

In The Matter Of:

Brookline Zoning Board of Appeals Hearing

HEARING - Vol. 11

January 5, 2015

MERRILL CORPORATION

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Brookline Zoning Board of Appeals Hearing

Case Number 20130094

40B Application by Chestnut Hill Realty

The Residences of South Brookline

January 5, 2015 at 7:00 p.m.

Office of Town Counsel

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Appearances

Board Members:

Jesse Geller, Chairman

Jonathan Book

Chris Hussey

Mark Zuroff, Associate Member

Allison Steinfeld, Planning Director

Maria Morelli, Planning Consultant, Planning Department

Samuel Nagler, Esquire, Krokidas & Bluestein

Edith M. Netter, Esquire,

Edith M. Netter & Associates, P.C.

Dan Bennett, Building Commissioner

Joseph Geller, Stantec Consulting

Marc Levin, Chestnut Hill Realty

Steven Schwartz, Esquire, Goulston & Storrs

1 PROCEEDINGS

2 7:14 p.m.

3 MR. JESSE GELLER: Good evening, everyone.

4 This is the continued hearing for the Residences at
5 Chestnut Hill.

6 The ZBA, as everyone will recall, has been
7 granted an extension to today's date for the close of
8 the public hearing. The Planning Department has
9 submitted a summary of all written testimony submitted
10 relative to the revised plans to assist in the board's
11 review. Although the review process is ongoing, I
12 understand that there have been revisions that were
13 presented this afternoon and I understand that the
14 applicant may wish to present those provisions.

15 MR. JOE GELLER: Let me just say that we did
16 submit -- there was the letter that we got from the
17 town on the Wednesday afternoon, a letter from the
18 Planning Department, and a letter from Peter Ditto in
19 the Engineering Department. So we responded to those
20 letters. We commented on the revisions of the plan
21 requested by the town. So we've actually done all of
22 that.

23 And there was a question about access, so
24 pathways around the larger buildings.

1 MR. JESSE GELLER: Sidewalks?

2 MR. JOE GELLER: Sidewalks. And we did
3 provide, this afternoon, a plan showing how those could
4 be provided in response to a question that BETA had
5 come up with earlier in the process. And I think those
6 are the two things that we responded -- we responded to
7 all of the questions and comments and revised the plan
8 to reflect those and we added that one plan to respond
9 to the questions about the sidewalks.

10 MR. JESSE GELLER: Maria, do you have -- where
11 are you in terms of what's been presented and the list
12 that you made?

13 MS. MORELLI: Good evening. Maria Morelli,
14 planning consultant, Planning Department.

15 So we've received Stantec's letter, as Joe
16 mentioned. We've also received cap sheets for the
17 January 5th plans that Joe stated coincide with that
18 letter. And because we received it at the end of
19 today, just about between 4:30 and 5:30, we'd like an
20 opportunity just to review that letter and those plans
21 to make sure that we understand the changes that have
22 been made. It does appear that the applicant has been
23 very responsive to everything that we asked for.

24 At 5:30, in response to our concern about no

1 pedestrian pathways on the December 22nd plans, Stantec
2 did provide proposed pathways, sidewalks, on Lot E2
3 that would give pedestrians access between the surface
4 lot and the midrise building and around the midrise
5 building along Asheville Road and the rear of that
6 building. So we do need to look at that to understand
7 it better and also understand how it affects the
8 landscaping at the east elevation of the midrise
9 building. We don't have a corresponding landscape plan
10 that would show -- I understand from what they tried to
11 do that they are trying to preserve as much
12 landscaping, but a natural follow-up question is to
13 understand what needed to be lost. Thank you.

14 MR. JESSE GELLER: Thank you. There was also
15 a question about expression of retaining walls; is that
16 correct?

17 MS. MORELLI: Right. So on the plans, there
18 are several retaining walls that you haven't seen on
19 the August plans. Okay? There are about -- some of
20 them you have seen, some of them are there, but
21 overall, the majority of these 14 retaining walls and
22 tree wells aren't on the plans. They were introduced
23 on December 8th. We asked what their heights are
24 because they were not indicated on the plans. We

1 didn't see site sections for them. They weren't in any
2 renderings or 3D model.

3 So on December 22nd we got the height for,
4 again, most of them. I think there were two that they
5 missed and they have responded. We just haven't looked
6 at it yet.

7 So the question for us was -- they impact
8 three areas, these retaining walls. In one respect,
9 it's drainage on the west parcel. It's a concern of
10 Peter Ditto, Director of Transportation and
11 Engineering -- actually, I can show you. It's kind of
12 small, but at Building 1 and Building 2, Peter was
13 concerned about the tree wells there and how they might
14 affect water flow toward the abutters. It's a small
15 engineering problem. It really amounts to adding an
16 additional area drain. And what we're looking at right
17 now is how the applicant has responded to that. They
18 were very responsive in trying to deal with that
19 problem.

20 MR. JESSE GELLER: Is there a visual
21 implication?

22 MS. MORELLI: The heights -- you might not be
23 able to see them, but the heights of those tree wells
24 and retaining walls, I think they're between three and

1 seven feet. They start here. Here's one tree well.
2 I'm not sure if you can see them all. There is a
3 retaining wall here, and then there are tree wells
4 here, here, another one here, another one here, which
5 is closest to the property line.

6 And then just something else we want you to be
7 aware of. This has always been on the plans, but we
8 just want to help you understand what the implications
9 are. What you see in the red boxes are wall --
10 identification sign walls. So they would say
11 "Residences of South Brookline."

12 Okay. According to the site details, these
13 appear to be four feet, ten inches high. And from what
14 I can see, what I can measure -- and the applicant can
15 correct me if I'm wrong -- they appear to be sixteen
16 feet long and brick. Okay. The one at Independence
17 Drive appears to be sixteen feet long, but we have a
18 concern about the one that's at the corner of Beverly
19 Road and Independence because it's -- the symbol is
20 showing a longer wall, so we did ask, and we would have
21 to review the letter to see how long that wall is.

22 We're actually proposing a condition that
23 would have that identification sign wall removed as
24 well as -- at Asheville Road there are two signage

1 walls here. We, actually, are proposing conditions to
2 have those removed, so the only ones remaining -- there
3 are five walls -- the only sign walls that would remain
4 are the ones on Independence Drive.

5 The other implications of the retaining walls
6 concern height. The applicant has asked for some
7 waivers for the height regulations for retaining walls,
8 but the building commissioner can explain that they
9 haven't asked for height waivers for all of the
10 locations from front or rear yard setbacks, and he can
11 address that more fully with you.

12 The other concern, as I alluded to before, was
13 how the retaining walls would coexist with pedestrian
14 pathways that had been promised back in September.
15 This was just something they were working on
16 conceptually, and they have noted that the final
17 locations would be determined.

18 But BETA, the peer reviewer, really was
19 concerned about pedestrian access between the surface
20 lot that you see here and the midrise building as well
21 as access to the 40A lot and along Asheville Road.
22 Okay. So the yellow shows what Stantec was proposing
23 for pedestrian access in terms of sidewalks, and BETA
24 seemed happy with that. So when we didn't see that on

1 the plans, we inquired about that and that's when you
2 got the plans that I -- or the schematic that you got
3 at 5:30. It looks different from this, and that's what
4 we really do need to evaluate, preferably with the
5 applicant.

6 MR. JESSE GELLER: Okay. And is -- for
7 instance, what I'm seeing here, is this articulated in
8 an elevation?

9 MS. MORELLI: So this -- what you're seeing
10 here is a schematic -- it's something that Stantec had
11 proposed. It was a draft. It's not part of any plans
12 that you have.

13 MR. JESSE GELLER: So none of the elevations
14 that we've seen either in the presentations that we --
15 you know, the glossy presentations -- or in terms of
16 just the fixed drafts of elevations show any of that?

17 MS. MORELLI: They don't show the pedestrian
18 walkways. There are some of the them --

19 MR. JESSE GELLER: I mean the retaining walls.

20 MS. MORELLI: You're talking about the
21 retaining walls in the elevations in the 3D models?
22 There are some that were shown. I think what's
23 important -- we're really concerned about this east
24 elevation. And I think the applicant can explain to

1 you -- their feeling is that this retaining wall here
2 has always been there, and they can explain what you
3 would see. They're telling us that it starts at zero
4 at this point and then moves to almost ten feet when it
5 gets to the building. And that should be clarified by
6 the applicant for your satisfaction -- to your
7 satisfaction.

8 MR. JESSE GELLER: Okay.

9 MS. MORELLI: Just while we're here, there are
10 other retaining walls that are not visible from the
11 single-family homes. I'm sorry if it's not very clear
12 here, but there's a longer one here that is about 20
13 feet high -- expect it to be about 20 feet high -- and
14 we have recommended that it be tiered so that it would
15 allow for more landscaping and it wouldn't look like
16 such a massive wall at that area.

17 But I did want to point out that the last time
18 you saw the 3D model you very likely saw puddingstone
19 repurposed and used for retaining purposes. I think
20 that's what you might have seen, not this particular
21 retaining wall.

22 MR. JESSE GELLER: Do any of the board members
23 have questions about this?

24 (No audible response.)

1 Mr. Book, you, in particular, were the member
2 who commented about making the fourth floor disappear,
3 so I'm harking back to your comment about the visual
4 from Asheville Road. And I think you went so far as to
5 say from the right side of Asheville Road and the left
6 side of Asheville Road. So I wanted Maria to explain
7 that because I wanted you to understand. I don't know
8 whether you knew that there was a zero- to ten-foot
9 retaining wall. I don't know how visible it is from
10 Asheville Road, but it's there. It's clearly there in
11 this version.

12 MR. BOOK: This is part of the landscape.
13 It's a hardscape.

14 MR. JESSE GELLER: It's a hardscape.

15 MS. MORELLI: Mr. Chairman, if I could just
16 explain. It might not have been clear on an overall
17 site plan that there was a retaining wall there, but
18 the applicant is attempting to explain to us that that
19 wall has always been there. It's kind of like a
20 driveway sloping. So if they have something, a visual,
21 that they can show you or go back to something that
22 they had shown you before where that retaining wall was
23 there, I think that might be helpful.

24 MR. JESSE GELLER: Yeah. I'm not asking these

1 questions because I'm trying to just be pointed. I'm
2 simply trying to respond to things that I know were
3 issues from prior conversations. So I'm just trying to
4 get some answers.

5 MS. MORELLI: Right. I'm just saying I think
6 it would be helpful for you to see a rendering, if the
7 applicant can go back to a rendering where this wall
8 existed.

9 MR. JOE GELLER: Well, to your point, the
10 specific question to Mr. Book, the wall that we're
11 talking about, you don't see that wall from any of
12 those points that you just talked about because the
13 wall is hidden behind -- as you remember, one of the
14 things that we decided to do was keep that knoll.
15 Originally, we had blown that knoll away. And when we
16 blew the knoll away, we didn't need a wall. Then when
17 we decided to keep the knoll, then we needed a wall
18 because we're cutting down around that knoll to get
19 into the garage. So you'll never see this from
20 Asheville because it's behind the knoll. The wall is
21 behind the knoll and behind the trees on the knoll.

22 MR. JESSE GELLER: Okay. So from the right
23 side, if I'm standing at the entry to the garage,
24 that's where the ten-foot -- the zero- to ten-foot

1 height is. So I'd have to be at that side to see it?

2 MR. JOE GELLER: You'd have to be looking down
3 the driveway to see it.

4 MR. JESSE GELLER: To see it. If I'm standing
5 on Asheville Road, I'm just seeing the knoll.

6 MR. JOE GELLER: You're seeing the knoll,
7 right. You never see the wall. The only place you'll
8 see the wall is from on the property as you're driving
9 into the garage. Because, actually, the height of the
10 area on either side of it is higher because you have
11 the knoll on one side and you've got the other knoll
12 that kind of comes around in front of the other
13 building on the other side, so that's hiding it as
14 well. So the only place you see this wall is at that
15 location.

16 And I just want to point out that all of the
17 walls that Maria talked about in terms of the tree
18 wells and everything, those were on the animations.
19 You just didn't see them because there was landscaping
20 in front of them or there was -- you know, the grades
21 were in front of them. So those walls were all there
22 on the animations. You just -- you don't see them
23 because of everything else we've put in there so that
24 you don't see them. That was the intent. And the

1 grades were actually shown on the grading plan, but we
2 didn't have a detail that said what the height of each
3 one of the walls -- the grades were there. But they
4 asked us for more detail, which we provided to them, to
5 show just what the grades would be.

6 MR. JESSE GELLER: There's just two things I'm
7 trying to figure out. I'm just trying to figure out,
8 one, aesthetically, to sort of make certain it doesn't
9 take us a step back from comments that we received. It
10 sounds like that's not the case.

11 And secondly, I'm trying to figure out what
12 Maria, frankly, you need in order to take a look at
13 these things and do your usual diligent job and make a
14 recommendation to the ZBA. So is there more that is
15 needed, I guess? And I understand you got this at
16 4:30, 5:00, 4:00, whatever time it came in, so you
17 can't really answer the question because you need an
18 opportunity to take a look at it.

19 MS. MORELLI: Right. So we're making this --
20 it's a priority. And, you know, I have to tell you
21 that when I got these plans and when this hearing
22 started, I was not able to review this. Okay? And
23 it's not that I think that there might be more
24 information needed. I'm sure the applicant has been

1 responsive. I just can't give you an answer that's --
2 I mean, that you want to hear, that we don't need any
3 more information. I really don't know unless I look at
4 this.

5 But, you know, even if we have questions, it
6 might be helpful to just sit with the applicant and
7 have a face-to-face rather than spend the time writing
8 memos and getting a formal response. It would be more
9 expedient to just be in a room with the applicant to go
10 over any outstanding details.

11 MR. JESSE GELLER: I agree.

12 And I want to turn to our resident experts to
13 my right. So the question becomes -- we have a
14 continuance of the hearing through today. You know,
15 Maria needs to look at this and then there may be some
16 further questions, further asks. What is the
17 ramification? What -- do you have a recommendation for
18 the ZBA in terms of what -- obviously, the goal here is
19 that Maria have a full opportunity to review these, ask
20 whatever questions need to be asked, verify that
21 they've given all the information that's needed, or
22 say, well, sorry, you're missing sheet number 3, or
23 this is missing off of the description. What's the
24 impact of closing the hearing?

1 MR. NAGLER: What the regs say -- I'll just
2 read it to you -- is that the hearing is deemed
3 terminated when all public testimony has been received
4 and all information requested by the board that it is
5 entitled to receive has been submitted.

6 So if there's anything in the way of either --
7 and there's case law as well that talks about -- it's
8 either information or persuasion. If anybody is
9 communicating to the board anything that falls into the
10 category, however broad, of new information as opposed
11 to, can you give us another copy of that plan or, you
12 know, the most minuscule, routine clarification,
13 anything in the category of new information, that's
14 considered public hearing. So if you close the hearing
15 and then you ask for it, that's not permitted because
16 then you're continuing the public hearing beyond the
17 date in which the applicant agreed it could be
18 continued.

19 MR. JESSE GELLER: Maria, I assume, for your
20 purposes, your preference would be that there would be
21 an extension so that you can get clarity on these
22 issues; correct?

23 MS. MORELLI: I think it makes practical
24 sense.

1 MR. JESSE GELLER: Have you spoken to the
2 applicant at all about this?

3 MS. MORELLI: I have broached that subject
4 with the applicant.

5 MR. JESSE GELLER: Mr. Hussey?

6 MR. HUSSEY: There's a technical issue in
7 terms of communication. This sketch plan of the
8 walkway location has got a number of site symbols on it
9 indicating fencing or something but no legend. And so
10 that may fall into the category of new information not
11 present on this plan right now that she and we may need
12 in order to interpret exactly what's being done. I
13 don't know. And I couldn't see that there was --
14 there's a legend in the main body of the December 22nd
15 plan, but I couldn't see specifically these indications
16 in that legend. Do you know what I mean?

17 MR. JOE GELLER: They're all there, but
18 they're not on the plan.

19 MR. HUSSEY: Oh, they are here? Okay.

20 MR. JOE GELLER: But I hear what you're
21 saying, Mr. Hussey, and I can address that.

22 MR. HUSSEY: Okay.

23 MS. MORELLI: I just also want to point out
24 that the applicant is very willing to tier that longer

1 wall that you see here that's about 20 feet high. So
2 that's a design that they will be -- I'm not sure if
3 it's something they expect to be covered in a condition
4 or if they're expecting to show how they're going to
5 design it as a tiered wall, but that's one of the
6 things that we would discuss with them.

