

In The Matter Of:

BROOKLINE ZONING BOARD OF APPEALS HEARING

***40B APPLICATION BY CHESTNUT HILL REALTY - Vol.
22
January 12, 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 12, 2015 at 7:00 p.m.

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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

Polly Selkoe, Assistant Director of Regulatory Planning

Samuel Nagler, Esquire, Krokidas & Bluestein

Edith M. Netter, Esquire,

Edith M. Netter & Associates, P.C.

Dan Bennett, Building Commissioner

Peter Ditto, Director of Engineering and Transportation

Joseph Geller, Stantec Consulting

Marc Levin, Chestnut Hill Realty

Steven Schwartz, Esquire, Goulston & Storrs

1 PROCEEDINGS

2 7:04 p.m.

3 MR. JESSE GELLER: Good evening, everyone. We
4 are calling the continued hearing on the Residences of
5 Chestnut Hill. My name is Jesse Geller. Jonathan
6 Book, Mark Zuroff, and Chris Hussey. As I've commented
7 to Mr. Hussey, he seems to be moving further and
8 further away from me.

9 Tonight we will continue our discussion -- or
10 we will primarily continue our discussion on the draft
11 decision and, in particular, the conditions. As we
12 announced at the last hearing, the intention is that by
13 the end of this evening's hearing we will close the
14 public hearing and end testimony on this matter. We
15 will then continue with public meetings in which the
16 board will continue its discussion of conditions.

17 For tonight's agenda, we have, first of all,
18 administrative details. I just mentioned them.

19 Secondly, we understand that the applicant
20 would like to present some additional information. I
21 believe there are some updates on waivers, among other
22 pieces of information, for the board.

23 MR. JOE GELLER: Thank you, Mr. Chairman. I'm
24 Joe Geller from Stantec Consulting, Chestnut Hill

1 Realty.

2 So I'll start off with the -- actually, we had
3 a working session with the town departments, and it was
4 very productive. We were able to go through all of the
5 questions and concerns, I think, that the departments
6 and staff had, and we were able to resolve, I believe,
7 all of them. And so what I'm going to present tonight
8 is basically those resolutions, and hopefully if you
9 have questions, just stop me as you know you can.

10 So this was the overall site plan that we had
11 produced before. There was a question right here about
12 what was being shown there. It looked like it was sort
13 of a portico that didn't have any building above it, so
14 we actually -- it was sort of dashed in, so we actually
15 added that in so it's very clear. It shows up on all
16 of the architectural drawings, but it wasn't as clear
17 on this drawing, so we just made that very clear. So
18 there is -- this is where the entrance is, and there is
19 a room above or space above that portico, that
20 drive-under, and we just wanted to make that clear on
21 the drawing, so that was changed.

22 And then there was the question that came up
23 last time we were here -- it was a week ago -- about
24 walkways, the requested walkways around the buildings,

1 particularly at this end of the site. And we worked
2 that. And after a discussion with the town staff --
3 the fire chief was at the meeting, as well as the
4 Engineering Department and the folks in the Planning
5 Department -- we have added a walkway that actually
6 comes around to the back of the building to this
7 parking lot as well as a walkway that comes along the
8 front of the building and ties into that entrance down
9 at that part of the site. And then it's connected here
10 across this way to the other part of the site. So
11 everything connects out on this part of the site.

12 And one of the questions or concerns was what
13 would that look like? How would the fire truck
14 access? All those kind of things. So we talked to the
15 fire chief about the access. He was comfortable with
16 that. We actually have added a wall back here in the
17 walkway.

18 One of the concerns the chief had originally
19 about using Grasscrete as the paving surface there was
20 that there would be no clear definition to the edge of
21 the Grasscrete. When they drive up there, they
22 wouldn't know where it is in the snow or whatever. It
23 was just a grass area. So we talked about putting
24 markers along that area that you can see, the trucks

1 could see. This actually makes it a lot clearer
2 because there will be a -- the walkway will actually
3 form the edge of that Grasscrete fire lane as well as
4 the wall on this side. So he appreciated that, to make
5 a very clear delineation of that fire lane.

6 And then the wall that we talked about a lot
7 last week, we actually extended it a little bit. It
8 starts at zero here. It goes to 10 feet here where you
9 drive down into the garage, and then the walkway comes
10 across here. We added the walk on this side. I think
11 the previous sketch we showed the walk over here, which
12 is a little more challenging. This actually works a
13 lot better to connect people up from the rear of the
14 building to the parking as well as the front of the
15 building.

16 We added a tree well here to protect this tree
17 so that we could kind of snake this walkway around
18 through the knoll that's here. You know, as we talked
19 about before, one of the changes that we made earlier
20 on was to protect this rock knoll here and the trees
21 that are on it. And so we've actually been able to
22 protect this tree as well by building a rock wall here
23 and having a path snake around to that side of the
24 wall. And then the landscaping plan for this whole

1 area was updated. As we put in the walkways, we
2 relocated the planting that was there.

