's right across the street.

MS. SCHNEIDER: I just want to clarify. I think your question is have we granted any rights to this project for outdoor seating on the sidewalk. And there was a discussion that there is a separate town licensing process that would have to occur for them to have any kind of restaurant or cafe space, and if they did want to be using sidewalks, it's a separate licensing process that occurs wholly outside of the purview of this board.

MS. SHAW: Right. But this coffee shop's not even allowed to have seats inside the coffee shop
because it was --

MS. SCHNEIDER: Right. But that's --

MR. GELLER: It's a separate licensing issue.

MS. SHAW: I just wanted to bring that up, just as a thought.

MR. GELLER: Sure. Okay.

Next, Maria, what do we have?

MS. BARRETT: You need to actually close the hearing.

MR. GELLER: Anybody?

MS. SCHNEIDER: I move to close the public hearing on 420 Harvard Street.

MS. PALERMO: I second it.

MR. GELLER: All in favor?

(All affirmative.)

MS. POVERMAN: I have a question. Now that we've made a decision, is the alternate's role done? If we're granting the comprehensive permit --

MS. BARRETT: You haven't voted to grant it.


(Discussion held amongst the board.)
MS. MORELLI: So we'll have a public meeting on January 23rd at 7:00.

MR. GELLER: Okay. Thank you, everyone.

(Proceedings adjourned at 8:47 p.m.)
I, Kristen C Krakofsky, court reporter and notary public in and for the Commonwealth of Massachusetts, certify:

That the foregoing proceedings were taken before me at the time and place herein set forth and that the foregoing is a true and correct transcript of my shorthand notes so taken.

I further certify that I am not a relative or employee of any of the parties, nor am I financially interested in the action.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 10th day of January, 2017.

Kristen Krakofsky, Notary Public
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