7 MR. JESSE GELLER: Be nice to see it.

8 MS. MORELLI: Yeah.

9 MR. HUSSEY: That is not going to be visible,
10 however, from the Russett Road area; right?

11 MR. JESSE GELLER: Right.

12 MR. HUSSEY: So is there not internal
13 information that we can get that doesn't fall under
14 this open-meeting category such as the tiered wall? I
15 mean, that stuff that would be useful to us in our
16 deliberations on the conditions, but --

17 MR. JESSE GELLER: Yeah. The issue is --

18 MR. HUSSEY: -- germane to the public.

19 MR. JESSE GELLER: Well, again, the issue
20 becomes that Maria wants to review these things to
21 determine if something is missing, incorrect, you know,
22 and then make a recommendation back to us. And as I
23 understand it from Mr. Nagler's comments, in order for
24 that information to be entered as further evidence as

1 part of the hearing, the hearing obviously has to be
2 open. It's difficult for Maria to say that nothing's
3 needed or I don't anticipate anything being needed
4 without looking at it.

5 MR. HUSSEY: Right.

6 MR. JESSE GELLER: I see Marc standing at the
7 podium.

8 Mr. Levin, how are you?

9 MR. LEVIN: Good. How are you?

10 MR. JESSE GELLER: Very well.

11 MR. LEVIN: Happy New Year, everybody.

12 Let's see. We would welcome the opportunity
13 to sit down with Maria this week and explain all the
14 clarifications and the small modifications that have
15 been submitted so that she has a full understanding of
16 what we have submitted. And it was, in fact, a
17 thorough response to the questions that came in not
18 long ago. And I think that you will find that the
19 retaining wall in question was a misunderstanding;
20 that, in fact, it starts at zero and it only gets to
21 ten feet by the time you're at the garage, and that's
22 not something that's going to be visible except for the
23 people using the garage.

24 As far as the retaining wall on the southwest

1 side that Mr. Hussey accurately notes is not visible by
2 any of the abutters, we think it's ugly. We're going
3 to --

4 MR. JESSE GELLER: Looks like a schloss?

5 MR. LEVIN: More like schlock. But as the
6 case may be, that said, it's not a simple solution.
7 It's a creative process, and we will be working to
8 redesign that wall to, in fact, achieve that terraced,
9 tiered look so it's not a 20-foot wall and, in fact, is
10 something else that can accommodate landscaping and
11 perhaps a walkway and something that looks really
12 nice. It's going to take a while to do. It's not
13 going to be within the time frame of these hearings.
14 So I'm just pointing that out that we would -- if you
15 were to accept this as is, we would be coming back for
16 a minor modification to show what that wall would look
17 like in its improved form.

18 MR. JESSE GELLER: I guess my question is:
19 Would the applicant consider an extension? And believe
20 me, I'm no advocate of extensions. I'm an advocate of
21 getting this done. But it seems to me that if
22 Ms. Morelli is telling us that she needs to look at it
23 to sort of think it through and then -- I think the
24 meeting is an excellent idea. You'll cut to the chase

1 a lot faster. But there may be some other things she
2 needs, but she needs to look at it. It seems to me, a
3 reasonable extension makes sense and I guess that's the
4 ask.

5 MR. LEVIN: I think the answer to that is
6 yes. I think it would take a week to do that. I don't
7 see why we can't get this accomplished over the course
8 of the next week. It's really an explanation. I don't
9 believe there's additional information.

10 And candidly, you know, I've looked at
11 other -- I haven't been involved in a 40B. I've looked
12 at other 40B projects, and we've given far, far more
13 information. In fact, you know, it sort of falls into
14 the category, you know, every good deed goes unpunished
15 in that the more information we give, the more details
16 we give, the more questions that come up and more
17 requests for additional information.

18 Now, we've been happy to do that. We've done
19 it. And, you know, our team has worked extremely hard
20 in developing these site plans far beyond anything that
21 I've seen submitted. So as it is, we'll gladly, you
22 know, address these last -- communicate these last few
23 clarifications and minor modifications.

24 And I just want to say that when Maria was

1 saying "modifications," a lot of it was, you know,
2 labeling plans to be consistent with other plans in the
3 documents. It wasn't like we were modifying this
4 plan. I think the area of the walkways is the only
5 thing that was modified. And that's the plan that --

6 MR. JESSE GELLER: I think the linguistic
7 stuff stems from the issue of just -- you know,
8 possibly not having had a chance to really look through
9 it and ask whatever questions. So I think that's just
10 a function of timing. And I'm not saying that to fault
11 anybody.

12 So the question, Ms. Morelli, is: What's a
13 reasonable period of time for you to review this,
14 respond, and meet with the applicant to clear up
15 whatever needs to be cleared up?

16 MS. MORELLI: I just want to make it clear
17 that this review does involve more than just me. So we
18 would want the fire chief to look at those pedestrian
19 pathways on the fire lane that -- in the rear
20 building. Peter Ditto is looking at the plans and the
21 responses to his questions, which are significant.
22 Well, they're not significant engineering problems, but
23 they do need to be resolved, so he would be involved in
24 that review. He might have follow-up questions, and

1 the building commissioner as well.

2 I think there is still a question about
3 outstanding waivers that haven't been requested that
4 need to be requested for the retaining walls. So we
5 can try to do that within a week. We'll certainly
6 attempt to meet that, but --

7 MR. JESSE GELLER: What's a reasonable period
8 of time for you?

9 MS. MORELLI: Well, I'd like -- if my
10 colleagues who are involved in that review have any
11 opinion other than -- is a week okay, Dan, with you?
12 And Peter?

13 All right. So they both nodded, so we will
14 work with the one-week deadline.

15 MR. JESSE GELLER: Okay. So one week is the
16 12th, yes? Extension through the 12th, Mr. Schwartz?

17 MR. SCHWARTZ: Yup.

18 MR. JESSE GELLER: Mr. Book?

19 MR. BOOK: Is this going to result in our
20 getting a report at 3:00 on Monday that needs to be
21 reviewed for 7:00 that evening? That's been a little
22 bit of a challenge in terms of the information, the
23 timing of the information that comes in to us. And I
24 understand that people are getting it to us as quickly

1 as they can, but it doesn't really --

2 MR. JESSE GELLER: It's a fair comment. You
3 know, I think there are tight time constraints and I
4 think everyone knows that giving us materials at the
5 hearing or at 5:00 or at 3:00, even, makes it nearly
6 impossible for us to review it. And whatever the
7 consequence of that is the consequence. I would urge
8 people to, obviously, give us as much time as possible
9 to look at materials. I don't know what else I can do.

10 MR. JOE GELLER: Totally understand. And
11 we're in the same boat because we get information and
12 we have to respond as well.

13 MR. JESSE GELLER: Absolutely.

14 MR. JOE GELLER: I just want to make sure --
15 we responded to the comment letters from both Mr. Ditto
16 and yourself, and almost all of those things were
17 addressed by changes on the plan that reflected --
18 there were, like, clarifications on the number of
19 parking spaces, things like that. All of that stuff
20 has been done. So I think, I think -- I just want to
21 make sure that we're all on the same page here. I
22 think what we're talking about is clarification on the
23 retaining walls and clarification on the walkway system
24 around the building. Those are the two issues that we

1 need to resolve. Everything else has been submitted.
2 So if you look at those plans and reflect what's in
3 your memo, you should be able to match those up.

4 MS. MORELLI: Right. But one thing we do want
5 to understand, so that the ZBA has all the information
6 that they need, we just -- one of the questions we will
7 be asking is how the pedestrian walkways at the midrise
8 between the surface lot and the midrise, how they
9 affect the landscaping. I know you're trying to
10 preserve as much -- but --

11 MR. JESSE GELLER: Okay.

12 MR. JOE GELLER: So if those are the issues
13 that you brought up, then we can address those issues
14 this week and get that to the board so we get it before
15 4:00 on --

16 MR. JESSE GELLER: So, Ms. Morelli, I just
17 want to make sure -- because Mr. Geller is putting it
18 this way -- so all of the other issues that you have
19 identified within your memorandum that was sent to
20 them, you've actually run the checklist and you've
21 confirmed that they've responded or --

22 MS. MORELLI: I would have to. I'm sure
23 they've responded accurately. My questions were very
24 straightforward. I'm sure it's going to be fine. I

1 just can't tell you that I've reviewed it.

2 MR. JESSE GELLER: So, Mr. Geller, just to
3 respond to your question, she's answering you to the
4 best of her ability. She's not gone through it.

5 MR. JOE GELLER: I just -- I would hope that
6 when we have the meeting together that Mr. Ditto will
7 be there, the building inspector will be there, and the
8 fire chief will be there so that we can get it all done
9 at that time and address all of those questions at that
10 point.

11 MR. JESSE GELLER: I would hope so too. Thank
12 you.

13 MR. NAGLER: Could I just ask a procedural
14 question? The regulations require an extension in
15 writing, and the current extension expires today.

16 MR. SCHWARTZ: I'll be happy to write one. I
17 think by hand still counts.

18 MR. NAGLER: Absolutely.

19 MR. JESSE GELLER: Thank you.

20 Okay. So last time we started -- I won't even
21 go that far. We didn't start. We nearly started the
22 process of reviewing the proposed draft of a decision.
23 I'd like to see if Mr. Schwartz at this point, who I
24 know has submitted, in the interim, some comments,

1 whether he would like to provide a presentation.

2 MR. SCHWARTZ: Yes. Just pardon me. I didn't
3 know that I was going to do it right now, so I just
4 have to get organized for a moment.

5 MR. JESSE GELLER: Sure. Take your time.

6 MR. SCHWARTZ: For the record, Steven
7 Schwartz, Goulston & Storrs, attorney for the
8 applicant.

9 We have submitted very detailed comments to
10 the board, as the board has probably seen, on the draft
11 decision. And in the interest of time and everybody's
12 sanity, I don't think it's necessary to repeat all
13 those comments in detail. But with your indulgence, I
14 do think it's useful to spend a few minutes putting
15 into categories the nature of our comments so you can
16 better understand where we're coming from and maybe
17 that will inform your review and discussion.

18 This is -- as you know, it's an incredibly
19 detailed decision with 68 proposed conditions. It goes
20 on for many page, appendices, and in many instances we
21 don't have any significant objection to these
22 conditions.

23 But there are a number of areas where we do
24 have substantial concerns and, frankly, we don't

1 believe that the conditions, as drafted, comply with
2 40B and its implementing regulations and the case law.
3 And I would be happy to point out some categories of
4 those types of conditions.

5 So the first category are conditions that we
6 believe are outside the scope of the board's authority
7 insofar as they are within the exclusive jurisdiction
8 of the subsidizing agency. And the leading case here,
9 as Sam and Edie know and as the board may know, is the
10 Amesbury case that was recently decided by the Supreme
11 Judicial Court.

12 There, the court upheld the Housing Appeals
13 Committee having struck numerous conditions -- now I'm
14 quoting -- based on a determination that they concern
15 matters that were properly within the regulatory
16 responsibility of the state subsidizing agency such as
17 MassHousing and the Department of Housing and Community
18 Development and not a matter of local concern. And for
19 these purposes, the matter of local concern is a
20 defined term that's limited to items such as height,
21 site plan, size or shape of building materials, but
22 not -- and here again I'm quoting -- project funding,
23 regulatory documents, financial documents, and the
24 timing of the sale of affordable units versus market

1 rate units.

2 And so I would say that many of the conditions
3 in the section of the permit that are under the label
4 "Housing" are not permissible under Amesbury and the
5 subsequent HAC cases.

6 For example, conditions mandating a percentage
7 of affordable units, involving the town in the lottery
8 for the affordable units, mandating a springing
9 regulatory agreement that would come into effect
10 perhaps 30 yeas from now, but the draft condition would
11 require it be executed prior to the issuance of a
12 building permit in which, in and of itself, contain
13 problematic requirements such as a permanent limited
14 dividend restriction which is not mandated by 40B or
15 the case law. And several others.

16 All of these, in our judgment, run afoul of
17 Amesbury and subsequent HAC cases such as the Haskins
18 Way versus Middleborough case, which I'll return to in
19 a moment. That's the first category.

20 The second category -- and this really touches
21 on something that we were just discussing in a slightly
22 different context -- relates to the scope of subsequent
23 review and approval of plans. In this condition -- in
24 this draft decision, by our count, there are some 17

1 conditions that in one form or another require
2 subsequent review and approval by town officials. And
3 here the 40B regulations are very specific in terms of
4 what is permissible in this area. The review of the
5 plans can be done -- and here a quote from the
6 regulations -- only to ensure that they are consistent
7 with the comprehensive permit, including any waivers,
8 the final approval of the subsidizing agency, and
9 applicable state and federal codes.

10 The plan and other materials that have been
11 submitted in this case are extremely detailed. In our
12 judgment, I really think that they go far beyond the
13 preliminary site plans that are required under 40B.

14 So a little bit here -- and I'll go off script
15 a little bit -- part of what we're struggling with is
16 sort of a having-your-cake-and-eating-it-too
17 phenomenon, a concern about that, with all respect to
18 all the hard work that the Planning Department is
19 putting in, wanting to have extremely detailed plans
20 submitted prior to the close of the hearing and yet
21 reserving, in many instances, review and approval on a
22 fairly open-ended basis of subsequent plans.

23 I want to read to you from an HAC decision,
24 very briefly, that -- but I think it's relevant. It's

1 from the 45 Marion Street case. It's from this board,
2 although not these members, from about 10 years ago.
3 It's obviously very relevant because it's a Brookline
4 project, it was another very controversial 40B project,
5 and because, in this context, there's a very succinct
6 statement about the limits of further review. That
7 permit, as does this permit, also required extensive
8 further review and approval of plans. The HAC rejected
9 that and noted as follows:

10 And now I'm quoting. Under the comprehensive
11 permit law, the developer will submit all the
12 preliminary site development plans and preliminary
13 prior architectural drawings to the board for
14 approval. Requiring subsequent review by the board of
15 the construction details and setting general, quote,
16 industry standards as the standard for such a
17 subsequent review undermines the purpose of a single
18 expeditious comprehensive permit.

19 And then citing another case, the committee
20 noted that we have consistently taken the position that
21 a board of appeals and all other local officials may
22 have only one opportunity to review a proposal. The
23 developer may include in his comprehensive permit
24 application any aspect of the construction which it

1 wants reviewed, whether that aspect requires a waiver
2 of local regulations or not.

3 The Board of Appeals must consult with all
4 other local officials, and once the comprehensive
5 permit has been issued, those details described in the
6 application may not be revisited. A condition may not
7 require overview and approval rather than simple
8 examination of construction plans for compliance with
9 the comprehensive permit, state codes, and undisputed
10 local restriction.

11 All that may be required after issuance of the
12 comprehensive permit is routine inspection during and
13 after construction by the appropriate town officials
14 or, as the board so desires, its consulting engineers
15 for compliance with the comprehensive permit, the final
16 written approval by the entity that issued a project
17 eligibility letter, and applicable state and federal
18 codes. Again, citing the regulations.

19 So we have concerns as to many of these
20 conditions. I think we're not opposed to subsequent
21 review and approval of plans to the extent that there
22 isn't the detail on the detailed plans that we have
23 submitted to ensure that they're consistent with our
24 plans and with written codes.

1 We are very concerned, that is, to the subset
2 about further review and approval of conditions that
3 propose open-ended mitigation requirements, some of
4 which the applicant has not agreed to and some of which
5 cannot even be foreseen at this point. And I'll take
6 as the most obvious example the transportation access
7 plan that needs to be approved by three separate local
8 officials, which includes, but not limited to, certain
9 mitigation requirements, some of which is noted in our
10 comments we have not agreed to.

11 But as I said before, it includes, but not
12 limited to, thereby implying that local officials can
13 impose other mitigation requirements and restrictions
14 on the project that this board is not mandating. That,
15 we believe, is improper under the 40B regulations.
16 It's improper, we think, to have local officials using
17 their discretion to impose even greater requirements.