3 Another question that came up was the site
4 walls at the entrance that were signage walls. And on
5 this case, what we did was actually move the signage
6 wall back to this point, so you'll see the signage
7 wall -- and I do have a rendering that shows this -- so
8 that as you drive into the site, you actually -- it
9 would say Hancock Village and you know that you're at
10 the -- I'm sorry -- the Residences of South Brookline
11 and you'd know that you're at the Residences of South
12 Brookline.

13 So I think, on this one, that pretty much
14 explains everything that we did after those
15 discussions.

16 Some the waivers that came out of that --
17 those discussions was that the sign walls -- so there's
18 a sign here at the west side of the site, a sign here
19 on the entrance off of Independence Drive on the east
20 side of the site, and then the one I just showed you
21 over here. So there's a waiver for signage because
22 that's not allowed in the S district. And this is what
23 that sign looks like, because there are existing signs
24 that are at Hancock Village and they would be similar

1 to the ones that are here. The signs would be similar
2 to the ones that I just showed you.

3 And then the other waivers, there's basically
4 this M waiver here, which is for retaining walls in the
5 setbacks. And we realize, actually, that because this
6 is now a front, the wall right here, this little piece
7 of wall is actually in a front setback. We had it in a
8 side setback before. So we changed that to a front
9 setback and then we added waivers for these walls at
10 this end of the building here and here and here that
11 are all, again, in the setbacks. And a few of them are
12 for height as well. And I think we talked about that
13 last week, but this just clarifies it on the waiver
14 plans.

15 There was also a discussion about the height
16 of the light pole. So that was the last waiver change
17 that we asked, which was a request to change the height
18 of the light pole. We had been looking at a light pole
19 that had a 16-foot height to the base of the light and
20 then it was a little -- I'm sorry -- 15 and then higher
21 in here. So what we've asked for now is a waiver for
22 17 foot of height, which would give you a 15-foot
23 mounting height. So the light itself would be at 15
24 feet, which is the bylaw, but the top of the pole,

1 because of the goose neck of the pole, actually is 17
2 feet. That gives us a little bit of flexibility in the
3 sort of aesthetic of the light that we're selecting,
4 but the light itself would be no higher than 15 feet.

5 So that's pretty much all of the waiver
6 changes. Everything else was similar to what we had
7 before.

8 Mr. Hussey asked us to do -- I think this is
9 the section you asked for -- and it's if somebody was
10 standing at Asheville and looking up, what would they
11 see. And clearly, you don't see the fourth floor of
12 the building. There's the space between it. And
13 that's now incorporated into the drawing set, so it's
14 part of the record plans.

15 MR. HUSSEY: Joe, I've got a question on this,
16 if I may. The edge of the third floor, there appears
17 to be a parapet or a wall of some sort that's above the
18 roof level; is that right?

19 MR. JOE GELLER: Yes. All the renderings we
20 showed had a parapet on that part of the site. This is
21 actually the worst-case scenario, because if you
22 remember the building, on the corner there it actually
23 has a couple of, like, pointed pieces and then there's
24 a parapet. And so that would be, like, the worst-case

1 scenario.

2 MR. HUSSEY: And that's a solid --

3 MR. JOE GELLER: Yes.

4 MR. HUSSEY: -- solid wall? Okay.

5 MR. JESSE GELLER: Joe, where's the -- do you
6 know the reference to the sky plane?

7 MR. LEVIN: Do you know what plan that is?

8 MS. MORELLI: 911.

9 MR. KINDERMANS: 911.

10 MR. LEVIN: 911 -- L911.

11 Mr. Hussey, does that answer your question?

12 MR. HUSSEY: Yup. That's what I've got, L911.

13 MR. LEVIN: Did I answer your question,
14 Mr. Hussey?

15 MR. HUSSEY: Yes, you did. Thank you.

16 MR. JOE GELLER: And this is the view with --
17 you can see the new sign wall here. The walkway comes
18 through here. There's a little tree well here, and
19 then the existing tree that's protected, and then this
20 is the landscaping that was there before. And we've
21 shown some more evergreens on this side, and the
22 planting rearranged, as I said, in the plans. So that
23 would be the image of what you've seen before with the
24 new pathway installed. And that's what it would look

1 like in the winter.

2 There were a couple of other small things that
3 we were asked to do. I think at the last hearing,
4 Mr. Ditto has some concerns about drainage at the edge
5 of the property. We talked about, actually, in our
6 response that the water going off the property today
7 would be more significant than what was going off the
8 property at the end of the day. But as a -- because he
9 had some concerns about it, what we ended up doing was
10 putting in a trench drain in this area and a trench
11 drain in this area and connecting them to the area
12 drains so none of that water will actually go off
13 site. It's what Mr. Ditto had asked for, so we did
14 that.

15 And then the fire chief had some questions
16 about the hydrant locations. And we had shown the
17 hydrant locations. I think BETA had commented on them,
18 that they were fine, but the chief actually had some
19 concerns about where the location was, so we
20 relocated -- this one, I think, was up here somewhere.
21 He wanted it towards the middle of the site so he had
22 better access to the three buildings. This one was
23 relocated here -- or new -- actually, it's a new
24 hydrant. So that serves these two buildings. And then

1 this one was relocated, actually, from over here to
2 here so he can grab it as he comes in. And then this
3 one was located to here. It was down at this location
4 down here. So we -- basically, whatever the chief
5 asked for, we did, so those will be the new hydrant
6 locations. And I think that's about it.

7 MR. JESSE GELLER: Thank you.

8 Questions? Mr. Hussey?

9 MR. HUSSEY: No.

10 MR. JOE GELLER: I'd like to call on
11 Ms. Morelli to speak to her review of the plans as
12 revised.

13 MS. MORELLI: Thank you, Mr. Chairman. Staff
14 has reviewed the plans and that involved the fire
15 chief, the building commissioner, the planning
16 director, the assistant director for regulatory
17 planning, the building commissioner, and myself. And
18 we're satisfied that the changes do address the issues
19 that we have raised.

20 MR. JESSE GELLER: Anybody have questions at
21 this point?

22 (No audible response.)

23 MR. JESSE GELLER: Okay. What we'd now ask is
24 that -- I understand that you have some comments on a

1 number of the conditions. What I would ask the members
2 of the board to consider is that what Ms. Morelli is
3 going to do is she's going to provide some comments
4 to -- I won't use the term "scatological list of
5 conditions." There's some logic to them, but they are
6 not in a -- they don't follow sequentially 1 to 66.
7 These are specific conditions that Ms. Morelli wanted
8 to make comment to. These are conditions that I would
9 say are significant, and therefore I think when the
10 board resumes its discussion about conditions, what we
11 should do is focus on those conditions first, even
12 though it's taking them out of order. Does everybody
13 understand?

14 MS. MORELLI: Thank you, Mr. Chairman. I just
15 want to make it clear that these are issues that we
16 feel should be addressed before the hearing closes.
17 And these are not all the comments that staff might
18 have, so when you do go through the conditions one by
19 one, we may have some additional but minor comments.

20 I'd like to begin with Condition 20, which
21 concerns the redesign of Independence Drive, and these
22 are the salient points staff would like to make:

23 One, the town will propose both a design and
24 construction drawings for Independence Drive and will

1 administer the construction contract.

2 Two, the town has not --

3 MS. NETTER: Slow down. Can you say the first
4 and second point again? I'm sorry.

5 MS. MORELLI: Sure. Regarding that first
6 point, the town will propose both the design for
7 Independence and construction drawings and will
8 administer the construction contract.

9 And if you're ready, I'll continue with the
10 second point. The town has not necessarily accepted
11 the proposed complete street design that the applicant
12 proposes, including under procedural history. So this
13 is item 2 under procedural history. So that inclusion
14 needs to be taken out. It's a complete streets
15 design.

16 And the third point is that the Transportation
17 Board must be involved in changes that affect public
18 ways as Independence Drive is outside of the 40B.

19 And the last point concerns costs. Peter
20 Ditto, who's the director of Transportation and
21 Engineering, wanted to provide an estimate of
22 construction costs which the applicant would be
23 financially responsible for. And adjusted for
24 inflation about three years out, this is estimated at

1 \$350,000.

2 MR. JESSE GELLER: The complete streets --

3 MS. MORELLI: No. Don't call it "complete
4 streets." That's just one design option for
5 Independence Drive.

6 MR. JESSE GELLER: So how are they coming up
7 with that number?

8 MS. MORELLI: You can ask Peter Ditto. He's
9 the one who came up with the itemization. I don't have
10 that before me.

11 But I just want to make it clear that a
12 redesign of Independence Drive could be any number of
13 things. A complete streets design, which the two lanes
14 on each side, west and eastbound, are reduced to one
15 lane each, that's what we refer to a complete streets
16 design. It accommodates the bicycle -- cycle track and
17 so forth.

18 What the town is saying, that could be one of
19 the design options but certainly not the only design
20 option. The town will propose a design and a
21 construction drawing. They just did not want to be
22 wedded to one particular design for Independence.