18 The third category: Under the 40B
19 regulations, conditions cannot be imposed that are
20 generally not imposed by local boards on unsubsidized
21 housing projects. In this case in particular, we are
22 concerned with the number of conditions which would
23 impose open-ended review fees that are above and beyond
24 the very substantial building permit fees that will be

1 paid for this project as well as very, very broad
2 bonding requirements for the work, even though this is
3 not a subdivision where bonding is typically required.

4 And here, I think, a relevant case is, again,
5 the Haskins case versus Middleborough, which I cited
6 earlier. And what the HAC said in that case is,
7 typically towns are reimbursed for the cost of such
8 monitoring by the quite substantial building permit
9 fees assessed for all construction. Since the board
10 has not waived any part of such fees in this case, the
11 developer will, of course, pay those fees. It is
12 possible that in Middleborough additional fees are also
13 normally assessed for large market rate subdivisions.
14 If so, commensurate fees can be assessed to this
15 development, but assessment of higher than normal fees
16 is prohibited by the unequal application provision of
17 Chapter 40B, Section 20.

18 So we have not done an exhaustive search of
19 all non-40B decisions whether issued by this board or
20 the planning board in the Town of Brookline to see
21 whether these types of very broad subsequent review
22 fees and bonding requirements have been imposed.

23 But one project which this board should be
24 very familiar with because the three voting members of

1 this board approved it last year -- also, as I
2 understand it, as a rather controversial hotel
3 project -- is 111 Boylston Street, close to 100,000
4 square-feet project, five-story building. The board
5 approved it with 12 conditions. Not 12 conditions
6 require further approval, 12 conditions. There was no
7 requirement for additional review fees and no
8 requirement of bonding.

9 Just to take another 40B example, the Saint
10 Aidan's project which was -- I guess you'd call it a
11 friendly 40B, but nevertheless, it was a 40B project --
12 no requirement for payment of any review fees, no
13 bonding requirements. I point this out not to say that
14 we're totally opposed to paying a reasonable cost of
15 the review -- and we can work out what a cap would
16 be -- but the open-ended nature of some of these
17 requirements concerns us greatly. As it is tied to the
18 first level -- the second level of concern of review of
19 subsequent plans, it seems like we may be writing a
20 blank check for unlimited further review by local
21 officials.

22 Finally, in addition to those categories,
23 there are individual conditions that are quite
24 concerning to us. For example, the language --

1 although we did agree to a restriction to be held by
2 the town which would prohibit certain further
3 development, as drafted, we're very concerned that even
4 minor changes to the plan which this board would see as
5 insubstantial would then require us to go to the Board
6 of Selectmen -- which I think, as testimony has shown
7 in this project, at least in its current composition,
8 is less than enthusiastic about this project -- would
9 require them to approve those change.

10 We're concerned about the language -- the
11 drafting of the VFW access condition which could be
12 read as mandating that access is required and not just
13 that we use best efforts, commercially reasonable
14 efforts to get it, and would mandate the filing of that
15 application even while possible appeal of this permit
16 is pending.

17 In any case, this is something we'd like to
18 discuss with the board. We don't believe that the way
19 it's worded would maximize the likelihood of success
20 for getting that approval from the state, which I think
21 is in everyone's interest, and we've suggested that the
22 town may want to take the lead at full cost to the
23 applicant in preparing the plans and in pursuing the
24 approval but that the town would be the applicant.

1 And finally, there are a number of respects in
2 which the conditions just don't accurately reflect the
3 factual matters shown on the plans, as we pointed out
4 in our comments. We'd be happy to get into as much
5 detail as the board would like as to those matters, but
6 that is the final matter. So with that, and again, in
7 the interest of time, I'll stop, but happy to answer
8 any questions.

9 MR. JESSE GELLER: Thank you.

10 Questions at this time?

11 MR. ZUROFF: Not of the applicant.

12 MR. HUSSEY: Only as to process, and that is,
13 how are we going to work our way --

14 MR. JESSE GELLER: Is that a question for us
15 or --

16 AUDIENCE MEMBER: Microphone.

17 MR. HUSSEY: Sorry.

18 Only as to process as to how we, as the board,
19 are going to work our way through this manuscript from
20 Mr. Schwartz. It's a question for the board and our
21 consultants, just so that I understand what the process
22 is.

23 MR. JESSE GELLER: Are you talking about what
24 Mr. Schwartz submitted, or are you talking about the

1 decision itself?

2 MR. HUSSEY: What I'm talking about
3 specifically is what Mr. Schwartz has submitted. How
4 is that going to be adjudicated?

5 MR. JESSE GELLER: We, as the ZBA, look to our
6 advisors, consultants, lawyers for their wisdom. And
7 I'm sure they will have a response to Mr. Schwartz and
8 what he's proposed within his comments, so we'll look
9 to them for recommendations, comments.

10 MR. HUSSEY: But then we will make the final
11 decision?

12 MR. JESSE GELLER: Ultimately, it's our
13 decision.

14 MR. HUSSEY: Okay. Thank you.

15 MR. BOOK: Just to follow along with this, we
16 will start at the beginning and we're going to work
17 through it finding by finding, condition by condition.

18 MR. JESSE GELLER: Unless you have a better
19 system.

20 MR. BOOK: No. That's, I think, how it's
21 going to have to go.

22 MR. NAGLER: In the public meeting phase.

23 MR. BOOK: Right. So we have Mr. Schwartz'
24 comments on the draft conditions and the findings

1 conditions, we've had some input from the community and
2 their attorneys as well. All of that we need to --

3 MR. JESSE GELLER: All of that soup, yes, will
4 boil up and we will take that into account in our
5 discussion. And, frankly, our discussion will include
6 things that are within the base decision. They will
7 include some things that Mr. Schwartz has responded to
8 that we feel is either relevant or, frankly, that we
9 think doesn't ring true, we disagree with, whether
10 because we think that, based on recommendations made by
11 our experts that it, in fact, is not volitive of 40B or
12 any of the cases, or frankly, because we make a
13 decision that, in our mind, it is so integral into what
14 it is we have decided as part of this decision, we
15 don't care. We'll take the case -- you know, we're
16 willing to allow it to stay in. So I think that's part
17 of what we do.

18 The question is: When are you prepared to --
19 I guess there may be individual questions, but when
20 would you want to address the overarching summarization
21 of comments?

22 MS. NETTER: Which overarching summarization
23 of comments?

24 MR. JESSE GELLER: Mr. Schwartz'.

1 MR. NAGLER: I have some preliminary thoughts
2 I could share now if you'd like.

3 MR. JESSE GELLER: Sure.

4 MR. NAGLER: On the first issue in terms of
5 the Amesbury conditions, if you will, I agree with the
6 general principle that Steve cited but I have to say
7 two things. First of all, I definitely seen these
8 conditions in post Amesbury comprehensive permits. And
9 I guess the question is, does it really hurt?

10 And secondly, the project eligibility letter
11 was somewhat unusual, from my perspective, because it
12 seemed to defer a little bit more to the town than is
13 common. There's language in there that says,
14 "20 percent of all units will be affordably priced and
15 set aside during the term that the town imposes in a
16 comprehensive permit, if issued, the tenants with
17 income not exceeding 50 percent of area median
18 income."

19 So those are my, at least, preliminary
20 thoughts on issue number one.

21 MR. SCHWARTZ: Does it make sense for me to
22 respond category by category?

23 MR. JESSE GELLER: No. Let's hear it.

24 MR. NAGLER: On issue number 2, I think it was

1 the Marion case that got appealed to the appeals court.
2 It's the Zoning Board of Appeals in Brookline and the
3 Housing Appeals Committee. And the appeals court
4 upheld three of the conditions that were struck down at
5 the Housing Appeals Committee. I can read you some of
6 the language. And this, by the way, is an unrecorded
7 decision that, quote, may be cited for persuasive value
8 but because of the limitations noted, not as binding
9 precedent.

10 In any event, it said, "Paragon argues that
11 condition numbers 14, 18, and 21 were imposed outside
12 the board's jurisdiction because each required
13 subsequent approval, thus negating the single
14 comprehensive permit. We disagree. Though the purpose
15 of a 40B is to promote the development of affordable
16 housing, the fact that some delay in project execution
17 might result from conditions requiring further review
18 of the details of its construction management plan, an
19 erosion control plan, or to ensure timely completion of
20 project infrastructure does not place them beyond the
21 board's authority to impose."

22 So you have that language and then you have
23 the language in the regs that say you review it
24 strictly for conformance with the preliminary plans.

1 So I guess the question is how you reconcile that. I
2 think the process that they're talking about in the
3 appeals court case is further refining, getting into
4 the type of process that will normally happen after,
5 say, a special permit or variance is issued.

6 I don't think, during that process, further
7 review of the plans could say, well, I think you should
8 have fewer units or fewer parking spaces, whatever. I
9 think it does have to be consistent in that sense.

10 The third issue is the review fees. I agree
11 that they have to be consistent with non-40B projects.
12 I don't have any disagreement with that. The --
13 specifically, with respect to the bond --

14 MS. NETTER: Let me just add one --

15 MR. JESSE GELLER: I'm actually going to turn
16 to you after he's done.

17 MS. NETTER: It's just a tiny little point to
18 emphasize -- which is query whether this project is
19 like any other project in the Town of Brookline. So
20 that's another thing we have to consider.

21 MR. NAGLER: You would have to inject a very
22 practical consideration. That is true, but we have to
23 do the best we can, I think, with those parameters.

24 In terms of the bond fee, regs do empower the

1 board to impose subdivision standards on, you know,
2 subdivision projects, although the regs go on to say
3 that the applicant can seek waivers for such
4 requirements. So I think that's where the bond issue
5 comes in.

6 MR. JESSE GELLER: Is this in Regulation H?

7 MR. NAGLER: This is in 760 CMR, 56057 on the
8 waivers.

9 In terms of the restriction, I, personally, do
10 not have a problem with the insubstantial change
11 standard being the standard for modifications that
12 don't require approval.

13 In terms of the VFW access, I know some of the
14 abutters feel very strongly that that should be a
15 requirement, but just in terms of the -- I believe the
16 draft -- it was the intent of the wording not to make
17 it a requirement. I think -- I, personally, just
18 speaking for myself, think the applicant should be the
19 applicant and I'm not all convinced that it has to wait
20 until the appeal is resolved to pursue that. That's my
21 own opinion on that. So in broad strokes, those are my
22 thoughts.

23 MR. JESSE GELLER: Questions?

24 MR. HUSSEY: I assume that the -- I noticed in

1 the draft and also in Mr. Schwartz' letter the fact
2 that there were a number of other agencies in the town
3 requiring approval in the conditions that you've
4 written.

5 Now, if those get dropped for whatever reason,
6 I assume it doesn't preclude review and approval of the
7 building commissioner in order to issue a building
8 permit for this project. It doesn't override that,
9 does it?

10 MR. NAGLER: No, it does not.

11 MR. HUSSEY: Okay.

12 MR. NAGLER: And I think there can be review.
13 I mean, we could put overarching language. It's
14 certainly no intent on anyone's part to violate the
15 regulations or the applicable law, you know, that all
16 review will be in compliance and limited by the
17 regulations and applicable law.

18 MR. HUSSEY: So the review can stand, but the
19 approval is the issue in that.

20 MS. NETTER: How the approval is crafted.

21 MR. HUSSEY: Right. Thank you.

22 MR. ZUROFF: My question is related to that.

23 In 756 there are many references to local needs. Those
24 local needs include enforcement by the building

1 commissioner and other departments in the town as to
2 the construction of the project which will require
3 subsequent review of the long construction process. So
4 those can't be waived by us, nor would we want to waive
5 them.

6 MR. NAGLER: I don't think the applicant is
7 asking you -- you know, when the building --

8 MR. ZUROFF: But some of the fees are part of
9 that process. Are they not?

10 MR. NAGLER: It's what your customary fee
11 structure is.

12 MR. JESSE GELLER: Do you require it on a 40A
13 project?

14 MS. NETTER: Building permit fees are building
15 permit fees. Those are -- nobody's contesting those.

16 The applicant is making an argument -- and I
17 think he said it -- but so you understand, again, that
18 they don't want to pay fees that could be -- who knows
19 what. You know, they'd like to see some sort of cap on
20 fees and I don't know whether that's something that can
21 be established.

22 And then the applicant also is arguing that
23 with respect to inspection fees, they're arguing that
24 those are covered by the building permits. But, again,

1 I would be surprised if the -- I don't think the
2 applicant is saying we're not going to pay -- I'm
3 repeating what Attorney Nagler said -- the customary
4 and usual fees to the extent there are customary and
5 usual fees for a project such as this.

6 MR. NAGLER: And I believe, also, the
7 applicant has agreed to pay for the blasting peer
8 reviewer -- the fees of the blasting peer reviewer.

9 MR. ZUROFF: So how would that apply -- for
10 instance, we have a stormwater management system as
11 part of these plans. So how would it apply in our
12 conditions for subsequent monitoring of the stormwater
13 system to make sure that it is still operating five
14 years down the road? Is that our purview?

15 MR. NAGLER: It's your purview if -- my
16 understanding, it's your purview if it's something you
17 would customarily do for a similar project. You can't
18 do it because this is a 4BB project.

19 MR. ZUROFF: Okay. So anything that would
20 apply to a normal construction project, a 40A project,
21 is perfectly acceptable for us to impose as conditions.

22 MR. NAGLER: I believe that's correct. And,
23 actually, one of the very, very few conditions upheld
24 at Amesbury was a post-comprehensive permit peer review

1 fee. So as long as it's not discriminatory, I argue
2 it's ...

3 MR. JESSE GELLER: Thank you.

4 Anything? If not, I'm going to turn to Edie.

5 MR. BOOK: I think one of the questions I have
6 you're going to address.

7 MS. NETTER: Uh-oh.

8 MR. BOOK: No. Well, we talked about it
9 before. In Category 4, Mr. Schwartz mentioned the VFW
10 access. Is it permissible to -- can it be
11 conditioned? We talked about this.

12 MS. NETTER: Right. And I think Sam has a
13 comment, but I don't think we differ. If the question
14 is, can we condition the permit on the applicant
15 obtaining VFW access, that's outside of our authority
16 because it's not within the control of the applicant.

17 MR. BOOK: And you've said that before.

18 MS. NETTER: And so has Attorney Nagler.

19 MR. BOOK: So in terms of -- so let's remove
20 that.

21 In terms of -- I mean, do you have a thought
22 on who should be the applicant?

23 MS. NETTER: I believe that, in the past, that
24 the applicant has made perhaps some references to

1 wanting the town to make the application. I think, if
2 that's acceptable to the town -- I don't know what your
3 thoughts are -- and it would work better because I
4 think every -- I can't speak for the applicant, but
5 they've represented they would like to have access to
6 VFW, and my understanding is the community would as
7 well. So I don't know what the traffic consultants say
8 is the best approach to it, and that might be helpful
9 to ask staff that question if they know the answer.

10 MR. BOOK: Okay.

11 MS. NETTER: But legally, I don't see any
12 issue. It's really what works.

13 MR. BOOK: Thank you.

14 MR. JESSE GELLER: Do you have any further
15 comments on the four issues that Mr. Schwartz --

16 MS. NETTER: No. I think Attorney Nagler has
17 summarized them.

18 MR. JESSE GELLER: You don't, in particular,
19 have a comment on review versus approval?

20 MS. NETTER: I think, looking at these issues
21 generically -- although I think it's appropriate what
22 Attorney Schwartz did -- but I think many of these
23 review processes can be crafted in such a way that we
24 don't necessarily use the word "approval," but you are

1 making -- and you can look at exact language in the
2 cases -- the determination of consistency with your
3 decision and consistency with your regulations and in
4 accordance with your normal practices. So you can get
5 to the same place, I think.

6 MR. JESSE GELLER: It's a linguistic
7 exercise.

8 MS. NETTER: I'm not going to say it that
9 way.

10 MR. SCHWARTZ: Mr. Chair, can I just respond
11 very briefly to a couple of things that Mr. Nagler
12 said?

13 MR. JESSE GELLER: Sure.

14 MR. SCHWARTZ: One of the things he said was
15 on the regulatory issues, what difference does it
16 make -- I'm phrasing -- no harm, no foul.