23 MR. JESSE GELLER: I just don't know what is
24 the basis for the amount.

1 MS. MORELLI: Peter Ditto did the
2 itemization. He is here this evening, and he can
3 justify that estimate.

4 MR. JESSE GELLER: Okay.

5 MS. MORELLI: May I continue?

6 MR. JESSE GELLER: Let's just answer that
7 question. I assume it's a quick answer.

8 MR. DITTO: I did a survey of the street. I
9 walked both sides. I estimated how much sidewalk would
10 have to be replaced, how much curb would have to be
11 removed and reset. Also, I estimated how much pavement
12 had to be removed and replaced and also accounted for
13 one pedestrian traffic signal at Thornton Street and
14 then estimated the striping of the street. So those
15 are -- you know, it's preliminary numbers, but I feel
16 within reason.

17 MR. HUSSEY: So this is construction costs?

18 MR. DITTO: Yes.

19 MR. JESSE GELLER: Anybody else?

20 MR. BOOK: So when you're looking at that --
21 for example, that estimate -- is the idea that -- given
22 that you haven't decided on the design, how does this
23 relate to what the applicant has proposed? I guess I
24 don't know -- they proposed a complete streets

1 methodology, which our peer reviewer seemed satisfied
2 with. There's a cost associated with that. How does
3 the number that you're -- that was just discussed, how
4 does that relate to what the applicant and its
5 consultants had proposed?

6 MR. DITTO: Well, I think what you have to
7 understand is what isn't going to change in the street
8 is the width of the sidewalks, the width of the
9 pavement. It may change -- the lane lines may change.
10 They may get rid of parking on one side, put a cycle
11 track on that side.

12 So, you know, the estimates for, for instance,
13 sidewalk replacement, those are pretty solid. You go
14 out there and say, there's 50 percent of the concrete
15 sidewalk that has to be removed and replaced and you
16 get a number. You look at the curb and you line it up
17 and you look vertically and horizontally and say 80
18 percent of this curb is good. That's a decent number.
19 Then you come and you repave the street. That's going
20 to be repaved to that same width no matter what. You
21 know, with complete streets or the way it is now, it's
22 going to be the same, so the tonnage of the asphalt
23 that's going down is not going to change.

24 The only thing that will probably change is

1 how we configure the lanes in the roadway. Do we go
2 down to ten-and-a-half-foot lanes, each direction we
3 put a bicycle track in there, and parking. So those
4 are the things we change, but that's only striping,
5 which is a minimal cost. So whether you look at it as
6 a complete street project or just a reconstruction
7 project, in this case, they're almost one and the same
8 dollarwise.

9 MR. JESSE GELLER: And, frankly, I would think
10 that assuming -- whether or not they follow through
11 with complete streets, whether that's ultimately
12 recommended, desirable, what they do, I assume that
13 sets the outside parameter of cost when you're
14 estimating. And therefore if less is done, they will
15 have -- you know, they will have estimated based on the
16 higher rather than the lower.

17 MR. BOOK: Right. I understand that. My
18 concern, which I think Mr. Ditto has addressed, is that
19 it seemed very open-ended. And we have seen one
20 layout, this complete streets layout that they
21 mentioned that our peer reviewer -- the town's peer
22 reviewer has deemed to be satisfactory. There's costs
23 associated with that. I don't know what the cost is,
24 but there is a cost. And I just didn't want to have

1 this open-ended and as the town starts to go through
2 this, it's doubled, tripled, or quadrupled. I don't
3 know. There needed to be some parameters for it.

4 MR. JESSE GELLER: Okay, great. Thank you.

5 MR. ZUROFF: Mr. Ditto, did this estimate also
6 take into consideration other curb cuts and entryways
7 from the other abutting public ways?

8 MR. DITTO: No.

9 MR. ZUROFF: So is that part of a separate
10 estimate?

11 MR. DITTO: The curb cuts there are there for
12 the east and the west village, so I don't even have to
13 count for those.

14 MR. ZUROFF: What about the potential VFW
15 entrance?

16 MR. DITTO: You can figure for the curb cut,
17 it's going to run you about 2- or \$3,000 each, so it's
18 pretty minimal in the grand scheme of things.

19 MR. JESSE GELLER: Keep in mind that this has
20 to do with Independence.

21 MR. ZUROFF: No. I understand. I'm just -- I
22 didn't want it to be lumped in if it wasn't. Thank
23 you.

24 MR. JESSE GELLER: Thank you.

1 MR. LEVIN: The complete street design, you
2 know, I think it went through a conceptual design, a
3 little bit of the schematic design, had input from the
4 peer reviewers mentioned. It was never expected that
5 that would represent the construction documents.

6 We're more than happy to work with the town in
7 coming up with a scheme that they're happy with, that
8 we're happy with too. Obviously, it's our front yard
9 on both sides, and we see the benefit. We're willing
10 to pay for it and, in fact, we would like to be the one
11 who administers the construction with the oversight of
12 the town because we can do it cheaper. And, you know,
13 obviously we want to get as much value as we can, but
14 we're more than happy to work with the town in both
15 aspects of design and construction administration and
16 make sure that everybody's happy in the end.

17 MR. JESSE GELLER: Thank you. Sorry, Maria.

18 MS. MORELLI: If I may, I'm not sure if Peter
19 Ditto wanted to respond to that.

20 MR. DITTO: We do this for a living, design
21 the streets, put them out to bid, supervise
22 construction. I respect his request to help out, but
23 to be honest with you, in my experience, at least in
24 roadway reconstruction, you know, my division can do it

1 as well as any other consultant and, in fact, it's
2 easier for me to do this work in-house.

3 MR. HUSSEY: I'd like to support Peter Ditto
4 also because what we're dealing with is not the streets
5 on the private property, but this is a public street.
6 The Town of Brookline, they should be responsible for
7 design and seeing ...

8 MR. JESSE GELLER: I agree with you,
9 Mr. Hussey. Thank you.

10 MS. MORELLI: I will continue with Condition
11 21 which concerns the transportation access plan. So
12 the TAP will pertain to only on-site mitigation
13 measures and not the off-site traffic study which is
14 covered under Condition 24.

15 Now, the applicant has proposed some deletions
16 amongst the list of TAP measures, and we'd like to
17 return to the initial Roman numeral number II, IV, and
18 VI.

19 II concerns the 50 percent subsidies for the
20 applicant's employees' public transit costs.

21 IV concerns expanding the existing shuttle
22 service. We recommend some specificity concerning
23 frequency and stops.

24 And VI concerns charging a fee for rental of a

1 parking space. We feel that these are reasonable
2 incentives concerning TAP measures.

3 If you have no questions, I'll continue to the
4 next condition.

5 MR. JESSE GELLER: Maria, hold on. I think
6 somebody raised a question about number 6. Does anybody
7 want to ask --

8 MR. BOOK: This is about charging a fee for
9 the parking spaces.

10 MR. JESSE GELLER: Number 21.

11 MR. BOOK: So let me ask the question. What's
12 the benefit of that?

13 MS. MORELLI: Well, the incentive is that if
14 there are separate fees, then one might think, I'll
15 have one car instead of two. I mean, it's been done
16 before in other Brookline projects, so it is a bona
17 fide traffic mitigation measure in terms of reducing
18 the number of cars that might be on-site, that might be
19 used. So it's certainly worth putting out there as
20 just another mindful measure that one would consider.

21 MR. JESSE GELLER: But they have -- but
22 they're getting a certain number of spaces.

23 MR. BOOK: Right. And these are rental
24 units. And whether the space is included in the

1 apartment or separately charged for, I just --

2 MR. JESSE GELLER: Right.

3 MR. BOOK: I'm not seeing the benefit of this.

4 MR. ZUROFF: Well, if they charge a fee for
5 the space, even though the space is there, it may
6 discourage somebody from actually using a space that
7 may have been assigned to --

8 MR. JESSE GELLER: So the incentive is to
9 have --

10 MR. ZUROFF: -- is disincentivizing the
11 parking --

12 MR. JESSE GELLER: It's an incentive for them
13 to have open spaces that are not utilized.

14 MR. ZUROFF: Well, you can look at it that
15 way.

16 MR. BOOK: But I don't see that ever
17 happening.

18 MR. JESSE GELLER: I think it's highly
19 unlikely, but you're simply passing along to the
20 consumer an additional cost.

21 MR. ZUROFF: Well, it may not be an additional
22 cost. It may be that they lower their rents and say,
23 if you want a parking space, it's \$25 or whatever they
24 choose. That goes back to their level of rent. But it

1 may discourage somebody from getting a second car if
2 they have to pay for it.

3 MR. BOOK: That's entirely possible. But I
4 think there will be enough people out there who would
5 want a second space who would be willing to pay for it.
6 So if not in X unit, then -- you know, in one unit --

7 MR. JESSE GELLER: Keeping in mind that these
8 spaces are all dedicated to this project.

9 MR. BOOK: Yeah. I fully expect all of the
10 spaces to be utilized.

11 MR. JESSE GELLER: I think, given what I
12 suspect the price point is for the at-market units
13 here, it's nice in theory but I don't think they're
14 going to have --

15 MR. ZUROFF: I'm following Maria's
16 recommendation where she's giving us the experience.

17 MR. JESSE GELLER: Understood.

18 MS. MORELLI: We can also -- I'm not sure if a
19 member of the planning staff who has experience with
20 this particular measure has any comments. I'll just --
21 if they want to, they have the opportunity to speak to
22 the point that you're making. I just want to say that.

23 Okay. If we can move on --

24 MR. SCHWARTZ: Can we respond to that?

1 MR. JESSE GELLER: Briefly.

2 MR. SCHWARTZ: With regard to the parking
3 matter, we feel very strongly that this should be
4 something that should be determined by the owner. And
5 I'm curious to know whether it's ever been imposed
6 before on a residential project in Brookline. That,
7 clearly, is relevant.