17 We fundamentally disagree with that for two
18 reasons. One is that the subsidizing agency should
19 have exclusive jurisdiction. That's a meaningful thing
20 because they're the ones who are going to be monitoring
21 and enforcing these restrictions that relate to the
22 regulatory issues both as to affordable housing and
23 limited dividend and anything that's within their
24 purview. And it creates an issue if we have both the

1 town potentially and the subsidizing agency doing that
2 and serving two masters, et cetera.

3 Particularly, we feel strongly about the
4 requirement for a local springing regulatory
5 agreement -- for lack of a better word -- which will
6 require -- not so much because we're worried about
7 what's going to happen 30 years from now -- I'm
8 certainly not worried about what's going to happen 30
9 years from now -- but because it is a requirement this
10 draft decision has imposed on us to negotiate with town
11 counsel prior to the issuance of the building permit.
12 We don't think it's required, we don't think it's
13 necessary, and we have some serious concerns about what
14 that agreement might say, what it might include. So we
15 do have concerns about that.

16 Generally, with regard to a lot of these
17 issues, what we're asking for is, frankly, consistency
18 with what this board and other boards that issue
19 discretionary permits in the Town of Brookline have
20 done for other projects. We respectfully don't think
21 that this is such a unique project that it will require
22 all kinds of conditions and requirements that are not
23 typically imposed on other large projects in the Town
24 of Brookline. We think it's a question of consistency

1 and fairness, we think that's supported by 40B, the
2 regulations and the case law, and we think it's the
3 right thing.

4 MR. JESSE GELLER: Thank you.

5 Okay. Page 1.

6 MS. NETTER: Do you want to start with the
7 findings, or do you want to start with the conditions
8 and then work back?

9 MR. JESSE GELLER: I want to start with the
10 findings. I don't know that we're going to have too
11 much to say about that, but we might as well work our
12 way through it and get to the conditions. So my
13 preference would be that we simply start at the
14 beginning and work our way through. I know you're
15 anxious to get to conditions, but ...

16 MS. NETTER: Only because there may be some
17 issues you raise that require some substantive
18 planning. I don't know where you're going to go with
19 it. That's why.

20 MR. JESSE GELLER: Anybody have strong
21 feelings one way or another?

22 MR. HUSSEY: I'm sorry. Repeat the question.

23 MR. JESSE GELLER: The question is --
24 Ms. Netter is advocating that we jump directly to the

1 conditions and start working through the conditions.
2 I've said that my preference is that we just follow it
3 in the order, and to the extent that we have comments
4 on the findings, that we run through them and just
5 continue. Those are the two options.

6 MR. HUSSEY: I concur with you, Mr. Chairman.
7 Let's start at the beginning and work our way through.

8 MS. NETTER: Let me just tell you my
9 thinking. The hearing is going to close next week.
10 And I know last time I was totally outnumbered. If you
11 outnumber me, that's that. But the sooner we get your
12 thinking -- if you need additional information, now is
13 the time. And the only way I think -- and I'm going to
14 be pretty strong here -- the only way we're going to
15 know that is for you to look at those conditions.
16 Okay? Because once the hearing is closed, you can't
17 turn around and say, gee, we don't have the information
18 for this. We don't really know. So that's your call,
19 but I've given it my best shot.

20 MR. JESSE GELLER: Thoughts? Mr. Zuroff,
21 Mr. Book, do you have an opinion here?

22 MS. NETTER: Well, Attorney Nagler, you feel
23 we should start with the findings?

24 MR. NAGLER: If there are issues that are

1 embedded in the findings, we can talk about it.

2 MS. NETTER: Okay, fine.

3 MR. JESSE GELLER: I don't know that there are
4 going to be many comments. Page 1, and people should
5 jump in if they have comments.

6 MR. HUSSEY: Are we working from the draft, or
7 are we working from Mr. Schwartz' --

8 MR. JESSE GELLER: No. We're working --

9 MS. NETTER: Why don't you --

10 MR. JESSE GELLER: I have both versions in
11 front of me, but I'm working largely off of the initial
12 draft.

13 MS. NETTER: 12/15?

14 MR. JESSE GELLER: 12/15 draft.

15 MS. NETTER: If you don't mind, since we have
16 the benefit of some time, as we go through it, I'd say
17 oh, gee, you know, I think I'm going to make X change.
18 I'll give you the benefit of that. So just so you
19 know, in the first paragraph under "Procedural
20 History," where it says "the project," I think we
21 should say "the original project" and then later talk
22 about the project as it is now and define that as the
23 project.

24 MR. JESSE GELLER: That's fine.

1 I had a note just to confirm that all
2 outstanding requested information has been addressed,
3 and the I think Maria is working on that.

4 Mr. Schwartz has added dates. He's corrected
5 the size of the parcel. I assume that would be
6 verified.

7 The reference to iterations, it seems to me --

8 MS. NETTER: Where are you?

9 MR. JESSE GELLER: I'm at page 1. So you see
10 EX-106?

11 MS. NETTER: Oh, the plan sheet.

12 MR. JESSE GELLER: Yeah. So based on the most
13 recent sheets that we have --

14 MS. NETTER: These aren't updated.

15 MR. ZUROFF: I'm presuming that we're going to
16 get an updated set that will be referred to.

17 MR. JESSE GELLER: We have them.

18 MR. ZUROFF: We're not getting one dated
19 January 5th? Is there going to be a set of plans dated
20 January 5th?

21 MS. MORELLI: Yes. I just got them, and
22 you're going to get the PDFs and hopefully the hard
23 copies as soon as possible.

24 MR. ZUROFF: So in our decision, we should

1 refer to the latest plans.

2 MS. NETTER: Eventually we will.

3 MS. MORELLI: We're keeping track.

4 MS. NETTER: Eventually.

5 MR. BOOK: So can we skip past all the list of
6 plans?

7 MR. JESSE GELLER: Yes. Reference the
8 December 15th date, obviously.

9 MS. Netter: Right.

10 MR. JESSE GELLER: And just one note, when you
11 refer to MassDevelopment, that's -- (inaudible.)

12 (Clarification requested by the court
13 reporter.)

14 MR. JESSE GELLER: Just for MassDevelopment,
15 it's Massachusetts Development Finance Agency --

16 MS. NETTER: Where are you, by the way? So I
17 know.

18 MR. JESSE GELLER: Findings.

19 MS. NETTER: Is everybody up to findings? You
20 all know that?

21 MR. JESSE GELLER: Yes.

22 MS. NETTER: Okay.

23 MR. HUSSEY: Number 3 on the findings,
24 Mr. Schwartz has changed "underground" to "base located

1 in a partially below-grade garage." I think that
2 implies that it's less than 50 percent, but I think
3 it's more, so I would say "substantially below-grade
4 garage," if my understanding of the drawings are
5 correct.

6 MR. JESSE GELLER: Mr. Hussey, do you want to
7 see a breakdown of -- within that recitation or within
8 another recital, do you want to see a breakdown of the
9 bedrooms?

10 MR. HUSSEY: No.

11 MR. JESSE GELLER: You don't think it's
12 relevant?

13 MR. HUSSEY: Well, I think it's documented in
14 other material.

15 MR. JESSE GELLER: Okay.

16 MS. NETTER: Did you say you want the word
17 "substantially" as opposed to "partially"?

18 MR. HUSSEY: Yes.

19 MR. JESSE GELLER: Anything else under
20 findings?

21 MS. NETTER: Yeah. I think what we're talking
22 about with respect to number 10 -- and this goes to
23 separating out the original project versus the project
24 that -- the plans which you're now reviewing -- is

1 making some general statements under "procedural
2 history" that the original project was -- let's say,
3 the midrise building was incongruous as to size or
4 whatever. The consultant is making some findings there
5 and relocating number 10. The conceptual project
6 design of the original project was not appropriate for
7 the site or something.

8 MR. BOOK: So you want to qualify 10 as it
9 relates to the original project.

10 MS. NETTER: Right. And put it into
11 "history." So separating out the history as this is
12 what was the original project that you were presented
13 with and then --

14 MR. BOOK: Okay.

15 MR. ZUROFF: Is all of these findings, in
16 summation, are sort of a preamble to why this is before
17 us as a comprehensive permit application?

18 MS. NETTER: Why and what your general
19 thoughts are. In order to approve a comprehensive
20 permit, you have to --

21 MR. ZUROFF: You have to make a finding --

22 MS. NETTER: You have to do number 11. You
23 have to get to there. Whatever you want to do, lead up
24 to there, we can ...

1 MR. ZUROFF: But none of this is -- other than
2 the conclusion, none of this is particularly important
3 other than as an explanation.

4 MR. BOOK: So are we moving -- is the
5 statement that we should move the finding number 10 to
6 the procedural history, or leave it as a finding?

7 MS. NETTER: My recommendation is to put it in
8 the procedural history because it relates to something
9 that was original.

10 MR. BOOK: Should we -- in addition to
11 Mr. Schwartz' comments on the draft decision and the
12 findings and the conditions, we received comments from
13 the community.

14 MR. JESSE GELLER: Yes.

15 MR. BOOK: And so maybe this is an appropriate
16 time to discuss some of the proposed findings?
17 Proposals were made as to additional findings that we
18 should include in our --

19 MR. JESSE GELLER: Yes. To the extent that
20 the comments that we've received from the public
21 pertain to findings as distinct from conditions, yes,
22 this would be the appropriate time to discuss them.

23 MR. BOOK: Okay. I'm specifically referring
24 to two findings that were put forth by Jay Talerman

1 who's representing some of the neighbors. One was a
2 finding that the -- I don't want to read the whole
3 thing but just the very beginning part -- that the
4 applicant has not yet demonstrated that the project is
5 fundable by a subsidizing agency. And it goes on.
6 That was the first finding.

7 And then the second finding had to do with the
8 1946 agreement and the litigation that's going on.

9 MR. NAGLER: I've actually -- can I discuss
10 the findings and the conditions that flow from those
11 findings in one discussion?

12 MR. BOOK: Yes.

13 MR. NAGLER: So in terms of the 1946
14 agreement, the regulations provide that site control is
15 a finding the subsidizing agency needs to make and that
16 the finding of site control is conclusive evidence. So
17 I don't know of any case law implying otherwise.

18 Plus, the SJC, in the 2013 Lunenburg case,
19 defined site control pretty narrowly as colorable
20 title. There was an infection invalidity argument that
21 was raised. And, of course, we're not talking about
22 buildability. We're talking about title.

23 So for those two reasons, I can't find support
24 for either the finding or the condition of the 1946

1 agreement.

2 MR. BOOK: Okay.

3 MR. NAGLER: On the project eligibility
4 letter, I think that's -- it's a complicated issue.
5 It's a serious issue. I think we're writing on a clean
6 slate in that I don't think the board -- any board --
7 has ever considered granting a comprehensive permit
8 with conditions while an appeal of a project
9 eligibility letter was pending.

10 But the language that I kind of get stuck on
11 is that -- in the regs -- is that determination of
12 project eligibility, quote, shall be an irrebuttable
13 presumption. It also didn't seem to give much wiggle
14 room for the board to condition the comprehensive
15 permit on matters having to do with the project
16 eligibility letter. In a way, it's a troubling
17 conclusion because the same 2008 amendments to the
18 regulation which added the "irrebuttable presumption"
19 language also imposed a lot more obligation and
20 requirements on the subsidizing agencies.

21 So it seems to me -- I'm happy to get other
22 people's thoughts -- but I don't know how you impose
23 all these obligations without giving the board some
24 say, but that's what they seem to have done. So I

1 would think if the board did impose a condition like
2 that, the applicant would appeal to the Housing Appeals
3 Committee. And I can't give the board any assurance on
4 the ultimate outcome of that. I cannot give you an
5 assurance that you would prevail on that.

6 I just point out that as a practical matter --
7 just from working on these transactions and not, you
8 know, as an applicant's counsel myself -- I think it
9 may be -- may -- be hard to get financing while the
10 appeal is pending anyway.

11 And I also think that even if the board
12 declines to impose the condition as worded by Attorney
13 Talerman, it would be appropriate to affirmatively
14 state that any construction activities conducted prior
15 to a definitive resolution of the appeal would be at
16 the applicant's sole risk. And if the result of appeal
17 is that the project eligibility letter is -- I'm
18 reading because I wanted to be very careful about what
19 I said here -- if the result of the appeal is that the
20 project eligibility letter were rendered null and void,
21 by definition, the comprehensive permit would be
22 rendered null and void as well. And in that case, the
23 applicants would be required to restore the property to
24 the condition it was in prior to construction. So

1 that's different than saying -- it's a shade different
2 than saying you may not build until the appeal is
3 resolved.

4 MR. BOOK: So as a practical matter, nothing
5 is going to happen. I mean, this project isn't going
6 to get built until those issues are resolved,
7 irrespective of whether or not we --

8 MR. JESSE GELLER: Could the applicant proceed
9 at its discretion and at its risk?

10 MR. NAGLER: Yeah, it could. Most lenders
11 would not feel comfortable with that out there, but I'm
12 not the lender. I'm not making that decision. Or, I
13 guess, the applicant could put its own money in.

14 MR. JESSE GELLER: And is it far fetched to
15 imagine that in a case in which the applicant lost,
16 that there would be remedies short of restoration? Not
17 just cessation of construction, but also -- so, in
18 other words, let's say they build a project. They
19 lose. Okay? They decided to take a risk. They lose.
20 Is it far fetched to imagine that a court might say,
21 well, we'll come up with monetary damages, but we're
22 not going to make you tear it down?

23 MR. NAGLER: We won't make you tear it down,
24 but you can't use it?

1 MR. JESSE GELLER: No. We'll simply come up
2 with monetary damages.

3 MR. NAGLER: I don't know how you do that.
4 It's a jurisdictional issue. The PEL is the entry, the
5 door, for the comprehensive permit process, so I don't
6 know how that would work.

7 MR. JESSE GELLER: Okay. I'm just trying to
8 work through it in my head, Mr. Talerman's parade of
9 horrors.

10 MR. NAGLER: Yeah. We're in unchartered
11 territory, as far as I'm concerned.

12 MR. JESSE GELLER: So what's your proposal?
13 Are you proposing that those two suggested insertions
14 be included both as findings and conditions?

15 MR. BOOK: No.

16 MR. JESSE GELLER: What are you asking?

17 MR. BOOK: I was asking if they were
18 appropriate as findings and conditions. What I heard
19 is not really. And -- which was my -- quite frankly,
20 was my instinct on it. And so while I appreciate
21 the -- what they're trying to get at, I just think
22 they're out of our purview. And, quite frankly, as a
23 practical matter, I don't think they're appropriate as
24 findings and conditions for this decision. And as a

1 practical matter, I can't imagine that anyone would
2 actually start building -- irrespective of whether or
3 not we included them -- I can't imagine anyone would
4 start building while this litigation is pending.

5 MR. JESSE GELLER: There's a phrase "boots on
6 the ground." They might think there's some advantage
7 to boots on the ground. I agree with you.

8 MR. HUSSEY: That's what occurred to me too.

9 MR. BOOK: That's my thought. You're free to
10 disagree.

11 MR. JESSE GELLER: No. My notes, actually,
12 are parallel to what you said.

13 Okay. Any other comments for findings? For
14 findings, not conditions.

15 MR. BOOK: I did not have anything else on
16 findings.

17 MS. NETTER: We're getting to conditions.

18 MR. BOOK: I don't think the conditions are
19 going to go quite as quickly.

20 MR. JESSE GELLER: Okay. We're on page 6,
21 which is the first page of conditions. We're on
22 condition 1. So this is the first location in which
23 Mr. Schwartz raises his issue, and it's a common-thread
24 issue through a number of the patterns, which is the

1 distinction between review and approval. Approval
2 would allow local officials to have some discretionary
3 authority. Ms. Netter has suggested that there are
4 ways in which this language could be corrected such
5 that it is more consistent with 40B and I would suspect
6 with what Mr. Schwartz is proposing. I'd clearly like
7 to see that.

8 MS. NETTER: Can I just say, this is kind of a
9 general catch-all of conditions, so maybe we can leave
10 number 1 and get rid of the second sentence and then
11 deal more specifically with each issue as we go through
12 it, what is the exact review standard, rather than
13 dealing with a general catch-all.

14 MR. JESSE GELLER: Sure any opportunity to
15 work harder rather than less, all for it.

16 MS. NETTER: Me too, by the way, but I don't
17 think we achieve anything extra here, so ...

18 MR. HUSSEY: So what's the decision?

19 MS. NETTER: At least for right now, I think
20 just the first sentence, as is, should stay in and we
21 don't need the general catch-all language and we'll
22 deal condition by condition.

23 MR. HUSSEY: So the beginning -- the second
24 sentence beginning with "The final site plans are

1 subject to review and approval," et cetera.

2 MS. NETTER: I don't think it's necessary.

3 MR. ZUROFF: Are we okay with
4 "substantially"?

5 MS. NETTER: No.

6 MR. ZUROFF: I'm throwing that out there. Not
7 just for you.

8 MS. NETTER: I shouldn't have responded. I
9 should have let your colleagues respond.

10 MR. ZUROFF: I would suggest that
11 "substantially" is too wide open.

12 AUDIENCE MEMBER: Louder please.

13 MR. ZUROFF: I'm suggesting that
14 "substantially" is too wide open and too open to
15 interpretation.

16 MS. NETTER: Just so you know, I mean, my
17 experience -- and I don't know if Mr. Bennett -- I
18 would assume he agrees -- but typically when you have
19 plans and there's a really little, little, little heal
20 change, that kind of thing is okay, but I don't think
21 we need the catch-all "substantially."

22 MR. BOOK: Well, just to be clear, I mean,
23 these aren't construction drawings. I mean, there are
24 going to be ...

1 MR. ZUROFF: This is the site plan.

2 MR. BOOK: True. But the project will be
3 constructed in conformance with the site and
4 architectural plans listed. So, I mean, there is going
5 to be -- to your point -- there are going to be some
6 deviations just in the natural course of going from a
7 50 percent architectural drawing to a 100 percent
8 construction drawing.

9 MR. ZUROFF: But we're dealing with two
10 different concepts. Correct me if I'm wrong. We're
11 dealing with, on one hand, the construction of the
12 buildings, which we're not overlooking here. What
13 we're dealing with is the site plan, where the
14 buildings are, where parking is, where the garage is,
15 where the access roads are, and I think that we've
16 hashed that through and we're pretty well established
17 that this is the way it's going to be built, if it's
18 going to be built. So I think we take out
19 "substantially."

20 MR. BOOK: We agree.

21 MR. JESSE GELLER: Anything else on 1?

22 Paragraph 2. I don't have an issue with
23 "underground" versus "garaged."

24 MR. HUSSEY: No. I don't have any problem

1 with that. "Garaged" is fine.

2 MR. JESSE GELLER: I do have one question for
3 Ms. Netter. Under the paragraph -- on the line
4 "decision," you're referencing in the last line -- the
5 next-to-last-line and the last line -- "site plans."
6 Do you not also reference architectural plans?

7 MS. NETTER: Yes.

8 MR. JESSE GELLER: I don't have any other
9 comments --

10 MS. NETTER: I'm going to put in, "subject to
11 all of the conditions." I may make some small changes
12 as I go through this.

13 MR. JESSE GELLER: Insubstantial ones?
14 I don't have any other comments on 2.
15 Paragraph 3?

16 MR. BOOK: No comments.

17 MR. HUSSEY: Fine.

18 MR. JESSE GELLER: And I assume this is where
19 you were referring to.

20 Paragraph 4?

21 (No audible response.)

22 No? Thank you.

23 Paragraph 5. There was -- okay. So the
24 question -- so in the last sentence it refers to, "at

1 least 25 spaces shall be designated for visitors." So
2 my question is: Who defines who may use guest spaces?
3 What are the parameters? Do we care?

4 MR. HUSSEY: I think that's covered later on,
5 isn't it?

6 MR. JESSE GELLER: Tell me where.

7 MS. NETTER: Who can use guest spaces?

8 MR. BOOK: Is this a question about whether or
9 not those guest spaces are to be reserved for the
10 guests of the 40B project versus the rest of Hancock
11 Village?

12 MR. JESSE GELLER: Does your law firm know
13 what a prize they have? Yes.

14 MR. BOOK: I don't know how they could manage
15 that.

16 MR. JESSE GELLER: I don't think either, but I
17 raise the question.

18 MS. NETTER: I think it was something one of
19 the neighbors --

20 MR. JESSE GELLER: Right. It was a comment
21 that was made in -- I apologize to whoever made it, but
22 one of the neighbors had raised this as a question.

23 MS. NETTER: Right.

24 MR. BOOK: I don't know how one would police

1 that. I would think that people visiting this project,
2 visiting residents of this project, would be parking in
3 the visitors spots, to the extent they were available,
4 closest to where they want to be. But I don't know if
5 there's a way to keep visitors of the rest of Hancock
6 Village, if they're willing to park --

7 MR. JESSE GELLER: Forget, for the moment, the
8 enforcement issue. That's Mr. Bennett's problem.

9 MR. BOOK: He doesn't have enough to do?

10 MR. JESSE GELLER: No, he doesn't. He
11 complains to me constantly that he doesn't have enough
12 to do.

13 You know, so the question is, one, you simply
14 modify it by saying "visitors to the project." It's
15 understood that that's what this visitors' parking is
16 for. The question was raised by someone in the
17 neighborhood about -- can they simply use utilize this
18 as additional parking for the rest of Hancock Village?

19 MR. BOOK: No. I think the intent is clearly
20 that it's -- these are visitors' spots and handicap
21 spaces for this project, and we should so qualify. How
22 it gets enforced, I --

23 MR. JESSE GELLER: It's his problem.

24 MS. NETTER: What do we do? Shall be

1 designated for visitors -- I missed it.

2 MR. JESSE GELLER: -- and handicap spaces for
3 the project.

4 MR. BOOK: It's visitors to the project and
5 handicap spaces for the project.

6 MR. HUSSEY: Well, the only thing that Steve
7 has done is he separated out spaces designated for
8 visitors and the handicap spaces. The handicap spaces
9 are designated by the required state law. Visitors'
10 spaces --

11 MR. JESSE GELLER: No, no, no. His correction
12 is fine.

13 MR. HUSSEY: Okay.

14 MS. NETTER: So visitors of tenants at the
15 project?

16 MR. ZUROFF: Visitors to the project.

17 MS. NETTER: Visitors to the project.

18 MR. BOOK: Part of this exercise is not just
19 to comment on Mr. Schwartz' comments or the neighbors'
20 comments, but also to --

21 MR. ZUROFF: We're trying to come to a
22 decision.

23 MR. BOOK: Yeah. It's sort of our first --

24 MR. JESSE GELLER: Let me also say one other

1 thing, which is that -- it's not simply taking, you
2 know, these 68 or 69 conditions. I would hope that in
3 addition you sort of stepped back and said, has
4 Ms. Netter actually captured -- and I think she has --

5 MS. NETTER: With staff.

6 MR. JESSE GELLER: With staff. Have they
7 captured all of the appropriate conditions of the
8 project? I don't want you to think simply within the
9 box, but also you should be considering whether this
10 encapsulates everything.

11 MR. ZUROFF: Well, I think we're not going to
12 really have perspective until we finish going through
13 the list and then maybe go back and see if we've
14 covered everything.

15 MR. JESSE GELLER: Okay. That's it on 5.

16 MS. NETTER: By the way, Mr. Nagler suggested,
17 and I concur with the suggestion, that there will be
18 general catch-all language in here that will say
19 something to the effect -- and I'm not going to say
20 this artfully -- but that all of these conditions
21 are -- these are the conditions to the extent that they
22 comply with the regulations and are consistent with the
23 case law. So there will be some general language.

24 MR. ZUROFF: Is that exculpatory? Sort of

1 lets us off the hook?

2 MS. NETTER: Yes.

3 MR. NAGLER: It's not just -- it's the
4 enforcement of the conditions.

5 MR. ZUROFF: That's exactly what I meant.

6 MR. JESSE GELLER: Paragraph 6.

7 MR. ZUROFF: Do we have to state that in
8 paragraph 6?

9 MS. NETTER: I'm going to state it in general
10 language so we don't have to keep stating it all over
11 the place. I think it's better to include this in
12 here, yes.

13 MR. JESSE GELLER: Why?

14 MS. NETTER: Because this is the subsidizing
15 program that you're approving. This is what the
16 project eligibility letter provides for the subsidy
17 that the applicant has presented before you.

18 Do you have anything to say?

19 MR. NAGLER: No. I think Steve and I had a
20 learned back and forth on that.

21 I will say a similar provision was struck in
22 Amesbury, but I know I've seen these post-Amesbury
23 decisions.

24 MS. NETTER: We can just say something in

1 accordance with the requirements of the subsidizing
2 agency at least.

3 MR. NAGLER: Right. We should give deference
4 to the subsidizing agency.

5 MS. NETTER: Number 7 is straight out of the
6 40B guidelines with respect to local preference.

7 MR. JESSE GELLER: Do you have an issue with
8 Mr. Schwartz' changes?

9 MS. NETTER: Yeah. I don't want to include
10 them.

11 MR. JESSE GELLER: You don't want to include
12 them? Because they're unnecessary?

13 MS. NETTER: They're unnecessary. They're
14 in -- what's most important is that you have to say you
15 want local preference because that allows for
16 preference for 70 percent -- up to 70 percent of the
17 units.

18 MR. ZUROFF: So your language is --

19 MS. NETTER: I think it should stay as it is.
20 Yeah, the language is acceptable. I think that -- a
21 colleague has pointed this out to me -- I don't think
22 we need the language of the lotteries. I think we're
23 getting into Amesbury.

24 MR. JESSE GELLER: Where are you? At the

1 end?

2 MS. NETTER: Yes.

3 MR. JESSE GELLER: So the deletion at the end
4 is acceptable?

5 MS. NETTER: Yes.

6 MR. HUSSEY: That makes sense.

7 MS. NETTER: And, in fact, the applicant is
8 responsible for monitoring the lottery and managing the
9 lottery.

10 Let me tell you, number 8, this is something I
11 happen to put in all my decisions. I've actually never
12 had a developer contest this. Do I think that this is
13 in accordance with Amesbury? I don't. Is this
14 something the applicant is going to push really hard?
15 If they do, then, you know, it's your call. But right
16 now they're saying it's improper.

17 MR. HUSSEY: I think it's -- I would rather
18 leave it. I mean, these are rental units.

19 MS. NETTER: Right.

20 MR. HUSSEY: And under MAD there are certain
21 standards -- in the larger building, at least -- that
22 would require, I think, 5 percent to be handicap. But
23 you don't want to have to hold those aside and not rent
24 them until you get handicapped people, so they should

1 have the option of moving somebody out into another
2 unit in order to make this available to a handicapped
3 person.

4 And I don't know what they do if the building
5 is 100 percent rented -- or the project. Let's say the
6 project is 100 percent rented. How do they move
7 somebody out in order to make room for a handicapped
8 person is the question. Because normally they've got
9 the entire Hancock Village as an alternate place to put
10 people.

11 MS. NETTER: I don't think so.

12 MR. ZUROFF: When a lottery happens, doesn't
13 that take precedence over the fair market rental?
14 Doesn't that happen first?

15 MS. NETTER: What the regulation provides is
16 that we -- actually, in terms of -- can I turn to the
17 applicant on this one? Because in terms of marketing
18 the affordable units, do you want to respond to that
19 one?

20 MR. LEVIN: What's the question?

21 MS. NETTER: Go ahead with the question.

22 MR. ZUROFF: Well, assuming the project is all
23 completed and you're holding the lottery for the
24 affordable housing units, doesn't that come first?

1 Don't you try to get those all rented immediately?

2 MR. LEVIN: My understanding is that units are
3 identified, so you have market-rate units and you have
4 affordable units. So those would be marketed
5 simultaneously because they're not in conflict.

6 MR. ZUROFF: So if you get a handicapped
7 applicant that's affordable -- in the affordable
8 housing -- I'm assuming -- well, I believe that most of
9 the affordable units are in the big building; correct?

10 MR. LEVIN: No. They're by regulation --

11 MR. ZUROFF: Okay. So they're distributed.
12 Are there any nonhandicapped accessible units in the
13 project?

14 MR. LEVIN: Absolutely. In the infill
15 buildings, the units on the upper floors are not
16 handicapped accessible.

17 MR. ZUROFF: Okay. So how would you handle it
18 if you had a handicapped applicant?

19 MR. LEVIN: We would have some of the --
20 clearly, by evenly distributing, there would be some on
21 the lower levels of those buildings. Those would be
22 available.

23 Now, if you have three and you have four
24 applications for accessible units, I don't really know

1 what the answer is.

2 MS. NETTER: Can I go back to something?
3 Because you said something, Mr. Levin, that was
4 different than what I recall Mr. Schwartz saying. I
5 had understood you to say that the intention with
6 respect to the affordable units would be they would be
7 floating, which is typically done in an apartment
8 context. But you said it's all subject to the
9 subsidizing agency, with which I agree.

10 Mr. Levin, you just talked about that you're
11 going to, up front, have fixed affordable units and I
12 guess I would like to know what your intention is in
13 that regard.

14 MR. SCHWARTZ: I will plead ignorance on what
15 MassDevelopment's program is. So I think that our
16 intention is to comply with their program. So if
17 they'll require us to identify them and set them aside,
18 that's what we'll do. If they allow us to have
19 floating units, that's what we'll do.

20 MS. NETTER: My experience is the subsidizing
21 agency is going to let you --

22 MR. SCHWARTZ: Right. So --

23 MS. NETTER: So I guess I just want to know
24 and understand -- I mean, we have largely stayed out of

1 the housing issues because of Amesbury, but I guess I'd
2 like to know what you're going to be proposing, if you
3 know, at this juncture.

4 MR. SCHWARTZ: At this point, I don't think we
5 can say any more than we'll comply with what
6 MassDevelopment wants us to do. So I don't think we're
7 prepared to commit to set them aside if that's not the
8 requirement of the subsidizing agency.

9 MS. NETTER: But the question I was asking
10 was -- my experience with rentals is, more often than
11 not, that all the units are the same and, therefore,
12 whatever becomes available, you'll keep on -- right?

13 But there are some developers -- and,
14 actually, I haven't run into this in a 40B context --
15 that will have the affordable units be located in a
16 specific location. Okay. You know what he's talking
17 about?

18 MR. ZUROFF: Then my feeling is that number 8
19 is -- if we can leave it in, we leave it in. If it
20 becomes an issue with the subsidizing agency, then it
21 can be addressed. It's more preferential than anything
22 else.

23 MR. BOOK: What happens if they don't have any
24 handicapped accessible units?

1 MR. ZUROFF: That's under state law, isn't
2 it?

3 MS. NETTER: Mr. Levin --

4 MR. HUSSEY: Yes, you're required to have --

5 MR. LEVIN: I may have misspoke. I may have
6 misspoke. When we applied for the PEL application, we
7 identified handicap unit types, not specific handicap
8 units. I was recalling identifying -- we had to do a
9 whole grid of the units, but they were actually unit
10 types as opposed to specific units, so I suspect you're
11 correct -- or that Steve's correct -- that it's
12 floating.

13 MS. NETTER: Well, maybe the thing to do -- I
14 mean, it's within your -- it's your consideration, but
15 maybe -- shall we see if they can --

16 MR. JESSE GELLER: What is the concern you're
17 trying to address? Let's back up.

18 MS. NETTER: I just want to make sure there's
19 not -- I mean, again, the reason why I've never had an
20 applicant -- I think the reason I never had anybody
21 argue against it is it would not be a good thing to not
22 have -- you know, if you're at your 5 percent and then
23 you just say -- you turn away and say, okay, you're at
24 5.1 percent, we're not going to provide you a unit --

1 that's all. But I'm not -- it's literally my thing and
2 it may not be --

3 MR. ZUROFF: But, again, this is state law
4 that governs whether it's available for a handicapped
5 person or not.

6 MS. NETTER: If you're fine with the 5
7 percent, then just let it go.

8 MR. JESSE GELLER: That's why I was asking
9 these questions. So from your perspective, the issue
10 is that if it just so happens that a special-needs
11 applicant applies and it's over and above whatever the
12 threshold is, then the purpose of this is to mandate
13 that the applicant actually increase --

14 MS. NETTER: Yeah. It's just an unlikely
15 situation. I don't know that we have to press it.

16 MR. BOOK: I think we should leave it out.

17 MR. JESSE GELLER: Okay.

18 MR. HUSSEY: I would tend to leave it in. It
19 only applies to the -- let's see -- the lottery. Once
20 you've got this thing built and you've got the
21 affordable units filled and what have you, and 10 or 15
22 years down the pike one of them becomes available, do
23 you have another lottery or is it --

24 MS. NETTER: That's what I wanted to ask. I

1 don't know what MassDevelopment is requiring, whether
2 it's just an initial lottery or whether there's an
3 ongoing lottery.