8 I'm also concerned about the legality of this
9 provision under recent court cases that prohibit the
10 charging of fees for amenities. It's something we need
11 to look into. But regardless of its legality, we
12 believe that that should not be something that's
13 imposed by the town unless the town can demonstrate
14 that it's done it before for other residential
15 projects.

16 With regard to the shuttle, we similarly feel
17 that that should be something that's left to --
18 Chestnut Hill Realty has extensive experience. We
19 don't think the town should be dictating the scheduling
20 of the shuttle, the number of stops. It's going to be
21 done in a way that makes sense for the usage, and we
22 think that's, frankly, a micromanaging aspect of this
23 project.

24 We'd also like to see if there's any -- for

1 any other residential project, whether there's ever
2 been a similar condition imposing or requiring
3 discounts for employees for public transportation.

4 MR. BENNETT: Just a quick comment. The
5 transportation access plan is not about increasing open
6 space; it's about reducing the number of vehicle trips
7 to a property.

8 Our bylaw, under 509 -- this would be
9 triggered under a normal 40A project when it should
10 have 100 units or more. So we have not had that in the
11 Town of Brookline in my time here, but it has been and
12 will be triggered when Brookline Place moves forward.
13 That will be our first bite of the apple with regard to
14 the transportation access plan, the TAP permit, and the
15 whole process.

16 Currently, the town is undergoing a town-wide
17 review for the consultant to look at ways to reduce
18 vehicle trips to large properties, commercial and
19 residential. And most recently, the town or the
20 residents have asked that the town employees be
21 included in this review. So this is something that the
22 town is looking at, has been looking at, and moving
23 forward, this is just a way to reduce, in one way or
24 another -- try to, at least -- one of the board members

1 just mentioned -- to reduce the number of vehicles
2 on-site.

3 MR. JESSE GELLER: Thank you.

4 MS. SELKOE: I'd like to just add one thing.
5 Polly Selkoe, Assistant Director of Regulatory
6 Planning.

7 In many of the 40A cases, we do require a
8 subsidy from the applicant, and that is very typical
9 that they have to pay for 50 percent of the T pass.
10 It's not just a question of selling the T pass
11 on-site. They actually have to subsidize it, which, of
12 course, incentivizes their employees to actually use
13 the T.

14 MR. JESSE GELLER: Thank you.

15 MS. MORELLI: If you're ready, Condition 22
16 pertains to the VFW curb cut request. And the town's
17 position is that the applicant, not the town, should
18 apply to the state for the curb cut, although the town
19 will support the applicant's request.

20 Regarding the timing, I believe there was a
21 deletion, but the town does feel it's important that if
22 not 30 days, then perhaps 45 days after the date the
23 decision is filed with the town clerk the applicant
24 should file their application with the state concerning

1 the curb cut.

2 And related to that, Condition 23, this is the
3 VFW curb cut and the 10 additional parking spaces that
4 the applicant would get if they secured a curb cut.

5 The town wants to refine that condition to say that the
6 town will grant the 10 additional parking spaces if,
7 and only if, the applicant constructs a curb cut. It's
8 not adequate for the applicant to merely receive
9 approval from the state for a curb cut.

10 If you're ready for me to continue, Condition
11 24 pertains to the off-site traffic study. This is
12 something that has not been conducted yet. It would
13 happen postoccupancy, and therefore, the director of
14 transportation and engineering must approve the
15 parameters of the off-site traffic study.

16 MS. NETTER: With respect to number 23,
17 there's language -- does the town have a comment -- and
18 if you don't, that's fine -- on the "insubstantial
19 change" language?

20 MS. MORELLI: Yes. In general, we really
21 object to that language, that phrasing, throughout.

22 For Condition 24, the off-site traffic study,
23 as I mentioned, the director of transportation and
24 engineering must approve the parameters of the off-site

1 traffic study. In addition, this postoccupancy traffic
2 study pertains to public ways, namely the Asheville,
3 Bonad, Russett, and Beverly Road. Therefore, the
4 Transportation Board must also be involved in that
5 review.

6 And third, I want to make it clear that the
7 town doesn't agree with the applicant that the traffic
8 report dated July 2014 should serve as the baseline to
9 which the postoccupancy traffic study will be prepared.

10 Is there a question I can address, Ms. Netter?

11 MR. NAGLER: Could you just repeat that?

12 MS. MORELLI: Regarding --

13 MS. NETTER: We're just trying to
14 understand -- the applicant had asked for a baseline
15 study?

16 MS. MORELLI: No. The applicant is not -- for
17 instance, at the bottom of page 12 of Attorney
18 Schwartz's --

19 MS. NETTER: I was on 13. That's what
20 happened.

21 MS. MORELLI: So is that clear that there will
22 be a postoccupancy traffic study, but there needs to be
23 a baseline to compare against existing traffic
24 conditions, and those existing traffic conditions are

1 captured in the traffic report conducted by MDM
2 Consultants and dated July 2014.