4 MR. SCHWARTZ: I don't know, but my experience
5 has been -- I don't usually get involved in this level
6 of detail, but my experience has been that once the
7 initial lottery is completed and the units are
8 initially occupied, subsequent to that there's a
9 waiting list. Typically the housing authority of the
10 town keeps that. There's a waiting list kept for the
11 affordable units. So it isn't really a lottery,
12 per se.

13 There is -- a lottery is required for the
14 first and it needs to comply with Fair Housing
15 requirements and there are complicated formulas that
16 need to be followed to make sure that Fair Housing
17 requirements are met. But once all of that is done and
18 the initial lease-up is completed, my understanding is
19 that there's just a waiting list. Again, typically the
20 housing authority or somebody maintains that and takes
21 people off the waiting list when an affordable unit
22 becomes available.

23 MR. JESSE GELLER: First come, first served.

24 MS. NETTER: Yeah. That's my experience too,

1 actually. I think we should just let it --

2 MR. HUSSEY: Leave it out? All right.

3 MR. JESSE GELLER: Okay. 9?

4 MS. NETTER: I don't agree -- I mean, I think
5 the language should stay in, I believe.

6 MR. JESSE GELLER: As you've drafted it?

7 MS. NETTER: Yeah. And, again, when I'm
8 speaking, I'm also reflecting and Attorney Nagler's
9 thinking unless he says to me otherwise.

10 MR. NAGLER: On number 9, I never really --
11 (inaudible.)

12 AUDIENCE MEMBER: Microphone.

13 MR. NAGLER: I'm sorry.

14 MS. NETTER: I just think it's not necessary.
15 There's no legal issue about limiting people's use -- I
16 mean, there's sanitation codes, there's all kinds of
17 stuff out there, and the law is the law is the law
18 regardless of what --

19 MR. JESSE GELLER: Well, isn't the kernel of
20 this that basically -- that those rooms identified as
21 bedrooms in the included plans are to be occupied as --
22 are the only rooms that shall be occupied as bedrooms?
23 Isn't that really what --

24 MS. NETTER: Yes.

1 MR. JESSE GELLER: And if that's all you say,
2 then you don't have to make reference to living rooms,
3 dining rooms --

4 MR. NAGLER: I thought what you might have
5 been getting at is, if you have a family of like ten
6 people and you say you can't live in this unit and they
7 have eight kids --

8 MR. JESSE GELLER: I don't think that's what
9 Edie is saying.

10 MS. NETTER: Well, Edie's not speaking on her
11 own, but reflecting --

12 MR. NAGLER: Can you prohibit a family of ten
13 who says, look, we're here, we're a family, we're going
14 to have to put one of our kids in the dining room?

15 MR. JESSE GELLER: That issue is covered by --

16 MS. NETTER: The only issue here is this goes
17 into the lease.

18 MR. NAGLER: I see what you're saying.

19 MR. ZUROFF: I would say leave it in.

20 (Multiple parties speaking. Clarification
21 requested by the court reporter.)

22 MS. NETTER: So the issue is not whether the 9
23 should stay in or out. The issue is the language on
24 it, "to the extent permitted by law."

1 MR. ZUROFF: I'm in favor of it all. The law
2 is already there. We don't have to specify.

3 MS. NETTER: That's what I think. Okay?

4 MR. BOOK: Agreed.

5 MR. NAGLER: We'll have the overarching
6 language that you're talking about anyway of all our
7 conditions.

8 MS. NETTER: Now we have a big issue coming
9 up.

10 MR. NAGLER: Yes. I guess there's several
11 components to this. From what I have been able to
12 experience, it does seem like subsidizing agencies are
13 liking and getting more comfortable with springing
14 regulatory agreements.

15 MS. NETTER: Why don't you define what that is
16 so everybody --

17 MR. NAGLER: It's a regulatory agreement that
18 allows the town or a designee of the town to impose or
19 enforce restrictions on affordability after the term of
20 the subsidy ends. So it's an agreement that basically
21 says, the following term shall apply 20 years from
22 now. They seem to be en vogue these days. So I know
23 Steve had expressed an objection to them, but I don't
24 think the subsidizing agency would mind seeing that.

1 MS. NETTER: Well, also, with respect to
2 housing, it seems to be implied by the regulations.
3 The question is when.

4 MR. NAGLER: Right, yeah. Clearly, under the
5 regulations, the subsidizing agency, when it's about to
6 expire, has to give notice to the town and then it's
7 contemplated that either the town or some other entity
8 approved by the subsidizing agency commences
9 enforcement of the restrictions. The only -- not the
10 only, it's a big question -- but is all that decided
11 now or do we just wait 20 years from now and deal with
12 it then?

13 MR. ZUROFF: Well, there's also the
14 possibility that at some point the subsidizing mortgage
15 is paid off, in which case, do we have a restriction or
16 don't we?

17 MS. NETTER: That's what we're talking about.

18 MR. NAGLER: Yeah. They have to give notice.

19 (Multiple parties speaking.)

20 MR. JESSE GELLER: Whatever the termination
21 date is, whether it's its natural term or earlier, of
22 the existing regulatory scheme, that's the trigger.

23 MR. SCHWARTZ: Can I just clarify one thing
24 that you said, though? Typically the term of

1 affordability under the regulatory agreement that's
2 entered into with the subsidizing agency is 30 years
3 independent of whether, you know, the loan is paid
4 off. And most typically, in my experience, for
5 example, if MassHousing -- MassHousing will continue to
6 monitor affordability even if, you know, there was a
7 MassHousing loan and it gets paid off. They'll monitor
8 it for a 30-year period. That's typically the term of
9 affordability.

10 MR. ZUROFF: So if that's the case, if I may
11 ask, what's your objection to leaving this language in
12 if you're willing to continue it even after the --

13 MR. SCHWARTZ: My objection is the requirement
14 to enter into the regulatory agreement before we can
15 get a building permit that we have to negotiate with
16 the town counsel.

17 And my argument is that that's not required by
18 regulation, in my opinion, and could prove to be a
19 barrier to our being able to commence the project.

20 There are also provisions in here which we
21 substantively disagree with such as the requirement
22 that there be a limited dividend restriction in that
23 regulatory agreement which is not required by 40B or
24 the regulations of any case law that I'm aware of.

1 MR. NAGLER: Just a clarification. Is -- I
2 don't know how to put this delicately -- is the issue
3 negotiating with town counsel, or is the issue with
4 negotiating with anybody?

5 MR. JESSE GELLER: In theory you could --

6 MR. SCHWARTZ: Let me try and respond. If we
7 had -- what I'm trying to do in our comments is put in
8 the substance of what we would be required to do in a
9 so-called replacement regulatory agreement. And I have
10 no objection if that -- if the board feels more
11 comfortable expanding on that to say, you know, that
12 the units will be required to be affordable in
13 perpetuity, that the town will have the right to
14 monitor that, to enforce that regulatory agreement,
15 that the monitoring will be paid for by the applicant.
16 All of the standard provisions that you would have in
17 such a regulatory agreement, I have no problem with
18 putting the body of that -- those types of provisions
19 in the decision. I don't know if that answers your
20 question.

21 MR. JESSE GELLER: Why don't you simply attach
22 a pro forma?

23 MS. NETTER: Pro forma? I think we're mixing
24 apples and oranges.

1 MR. JESSE GELLER: A regulatory agreement.

2 MS. NETTER: Oh. A pro forma is a -- okay.

3 MR. JESSE GELLER: No. You're thinking 40B.
4 I'm thinking just in terms of documentation.

5 MS. NETTER: I think that -- we can attach the
6 regulatory agreement, but MassHousing --
7 MassDevelopment does not have -- unlike the HCD or
8 MassHousing, MassDevelopment does not have a single
9 form regulatory agreement.

10 MR. JESSE GELLER: Is your proposal that after
11 expiration of the 30-year, if you will, regulatory
12 agreement with the subsidizing agency that the
13 secondary regulatory agreement with the town would be
14 identical to the prior one?

15 MS. NETTER: Okay. Let's back up. What
16 happens -- let's just talk about affordability right
17 now. And I know Attorney Nagler just said that. But
18 the regulations contemplate that subsequent to the
19 involvement of the subsidizing agency with respect to
20 overseeing long-term affordability, that they will
21 provide notice to the town, in which case the town, in
22 effect, would step into the shoes of the subsidizing
23 agency.

24 The original restriction/regulatory agreement,

1 the parties are the applicant and the subsidizing
2 agency. The town is not a party to that. This is
3 fairly new. This is not how it used to be done.

4 But in any case -- and so typically, towns
5 want to have some oversight over the assurance that
6 the -- so you've got the condition in your permit, but
7 also to have some specific oversight. And the nub of
8 that oversight, Attorney Schwartz has just outlined.
9 So to say, "to attach a regulatory agreement," what
10 regulatory arrangement?

11 MR. JESSE GELLER: One with the town.

12 MS. NETTER: Right. But what is the language
13 of that? And Attorney Schwartz is saying he does not
14 want to, at this juncture, negotiate the terms.

15 MR. JESSE GELLER: Is that what you're
16 saying?

17 MR. SCHWARTZ: Let me clarify.

18 MR. JESSE GELLER: He's objecting to the
19 limited dividend --

20 (Multiple parties speaking.)

21 MR. SCHWARTZ: Just as it relates to
22 affordable housing, if we could agree within the
23 next -- you know, within the 40-day period, if that's
24 permissible -- we'd have to talk with Sam about what we

1 can or can't do in terms of negotiating a form and
2 attaching a form -- I don't have a problem with that.
3 I think it gets to the same place, frankly, if we put
4 all the substantive provisions of what we need to put
5 in that agreement, which is what my suggestion is.

6 I think there's also another possibility,
7 which is -- and the other reason I say this is that
8 after the expiration of the initial term with the
9 subsidizing agency, there's always the possibility that
10 either that subsidizing agency or another subsidizing
11 agency or another acceptable monitoring agent under the
12 40B regulations that will then be in effect when I'm
13 hopefully on the golf course or somewhere not here will
14 be allowed.

15 So it's not -- I don't think it's an automatic
16 case that after 30 years it goes to the town to
17 enforce. In fact, I've been involved in cases where --
18 you know, older 40B projects where the initial terms of
19 affordability restriction expired and we've negotiated
20 an extension of the regulatory agreement with
21 MassHousing that -- with the HCD, actually. That
22 happened fairly recently. So there's a number -- one
23 of my concerns is there's any number of things that
24 could happen all those years from now, and we don't

1 want to box ourselves in.

2 But to the extent that we can agree on the
3 substance, the meat, of what it is that we would need
4 to do with the town and include that in the permit, I
5 have no objection to that.

6 MR. JESSE GELLER: I assume that your issue is
7 simply avoiding a delay at the point at which you're
8 applying a permit.

9 MR. SCHWARTZ: That is one issue. And the
10 second is having to agree to substantive provisions
11 that I don't feel are required -- or we don't feel are
12 required -- such as -- most specifically, such as the
13 limited dividend.

14 MS. NETTER: Just for housing right now.

15 MR. SCHWARTZ: Just for housing. My major
16 concern on housing is not having to negotiate, execute,
17 and record a regulatory agreement prior to the issuance
18 of a building permit.

19 MR. ZUROFF: Why don't you say "after the
20 building permit."

21 MS. NETTER: Well, Attorney Schwartz, I think
22 does not want to do it now. I have no substantive
23 problem with outlining the principal terms, but that's
24 up to you. I'm just talking right now about

1 affordability. I think there's a whole other issue
2 with limited dividend.

3 MR. JESSE GELLER: And the validity and
4 enforceability of the requirement is no less strong;
5 correct?

6 MS. NETTER: I don't know what you're saying.

7 MR. JESSE GELLER: By putting in a condition
8 that has bullet points and effectively providing that
9 the town's regulatory agreement will have the following
10 provisions, among others, you have not created a gap
11 legally.

12 MS. NETTER: So the strongest is obviously
13 review and approval prior to building permit or see
14 above.

15 MR. JESSE GELLER: Right.

16 MS. NETTER: You have complete control. I
17 mean, you understand this as well as we do.

18 MR. JESSE GELLER. Okay.

19 MR. ZUROFF: So where are we? Are we getting
20 to a bullet condition?

21 MR. BOOK: So, again, there would be a bullet
22 condition for a regulatory agreement to be entered into
23 30 years from now.

24 MR. JESSE GELLER: Not just 30 years.

1 Whenever --

2 MR. BOOK: Whenever the subsidizing --

3 (Multiple parties speaking.)

4 MR. JESSE GELLER: Let me ask you one
5 question, though. So when they reapproach the
6 subsidizing agency, if they reapproach the subsidizing
7 agency --

8 MS. NETTER: What do you mean?

9 MR. JESSE GELLER: At the end of the initial
10 term, okay, if they reapproach MassDevelopment and say,
11 we want to renew or extend, is it a given that the
12 extension will be on the same terms?

13 MS. NETTER: Extend their financing?

14 MR. JESSE GELLER: Extended the restriction.

15 MR. ZUROFF: Do they have jurisdiction there?

16 MS. NETTER: I just don't think this is a
17 likely scenario. I realize --

18 MR. JESSE GELLER: It's been proposed, and I
19 was just curious.

20 MS. NETTER: Yeah. I don't think it's --

21 MR. JESSE GELLER: -- likely.

22 MR. NAGLER: Your concern is if we're too
23 vague about a subsidy being in effect, it could be -- a
24 restriction being in effect, it could be too wishy

1 washy.

2 MR. JESSE GELLER: Right.

3 MS. NETTER: I'm not sure what you're saying
4 right now.

5 MR. NAGLER: I think what Jesse is saying
6 is -- well, the concern he's expressing is if we're --
7 if we talk about -- we only step in when there's going
8 to be no restriction, could there be a scenario where
9 there's a lesser restriction and we can't step in? 10
10 percent of the units, say?

11 MS. NETTER: Well, our condition says that
12 20 percent at below 50 is affordable in perpetuity.

13 MR. NAGLER: Yeah. That's been challenged.

14 MS. NETTER: Well, we're leaving that in.
15 We've decided that.

16 MR. ZUROFF: Presumably -- I mean, there's a
17 chance that 40B will change.

18 MS. NETTER: Hold on a second. I think
19 there's a conversation going on there, so --

20 MR. SCHWARTZ: No. We're just clarifying what
21 is it that we said.

22 MS. NETTER: In other words, if you want to
23 make a point, you will.

24 MR. SCHWARTZ: Right. I think what we said

1 was, we did strike that condition as being improper
2 under Amesbury. Mr. Nagler commented, I think
3 correctly, that that such condition was struck under
4 Amesbury. We struck it. What I think we're prepared
5 to say is to keep it in but to modify it to say to the
6 extent it's mandated by the subsidizing agency.

7 That goes to the next point, which is what
8 happens 30 years from now when 40B is changed and there
9 might be different affordability requirements? Is it
10 conceivable that we would be able to change those?
11 Yes. It's extremely unlikely that affordability
12 requirements would be loosened. If anything, they'll
13 probably be tightened. But it is theoretically
14 possibly, I suppose, that 30 years from now, you know,
15 there might be different affordability requirements and
16 we would want to take advantage of those. But I don't
17 see that happening. So I think that what we're saying
18 here is, to the extent required by the subsidizing
19 agency, 20 percent of the units will be affordable,
20 50 percent of area median.

21 It is true that one of the issues with regard
22 to the local regulatory agreement is that we be locking
23 ourselves in to a certain level of affordability in
24 perpetuity. I think what we're saying -- this is

1 really as a compromise -- is we're willing to say that
2 in the permit, that we would agree to that, entering
3 such a regulatory agreement. So in that sense, it is
4 a, you know, concession on our part because we took out
5 all references to affordability in the permit, which I
6 think is consistent with the Amesbury case.