3 MS. NETTER: Does the town have a comment on
4 the rest of the applicant's changes with respect to
5 limiting what the applicant agrees to, which is just
6 the --

7 MS. MORELLI: The \$64,000?

8 MS. NETTER: No. The speed bump.

9 MS. MORELLI: Okay. So in regard to --
10 Mr. Ditto has made it very clear that that speed bump
11 could be one option. There could be other traffic
12 calming measures. It could be no right-hand turn, it
13 could be stop signs, but the \$64,000 would be the upper
14 limit.

15 So we're actually going to skip ahead to
16 Condition 41, and this pertains to prebuilding permit
17 review. So there are original items A through D, and H
18 and I, which are standard, and we are stating that
19 those do need to be reinstated, especially regarding
20 the rubbish plan schedule and the performance
21 guarantee.

22 MS. NETTER: Which letters again?

23 MS. MORELLI: Under Condition 41, there are
24 subparts A, B, C, and D which were deleted and we're

1 saying that those need to be reinstated, as well as H
2 and I. I'm not actually dealing with G, which is
3 regarding the easement. I believe that's a legal
4 question, so the Planning Department has not responded
5 to that, although there will be a comment on that later
6 in the hearing. I'm just talking about the practices
7 that are standard and do need to be reinstated
8 regarding the prebuilding permit review.

9 And I also want to emphasize that the rubbish
10 plan schedule has not been submitted and,
11 understandably, the applicant wouldn't know how to
12 define that until postoccupancy. Therefore, this is
13 something that staff has not seen before and would need
14 to review.

15 In regard to the --

16 MS. NETTER: What little number are you
17 looking for?

18 MS. MORELLI: Regarding the rubbish, that
19 would be 41B, the chief of environmental health, I'm
20 giving you the rational for that.

21 MS. NETTER: Yup.

22 MS. MORELLI: And I'd also like to do the same
23 for the performance guarantee, if I may. The town has
24 required such before, mainly on the Olmstead 40B. This

1 project is large and unique, and the performance
2 guarantee would protect the town should utilities and
3 drainage not be installed properly. And that's the
4 purpose for that.

5 If you have no questions, I'll go to
6 Condition 43. This pertains to the construction
7 management plan and, again, this is something that has
8 not been submitted. The applicant's contractor would
9 submit it. It is something that is part of the
10 standard review that staff would conduct. And to give
11 you one example, truck routes would be part of that
12 construction management plan, and there is bylaw
13 concerning -- prohibiting commercial vehicles on
14 certain street, for instance Russett Road, although
15 there are exceptions. Therefore, that's just another
16 reason why there would need to be a review by staff
17 when the construction management plan is submitted.

18 Regarding Condition 44, the inspection of
19 ledge removal, ledge shall be removed at least four
20 feet below StormTank systems and inspected by the town
21 48 hours prior to installation of said systems.

22 Just two more. Condition 66 concerns review
23 of plans and inspection by town consultants. The
24 applicant is recommending a maximum cap of \$15,000 and

1 staff has provided some estimates. We'd like the cap
2 to be at \$27,800, and this would cover plumbing, gas,
3 and electrical inspections as well as engineering fees
4 for plan review and an inspection fee for engineering.

5 And the last item that we want to mention is
6 the appendix regarding the blasting.

7 MS. NETTER: Are you suggesting, basically,
8 the \$28,000 is an initial deposit, or you're saying
9 that that's what's anticipated to cover all --

10 MS. MORELLI: Right. What the town wanted to
11 provide was a maximum cap.

12 And the last item is for the blasting
13 appendix, and we have an additional condition. We want
14 to clarify that the applicant shall pay for fire and
15 police detail during blasting. To give you an idea of
16 what that detail might be, the fire detail would
17 consist of one firefighter there all day, not just
18 during the actual blasting. That rate would pertain to
19 the collective bargaining agreement. Currently that is
20 \$45 an hour. Police detail would be separate, and that
21 estimate would need to come later.

22 MS. NETTER: Do we have an idea of -- the
23 police detail would be the same time as the fire
24 detail, or we don't know that?

1 MS. MORELLI: Well, it actually could pertain
2 to closing off roads, so there's a little more
3 involved. Therefore, I don't -- the estimates would be
4 on par, but there might be more than one police officer
5 involved.

6 MR. JESSE GELLER: Are there any questions?
7 Mr. Hussey?

8 MR. HUSSEY: Not at the moment.

9 MR. JESSE GELLER: Okay. Thank you very much.

10 MR. HUSSEY: I would, though -- just
11 procedural -- I assume at some point we'll be getting a
12 revised draft of all this stuff, and we will then go
13 through it item by item; is that right?