7 If the law did change and allow lesser
8 affordability, it would be my position that we would be
9 able to take advantage of that. We're prepared to go
10 beyond that, however. By the looks of people, I'm not
11 sure if I'm confusing --

12 MS. NETTER: I think he's saying the short
13 story is the language is okay so long as we put in --
14 and I think it's appropriate -- "in accordance with the
15 requirements of the subsidizing agency."

16 MR. NAGLER: But aren't we saying --

17 MS. NETTER: We're only talking about the
18 beginning of this.

19 MR. NAGLER: -- our requirement -- putting
20 aside the subsidizing agency -- which I think
21 MassDevelopment has delegated to the board -- is
22 20 percent of all units shall be affordably priced and
23 set aside during a term that the town imposes under a
24 comprehensive permit for tenants with incomes not

1 exceeding 50 percent of the area median. So I think
2 the board --

3 MR. SCHWARTZ: I'm not sure exactly what the
4 intent of that language is, but I think it's possible
5 that they're referring to the term of affordability
6 rather than the specifics of affordability. And that
7 is consistent with the case law, which is, if the board
8 so chose -- which it won't -- but if it chose to impose
9 a term of affordability that was less than perpetual,
10 it has the ability to do that.

11 MS. NETTER: I don't see the substantive
12 argument, so can we move on?

13 MR. JESSE GELLER: You have to move on now to
14 the question about the --

15 MS. NETTER: Is the board clear where we
16 arrive on number 6?

17 MR. BOOK: No.

18 MS. NETTER: Okay. That's what I want to make
19 sure.

20 MR. JESSE GELLER: Number 10. I know you want
21 to revisit prior conditions, but --

22 MS. NETTER: Well, I wanted to go back to 6,
23 the requirement of the subsidizing agency, because that
24 relates to number 10. And the issue with number 10

1 is -- as you know, on the housing -- is the "prior to
2 the issuance of a building permit." And so what we
3 were discussing was for the applicant to -- or for us
4 to propose some term that would provide a framework for
5 subsequent regulatory agreements. And then I turned
6 over to Mr. Nagler and said, "Is that acceptable to
7 your vantage point?" And I just need a yes or a no.

8 MR. NAGLER: Number 10?

9 MS. NETTER: Yes.

10 MR. NAGLER: May I ask a clarifying question?

11 MS. NETTER: Mr. Chairman --

12 MR. NAGLER: Let's say MassDevelopment says 10
13 years from now, 20 percent is no longer required. It's
14 now 10 percent.

15 MS. NETTER: That's why I went back here. Our
16 decision says --

17 MR. NAGLER: But you said that the qualifying
18 language was to the extent -- bla, bla, bla -- of the
19 subsidizing agency.

20 MS. NETTER: Oh, that's what you're saying.
21 So we do need to go back to number 6.

22 MR. NAGLER: That's my question. You
23 qualified it by reference to whether the subsidizing
24 agency requires --

1 MS. NETTER: So are you recommending we take
2 that qualification out?

3 MR. NAGLER: Yeah. That's my --

4 MR. BOOK: I mean, the deal is -- speaking in
5 generalities -- 20 percent of the units are to be
6 affordable in perpetuity. It doesn't matter what the
7 subsidizing agency might decide down the road. They
8 could eliminate the affordable -- say no units have to
9 be affordable. That shouldn't matter. 20 percent of
10 these units --

11 MS. NETTER: At below 50 percent median.

12 MR. BOOK: -- are to be affordable in
13 perpetuity. That is the basis -- or one of the bases
14 in which we are -- if we were to grant this
15 comprehensive permit, that's one of the requirements.

16 MS. NETTER: That was my thinking.

17 MR. NAGLER: That's what I would like to see.
18 I'm not sure what the applicant is saying to that.

19 MR. SCHWARTZ: I would suggest -- honestly, I
20 haven't thought this through to give you a definitive
21 answer. But I would suggest to you that the 20 percent
22 at 50 percent of area median, which is
23 MassDevelopment's program which qualifies the project
24 for the tax credits, as distinct from the more typical

1 40B mixed income, which is 25 percent at 80 percent of
2 area median, which would also allow all of these units
3 as a rental project the count on the state's subsidized
4 housing inventory -- I would just suggest to you that
5 I'm not sure it's necessarily the board's concern,
6 although, you know, you may feel differently, as to
7 whether -- whatever the program is, whether it's 25
8 percent at 80 percent or 20 percent at 50 percent, as
9 long as this achieves a level of affordability that
10 meets state standards for a 40B project.

11 So that's the only thing I would leave for you
12 to think about, that to tie us in perpetuity to
13 20 percent at 50 percent versus some other level of
14 affordable -- we're willing to tie ourselves to
15 perpetual affordability and to say we'll enter into a
16 replacement regulatory agreement if that's necessary.
17 I'm less enthusiastic, to be honest, about tying to
18 20 percent and 50 percent and I'm not sure that that's
19 necessary for town's purposes -- or the board's
20 purposes.

21 MR. NAGLER: My thinking is -- I personally
22 don't have a problem with that. I would like to
23 lock -- I know it's highly unlikely that the standards
24 are going to loosen, but I'd kind of like to lock in

1 the current standards in perpetuity.

2 MR. SCHWARTZ: I have no problem with that. I
3 do not have a problem locking in the current standards.

4 MS. NETTER: So are you proposing to the board
5 either 20 percent at below 50 -- a minimum of either
6 20 percent at below 50 or 25 percent at below 80? Is
7 that what you're suggesting, Mr. Nagler?

8 MR. NAGLER: Yes.

9 (Multiple parties speaking.)

10 MS. NETTER: I'm turning to you to find out
11 what your legal opinion is so that the board can take
12 that --

13 MR. JESSE GELLER: Isn't the alternative
14 option to use as the baseline 20 percent, 50 percent,
15 or such greater requirement --

16 MR. SCHWARTZ: It's not greater --
17 Mr. Chairman, my apologies -- just different. It's not
18 greater. It's just different. It's a --

19 MR. JESSE GELLER: No. I'm setting a floor.

20 MS. NETTER: You're saying a floor in terms of
21 percentage of units?

22 MR. JESSE GELLER: Uh-huh.

23 MR. BOOK: I mean, as I think about this,
24 isn't what we're really concerned about is to make sure

1 that all 161 units are in inventory?

2 MS. NETTER: They will be.

3 MR. BOOK: I mean, that's why we're here,
4 that's why they're here, that's why we're entertaining
5 this project, is because it puts 161 units into the
6 inventory.

7 MS. NETTER: Yeah. This can come out
8 completely, if that's your thinking. On the other
9 hand, they're issued a project eligibility letter for a
10 particular project, and that's the other side of that.

11 MR. SCHWARTZ: If I may, that was really what
12 I tried to suggest in my language, which was that to
13 the extent that we need to do something to allow the
14 units to continue to count under the subsidizing
15 housing inventory, we'll do whatever is required. That
16 was the sum and substance of our comment. If that
17 requires a replacement regulatory agreement, we'll do
18 that. If it requires a different level of
19 affordability, we'll do that.

20 MR. NAGLER: I would like to say the
21 restriction will be such that the units will count in
22 the subsidized housing inventory. It will, in no
23 event, be less restrictive than the current
24 requirements.

1 MR. ZUROFF: So why can't we say that?

2 MR. SCHWARTZ: It's fine with me.

3 MR. NAGLER: Works for me.

4 MS. NETTER: I don't know what "less
5 restrictive than the current requirements" means.

6 MR. ZUROFF: I think we'll fine tune that
7 language a little bit, but we agree in principle.

8 MS. NETTER: So really taking out 6 and then
9 going to -- not taking out -- yeah, taking out 6.

10 MR. NAGLER: No, not taking out. Modifying
11 6.

12 MS. NETTER: Well, someplace we talk about all
13 of the units shall -- whatever the language is that you
14 changed -- shall qualify for -- do you know what I'm
15 talking about, Sam?

16 MR. NAGLER: Yeah.

17 MR. ZUROFF: You want to modify 6 to be more
18 restrictive?

19 MS. NETTER: Someplace in here it basically
20 says that -- I think it says all the units in the
21 project shall count towards --

22 (Inaudible discussion amongst the board.)

23 MS. NETTER: You know, I understand what
24 you're talking about. Let me work on 6 and 10. Sam

1 and I will work on that together, if that's okay with
2 you.

3 Actually, why don't -- who sort of articulated
4 that a minute ago?

5 MR. ZUROFF: Well, I think that what we want
6 to do is require that the affordability be tied to at
7 least what we have today, which is 20 percent,
8 50 percent, or such greater standard as may be imposed
9 by the affordability requirements of 40B or --

10 MS. NETTER: Let me ask you a question. I
11 mean, isn't what we're -- I do have trouble with the
12 restrictive part. Isn't it just that there's a
13 subsidizing -- that the project complies with the terms
14 of a particular subsidy and that all of the units --
15 I'm being colloquial now -- count towards the
16 subsidizing housing inventory? Isn't that the issue?

17 MR. ZUROFF: The subsidizing agency may change
18 at some point.

19 MR. NAGLER: The way I would word it is, all
20 units -- a restriction must always be in place such
21 that all units count in the subsidizing housing
22 inventory, but in no event --

23 MR. ZUROFF: -- less than.

24 MR. NAGLER: -- may they be less restrictive

1 than the current requirement.

2 MS. NETTER: And I don't know what "less
3 restrictive" means.

4 MR. NAGLER: We could work on that.

5 MR. ZUROFF: Such that there are not less
6 affordable units at a higher income level.

7 MR. NAGLER: Correct. If some new missive
8 comes out that all of a sudden all the units that count
9 in the subsidized housing inventory, 10 percent of the
10 unit are available to tenants of --

11 MR. ZUROFF: We don't want it --

12 MS. NETTER: Okay. I got it. So now we have
13 to talk --

14 MR. HUSSEY: One more thing. Can you explain
15 to me why you're tying the issuance of the building
16 permit --

17 MS. NETTER: We're not anymore.

18 MR. HUSSEY: Oh, okay. That's been dropped.

19 MR. NAGLER: I think we have two alternatives.
20 One is to describe the -- one is more ambitious than
21 the other. Alternative A is to describe the terms,
22 just by verbiage, of what this agreement would look
23 like.

24 The other is -- I think the applicant is

1 saying, we're okay with the form but not the form
2 postdecision. Only a form as an exhibit to the
3 decision.

4 MS. NETTER: They don't want to be held
5 hostage to the agreement to get the building permit.

6 MR. NAGLER: Right.

7 MR. BOOK: I feel like this is a can that can
8 be kicked down the road. It's an agreement that can be
9 negotiated at the time --

10 MR. ZUROFF: And that's what we're doing.
11 We're doing bullet points.

12 MR. BOOK: I think that's what we should do.

13 MS. NETTER: So now we have to go to limited
14 dividend.

15 MR. ZUROFF: Isn't the limited dividend also
16 part of the equation?

17 MS. NETTER: But we're separating the two.

18 MR. ZUROFF: I understand that.

19 MS. NETTER: He's got a different -- go
20 ahead.

21 MR. NAGLER: Well, I haven't seen -- the regs
22 define the term "use restriction" in a way that relates
23 to what we've just been talking about, affordability,
24 and that's what the town gets to continue. I've never

1 seen authority for the town being able to impose
2 limited dividend obligations. I've never seen language
3 absolutely prohibiting it.

4 MR. ZUROFF: That's the Amesbury decision.
5 That's the essential part of the Amesbury decision, is
6 financial transactions.

7 MR. NAGLER: Yes. Certainly Amesbury was very
8 clear that the town -- the board has no say whatsoever
9 in the limited dividend requirements during the terms
10 of the subsidy, just like it doesn't for the use
11 restriction.

12 I'm not sure it specifically said afterwards.
13 Although the regs do say -- do specifically address the
14 affordability restrictions afterwards, they don't
15 include limited dividend, so maybe you can make some
16 negative implication to that.

17 MR. ZUROFF: I'm not really troubled by not
18 having that part in the requirement.

19 MR. JESSE GELLER: Let me play devil's
20 advocate. If all the housing continues to be counted,
21 right, and if we've created a floor for affordable
22 housing, do I care? Do I really care that it's a --
23 continues to be a limited dividend?

24 MR. NAGLER: I guess you care if it's -- if

1 they exceed that, the money is supposed to go to the
2 town.

3 MS. NETTER: But I think the likelihood of
4 that occurring is not great. Let's play this out for a
5 moment. Do you have some thoughts?

6 MR. BOOK: I guess I was thinking I didn't
7 really know if we cared. But I guess -- could you just
8 explain a little bit more about the surplus going to
9 the town? I don't think I quite understand.

10 MR. NAGLER: It's done more in theory than in
11 practice, but the idea is just supposed to be a limited
12 return of the investment. If they exceed that amount,
13 I think somewhere in the guidelines, somewhere, it says
14 the money is supposed to go to the town.

15 MR. ZUROFF: It's similar to a nonprofit type
16 organization. You can't show any profits.

17 MR. NAGLER: Yeah, but --

18 MR. ZUROFF: But you're talking possibly 30
19 years from now.

20 MR. NAGLER: Yeah. And there are the kind of
21 egregious cases where the -- actually, the inspector
22 general came down on someone --

23 MS. NETTER: They're all little developers and
24 homeownerships. Much clearer issue in the

1 homeownership context.

2 MR. NAGLER: And I think at least one
3 subsidizing agency that I deal with regularly does
4 think it's their province, the limited dividend
5 requirement.

6 MR. ZUROFF: Again, I'm not terribly troubled
7 by that.

8 MS. NETTER: I think 11 is okay.

9 MR. NAGLER: Yeah. Just a statement of the
10 regulations, really, other than the limited dividend.

11 MS. NETTER: Right.

12 MR. ZUROFF: So we're leaving it in.

13 MR. NAGLER: Other than the reference to the
14 limited dividend.

15 MS. NETTER: So we're up to 12?

16 MR. JESSE GELLER: I had a general comment
17 under architecture, and I think it fit within 12.

18 The concept -- the notion on the midrise
19 structure was that the fourth floor would not be
20 visible to the neighborhood from Asheville Road. But
21 if you go to the elevations in the latest iterations of
22 the plans -- because all they're showing you, of
23 course, is -- they're just showing you a mock-up of the
24 building. They're not showing you a perspective from

1 an angle at the location. You see the fourth floor.
2 So to me, conceptually, the notion that fourth floor
3 not visible from Asheville Road is important, rather
4 than simply referring to iterations of plans that
5 clearly show a fourth floor.

6 MS. NETTER: So if you include that as a
7 performance standard, query how and when it gets
8 measured. Is that what you're suggesting, that it goes
9 in there, the fourth floor shall not be visible?

10 MR. JESSE GELLER: Yeah. I want it as the
11 overarching understanding of -- you know,
12 notwithstanding what is indicated on the plan --

13 MS. NETTER: Oh, so the reviews that are done
14 shall determine -- there should be a performance
15 standard, but then the question is, visible from --

16 MR. JESSE GELLER: Right. Because if all you
17 do is refer to the iterations of the plans, you're
18 going to see the fourth floor and the argument could be
19 made that that supersedes whatever discussion we had
20 about not seeing it.

21 MS. NETTER: But my question I'm trying to
22 think through --

23 MR. JESSE GELLER: I haven't figured out the
24 language.

1 MS. NETTER: I know. But even the concept
2 rather than the language.

3 MR. ZUROFF: What are going to do, then, frame
4 it out and then take siting -- I mean, we have to be
5 practical.

6 MR. BOOK: Can this be dealt with in -- I
7 don't know -- rather than a condition in -- I guess it
8 does not fit into a -- the history. I guess that has
9 to be a condition.

10 MR. JESSE GELLER: It was drawn 8/19. The
11 elevation, HH and AA, show the fourth floor.

12 MR. BOOK: 8/19.

13 MR. ZUROFF: You could take the fourth floor
14 off altogether.

15 MR. JESSE GELLER: I think Mr. Hussey said
16 something like that.

17 MR. HUSSEY: I think you should refer to
18 discussing A12 in the drawing, which is the apartment
19 building, the schematic roof plan.

20 MR. BOOK: I guess I'm not -- so we've seen
21 plans, we've seen renderings where it's --

22 MR. NAGLER: Are you saying that if it turns
23 out there was a mistake in the renderings and then
24 later determined there is some visibility of the fourth

1 floor, that that's an overarching requirement?

2 MR. JESSE GELLER: Yeah. I want them to build
3 the building that Mr. Geller showed us in the computer
4 mock-up saying, see, you can't see the fourth floor.

5 MR. HUSSEY: From a particular point.

6 MR. JESSE GELLER: Well, he showed us from a
7 particular point, which was Asheville Road, and he did
8 it on the left side and on the right side because those
9 were Mr. Book's marching orders.

10 And I assume that's what you propose to
11 build. It's just that when I look at the flat
12 representation of the plans, I see the fourth floor, so
13 I want to make clear --

14 MR. LEVIN: Well, you always would. I mean,
15 there's an elevation. You're coming up to the point
16 where you're --

17 MR. JESSE GELLER: Right.

18 MR. LEVIN: But when you're down on the
19 ground --

20 MR. JESSE GELLER: I'm not talking the plans.
21 I'm simply -- when -- I just want to be clear that the
22 fact that you show it in the flat elevation, which you
23 have to do to show the fourth floor, does not undercut
24 the discussion about pushing the fourth floor back and

1 wherever it starts as the point at which it's not
2 visible from Asheville Road. And I don't know whether
3 they --

4 Is it shown on the roof plan, Chris? Does
5 that satisfy --

6 MR. HUSSEY: The outline of the fourth floor
7 is shown on the roof plan.

8 MR. BOOK: It's shown cut back. But your
9 question is, is that visible. I mean from the
10 rendering. I know it's not part of this package, but
11 from the renderings, the pictures that they showed us
12 at one of the previous hearings, it wasn't visible.
13 Maybe the answer is we make one of those renderings
14 as -- add it to the package.

15 MR. JOE GELLER: So what we showed you was a
16 model constructed using the existing topography, the
17 proposed topography, the building set on the site. So
18 the model is an accurate depiction of that from those
19 two places that you asked to take a view. I think the
20 elevation is always going to show the fourth floor
21 because it's a flat view of what --

22 MR. JESSE GELLER: Right.

23 MR. JOE GELLER: So I think Mr. Hussey's
24 suggestion of -- the roof plan shows the location of

1 where that floor is pushed back. That's a better
2 representation of what you're asking about than the --

3 MR. JESSE GELLER: To the extent that that
4 rooftop representation, the depiction of where the
5 fourth floor starts, right -- to the extent that that
6 correlates with the 3D rendering, that's fine. You're
7 correct. So I think what we're struggling with is, how
8 do you associate one with the other?

9 Mr. Book's suggestion is, well, why can't you
10 just take, you know, that representation from the 3D
11 model, take it as a snapshot, for instance, and it
12 clearly shows it, and attach that as sort of subtext to
13 the roof plan? At the end of the day we're simply
14 relying --

15 MR. HUSSEY: There's another possibility. You
16 have a number of site sections. You could take a site
17 section through the intersection of Asheville Road
18 where it enters the neighborhood towards the
19 building -- you know what I mean -- and through the
20 building, and that would demonstrate, it seems to me,
21 the site line.

22 MR. JOE GELLER: Angled through the building.

23 MR. HUSSEY: Yeah. That should demonstrate
24 site lines.

1 MR. JOE GELLER: I'm sure we can do that.

2 MS. NETTER: So what do we do with that? Do
3 we provide that when we're doing the review?

4 MR. HUSSEY: It becomes a part of the set, the
5 project set that's approved by the board, that drawing,
6 that site section drawing.

7 MS. NETTER: So when we're reviewing for
8 consistency with the architectural plans -- now, maybe
9 we have to have some language to the extent that a plan
10 conflicts with how that rendering looks, the rendering
11 governs.

12 MR. HUSSEY: No. Only if the section shows
13 that you might be able to see it. Then you've got a
14 problem. But the site section from the intersection --

15 MS. NETTER: Are you looking at something
16 here?

17 MR. HUSSEY: I'm looking at this right here.

18 MS. NETTER: Yeah. But what number?

19 MR. HUSSEY: Well, look, actually, I'll tell
20 you what I'm talking about. What I'm talking about is
21 the section where the viewer starts here and you draw a
22 line like this. Okay?

23 MS. NETTER: Right.

24 MR. HUSSEY: That's the section of the

1 drawing.

2 MS. NETTER: Right.

3 MR. HUSSEY: And this fourth floor ends here.

4 MS. NETTER: Right.

5 MR. HUSSEY: So by looking at that section,
6 and if they put a -- eyeball it, five and a half feet
7 at that point, you then draw a line and it should pass
8 over this corner and skip over the top of the roof of
9 that fourth floor.

10 MR. JOE GELLER: It's similar to -- if I can
11 make an analogy to something I think most of the board
12 members are familiar with -- the hotel on Route 9. You
13 know the sky plane concept? It's exactly what you're
14 talking about. If we show basically what we showed in
15 that plan, the sky plane of what you're seeing, you'll
16 see that you're not seeing that.

17 MR. JESSE GELLER: Right. And that will link
18 up -- that concept -- with your plan that's in the
19 sheet.

20 MR. JOE GELLER: Right. That, we can do.

21 MR. HUSSEY: I'd like to have a sidebar with
22 Joe. I've got one other question.

23 MS. NETTER: No. You need to do it not as a
24 sidebar.

1 MR. HUSSEY: All right. So would you take a
2 look at this L908 and see if that -- (inaudible.)

3 (Multiple parties speaking.)

4 MR. JOE GELLER: So Mr. Hussey is asking me
5 whether the section that has five floors is taken -- I
6 will check that.

7 MR. HUSSEY: On one section in the drawing, in
8 particular L908, it appears to show two floors of
9 garage and five floors of building when, in fact, there
10 are only four floors of building.

11 MR. JOE GELLER: I'll check that.

12 (Inaudible discussion amongst the board.)

13 MR. HUSSEY: All right. Can we move along?

14 MR. JESSE GELLER: Yes. After looking at the
15 clock, I think what we will do is -- because I'm not
16 sure that anybody in the audience can stand this much
17 excitement. And I think we will cut ourselves off
18 at -- we'll give ourselves a deadline of 10:00 p.m. and
19 then we will continue this to the next hearing date and
20 continue our discussion.

21 MS. NETTER: So number 12, I propose we leave
22 it as is unless you want some language that just says
23 "planning director" and we don't separate out the
24 "assistant planning director." I don't think it much

1 matters.

2 MR. ZUROFF: What about "substantially"?

3 MS. NETTER. No.

4 MR. ZUROFF: No what?

5 MS. NETTER: We'll leave our language as it
6 is.

7 MR. ZUROFF: Oh, that's underlined. Okay.

8 MS. NETTER: That's not my underlining.

9 MR. ZUROFF: Oh, that's his underlining.

10 Okay.

11 MR. BOOK: So this gets to the -- is this the
12 first instance where we get to this issue of approval
13 versus review?

14 MR. NAGLER: It's been in a couple of places,
15 I think.

16 MR. JESSE GELLER: Yeah. But Edie is
17 suggesting that we suggest it on a case-by-case basis.
18 So the question is -- we've got it -- well, let's first
19 deal with the question about whether it's the director
20 of planning or the assistant director. I'm fine with
21 this change.

22 MS. NETTER: Yeah. I'm fine too because then
23 it'll -- the director will do as she feels is
24 appropriate.

1 MR. JESSE GELLER: Right, of course.

2 MR. HUSSEY: So the question is, an approval.

3 MR. ZUROFF: Isn't that covered under 40A?

4 That's a normal standard.

5 MS. NETTER: Yeah. But we're not dealing
6 under a normal -- at all.

7 MR. ZUROFF: But, I mean, we have the right to
8 do that.

9 MS. NETTER: I think I need to tighten the
10 language a little bit. It's really conforming --
11 conform to the --

12 MR. JESSE GELLER: I think the notion is that,
13 you know, the manner in which Mr. Schwartz has sort of
14 given you a directional for -- and I think you've got
15 comments thinking about the way --

16 MS. NETTER: Yeah. I mean, sometimes
17 direction is acceptable and sometimes it isn't. But we
18 can tighten this up.

19 MR. JESSE GELLER: Okay. Any other comments
20 on that section? No?

21 MR. BOOK: I have none.

22 MR. JESSE GELLER: None. Okay, paragraph 13.

23 MR. ZUROFF: Are there any multifamily homes?
24 I don't think so.

1 MR. HUSSEY: No.

2 MS. NETTER: Let me just double check from
3 planning staff. I don't know if they're okay with this
4 language. If you don't mind, Mr. Chairman, planning --
5 Maria should interrupt whenever appropriate.

6 MS. MORELLI: Actually, the building
7 commissioner, Dan Bennett, does have an issue with any
8 mechanicals and air condensers, anything in the 20-foot
9 setback between the abutters and the site, so I just
10 might ask Mr. Bennett what his thoughts are on this
11 revision.

12 MS. NETTER: Can we go to the first -- how
13 about the first few lines? Are you guys okay with the
14 beginning? The first three lines, Maria, is okay,
15 or --

16 MS. MORELLI: I'm deferring to --

17 MS. NETTER: The whole thing, okay.

18 MR. BENNETT: The only issue with respect to
19 that -- so it's the abutters on Beverly and Russett and
20 that 20-foot setback where we've maintained all the
21 buildings. I felt that it probably would be prudent to
22 not allow any air conditioning condensing units in that
23 buffer area either. They can locate them to the side
24 of each of the buildings. That would reduce any

1 potential noise problems that they may have.

2 MR. JESSE GELLER: Are you proposing to
3 locate --

4 MR. LEVIN: We can make efforts to not place
5 them in the buffer zone. We envisioned putting them,
6 if anywhere in that buffer, immediately abutting the
7 building. So I think what we proposed was six feet of
8 the building, that the condensing unit would be sitting
9 there. Clearly, the noise issue is more relevant to us
10 than somebody who's 50, 60, 80 feet away. I don't know
11 what the town regs call. I think I'm told that you can
12 put air conditioners within the setback in the town. I
13 don't think this is an unreasonable set of
14 circumstances that we're looking for.

15 MR. BENNETT: We do consider them as accessory
16 structures, so we do apply the setback for accessory
17 structures. In this specific instance, it would be
18 within six feet of the lot line. And that's throughout
19 the town in any S and SC district. In this specific
20 case, I was just trying to be a little more proactive
21 and not create a problem down the line with respect to
22 noise. It's strictly noise and nothing else.

23 MS. NETTER: So you said clearly, but I want
24 to make sure for drafting purposes, what you're saying

1 is if this were a 40A case -- and they haven't sought a
2 waiver from this, as far as I understand -- that air
3 conditioning units could not go within six feet.

4 MR. BENNETT: Of the property line. It's
5 within six feet of the property line; correct. So what
6 they're proposing is, they've revised that section to
7 allow air conditioning units in the rear within that
8 twenty-foot setback, which would then reduce the
9 setback from a -- could potentially reduce the setback
10 from a condenser unit to fourteen feet from that
11 Beverly and Russett Road property line.

12 MR. LEVIN: So it's being expanded from six
13 feet to fourteen feet.

14 MR. JOE GELLER: I think on the noise issue,
15 Mr. Bennett, we'd have to meet all the noise
16 requirements, et cetera. We couldn't exceed any noise
17 requirements of the town.

18 (Inaudible. Clarification requested by the
19 court reporter)

20 MR. JOE GELLER: We'd have to meet the town's
21 bylaw, the noise bylaw, the state requirements for
22 noise. So putting in an additional setback from the
23 six that we could do is giving more -- I think more
24 support for that than not.

1 MR. BENNETT: Agreed. It's going to be
2 further back than would be allowed under other
3 circumstances. I felt, on the onset, this was a
4 20-foot buffer area that was, in my view, protected
5 across the line. And at a later date, over the last
6 month or so, I felt that, you know, protecting that
7 buffer area, the 20 foot from the condensing units, was
8 appropriate. We've maintained -- I think we've
9 maintained a 20-foot buffer all the way through there,
10 maybe with the exception of a few retaining walls and a
11 small bit of parking area that goes within 15 feet of
12 the lot line. For the most part, we've protected that
13 property line with a 20-foot setback for all
14 structures.

15 MR. JESSE GELLER: Questions? Thoughts?

16 MR. ZUROFF: Can the air conditioners be put
17 to the sides?

18 MR. LEVIN: It's conceivable. I don't want to
19 commit to that, because when you say, "to the sides,"
20 you're talking about the -- well, it depends on whether
21 it's the side -- it depends on what's abutting the
22 edge. But in this case you have -- okay, in Building
23 Number 11, if you were to put it on --

24 MR. ZUROFF: -- the side. I know it's on

1 the -- that's in the buffer.

2 MR. LEVIN: You'd be talking about in the
3 front or in the back.

4 MR. ZUROFF: Just phrase it in such a way that
5 they're not facing the buffer zone. They're not in the
6 buffer zone.

7 MR. JESSE GELLER: Well, I think your notion
8 is that they're not on the side of the neighbors' --

9 MR. ZUROFF: On the abutters' side.

10 MR. JESSE GELLER: Right.

11 MR. LEVIN: There are four units.

12 MR. HUSSEY: I think so. And there's one for
13 each unit; is that right? There isn't one for the
14 building. There are four units -- condensers --
15 right?

16 MR. LEVIN: We haven't designed the MEP
17 systems to those yet. I mean, on the larger units,
18 it's conceivable there would be two. So I don't want
19 to say, and I don't want to end up with all of the
20 condensing units having to run across one face of the
21 building. It's not going to go across the front. I
22 mean, we're not going to put it on the front.

23 MR. HUSSEY: Okay, fine.

24 MR. LEVIN: And to put them on the opposite

1 side of the building is problematic, so then we would
2 have to put all of them along one face, and I don't
3 know if they would fit. I don't know if there would be
4 doorways that they would be blocking. So I just want
5 the flexibility to put them within six feet of the
6 building.

7 MR. HUSSEY: I think that's fine. Is there a
8 fence along here?

9 MR. LEVIN: Yes, there is.

10 MR. HUSSEY: And it's a solid fence; right?

11 MR. LEVIN: Yes, it is.

12 MR. HUSSEY: A sound barrier; right?

13 MR. LEVIN: Yes, it is.

14 MR. HUSSEY: I'm not worried about it. The
15 solid fence -- sound travels like line of site. If you
16 put something in that line of sight, it'll deflect, to
17 some extent, any noise.

18 MR. BOOK: These are just going to be, like,
19 house-sized compressors?

20 MR. LEVIN: Yes.

21 MR. HUSSEY: So the way you've got it worded
22 here, it's going to be within six feet of the building,
23 I believe, right?

24 MR. LEVIN: Right. We want to tuck it to the

1 building.

2 MR. HUSSEY: I think that's fine. I'd leave
3 it alone.

4 MR. JESSE GELLER: Okay.

5 MR. ZUROFF: Can I make a suggestion that we
6 cut here?

7 MR. JESSE GELLER: Yes. Before we jump into
8 open space?

9 MR. ZUROFF: Yes.

10 MR. JESSE GELLER: That's a great suggestion.

11 MR. NAGLER: Can I ask one clarifying
12 question? Such setback areas refer back to the
13 previous sentence as the area between Buildings 1
14 through 11, Beverly and Russett Road neighborhood?

15 The last proposed sentence, "air conditioning
16 condensers may be installed and maintained in such
17 setback areas within six feet of any building," the
18 question is, does "such" relate back to the previous
19 sentence?

20 MR. ZUROFF: In the zoning setback?

21 MR. SCHWARTZ: The setback between the
22 buildings and the Beverly and the Russett Road
23 neighborhood, and we intend to modify that.

24 MR. NAGLER. Thank you.

1 MR. JESSE GELLER: Any other questions at this
2 juncture?

3 I want to thank everyone for watching what
4 lawyers do. I'm sure it filled you with great
5 inspiration. Our next hearing is January 12th, same
6 time. Thank you.

7 (Proceedings suspended at 9:58 p.m.)

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1 I, Kristen C. Krakofsky, Court Reporter and
2 Notary Public in and for the Commonwealth of
3 Massachusetts, certify:

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

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

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

13 Dated this 15th day of January, 2015.

14 _____

15 Kristen Krakofsky, Notary Public

16 My commission expires November 3, 2017.

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