14 MS. NETTER: That's the intention after I have
15 all of your thoughts.

16 MR. HUSSEY: Okay. I do have one question,
17 too, going forward. So this is the end of the public
18 hearing tonight. Going forward, we'll be doing
19 deliberations. During deliberations, will we be
20 allowed to ask questions of the people of the town --
21 administration, or the developer -- as we go through
22 and further analyze and discuss these conditions.

23 MR. JESSE GELLER: Mr. Nagler, do you want to
24 answer that question?

1 MR. NAGLER: Let me just kind of repeat the
2 language from the regulations. So "The hearing closes
3 when all public testimony has been received and all
4 information requested by the board that it is entitled
5 to receive has been submitted." And then there's case
6 law that says, "No submissions of evidence, no
7 persuasion." So even if it's not new evidence, someone
8 says, you know, you should really consider this related
9 to evidence already submitted, you can't do either.

10 MR. HUSSEY: You mean we can't do that, or
11 somebody from the --

12 MR. NAGLER: The public can't do it, the
13 applicant can't do it.

14 MR. HUSSEY: I understand that.

15 MR. NAGLER: There's a little leeway in the
16 Milton Commons case for clarification, but I think the
17 conservative thing to do -- you can ask the planning
18 staff clarification questions.

19 MR. HUSSEY: Planning staff?

20 MR. NAGLER: Yeah.

21 MS. NETTER: Town staff.

22 MR. NAGLER: Any representative of the town.
23 Because otherwise, the risk is that you're extending
24 the public hearing beyond the agreed-upon date, which

1 is an automatic grant of the permit.

2 MR. HUSSEY: No. I understand. Mr. Geller
3 was clarifying that it's for clarification only, any
4 questions that you have, which I understand.

5 MR. NAGLER: But they should be addressed to
6 the town employees, period.

7 MR. HUSSEY: Okay.

8 MR. JESSE GELLER: Got it?

9 MR. HUSSEY: I hope so.

10 MR. JESSE GELLER: Okay. So what I'd like to
11 do is I'd like to follow up on Ms. Morelli's comments
12 on nine of the conditions and one provision within the
13 appendix on blasting. I'd like to speak to those
14 issues -- or, actually, review those conditions in that
15 appendix issue, leapfrogging anything else. Okay?

16 So the first one was Condition Number 20.
17 Does anybody have any comments?

18 MR. BOOK: I'll start. I'm in general
19 agreement with Ms. Morelli's comments.

20 MR. JESSE GELLER: Okay. But no other
21 changes?

22 MS. NETTER: What do you mean, "no other
23 changes"?

24 MR. JESSE GELLER: I mean, does Mr. Book have

1 any other changes other than --

2 MS. NETTER: What I'm asking about is changes
3 to the original paragraph, or are we looking at the
4 applicant's changes? I don't know where we're starting
5 from.

6 MR. JESSE GELLER: We're starting from the
7 original paragraph.

8 And, actually, your comment actually goes with
9 the version that was provided by Mr. Schwartz. Is
10 that --

11 MR. BOOK: Yes.

12 MR. JESSE GELLER: Mr. Zuroff, thoughts?

13 MR. ZUROFF: I'm not going to complicate
14 anything that Ms. Morelli said. Her points are well
15 taken. I also think that the original draft is better
16 suited to what we are intending to do.

17 AUDIENCE MEMBER: Can you speak up?

18 MR. ZUROFF: The original draft of the
19 paragraph is more acceptable to me than the edited
20 paragraph by the applicant.

21 At this point, I might also add that none of
22 the suggestions that came to me during the course of
23 our original deliberation was expanding the shuttle
24 service, which I don't know if that's appropriate for

1 this moment or not, but I'd like to throw it out there
2 if it is.

3 MR. JESSE GELLER: Is that 21?

4 MS. NETTER: 21.

5 MR. BOOK: That's the next condition.

6 MR. ZUROFF: Then let me retract that shuttle
7 service comment and just say that I'd prefer to see the
8 original draft referred to.

9 MS. NETTER: Why don't we look line by line.

10 MR. NAGLER: Which I think what Maria is
11 proposing is different than the original draft.

12 MR. ZUROFF: She's adding conditions.

13 MS. NETTER: Okay. Let's look line by line.

14 So the first line -- and I don't know if you have
15 thoughts prior to --

16 MS. MORELLI: Well, I just want to make it
17 clear that in the original draft, if the applicant
18 would be proposing a redesign and the revision is
19 slightly different, the town will propose both a design
20 for Independence and a construction plan.

21 MS. NETTER: I understood that. But the other
22 question is -- okay. But also it's not just -- it's
23 design and construction.

24 MR. BOOK: Correct.

1 MS. NETTER: The first point is the town shall
2 prepare design and construction plans.

3 MR. BOOK: I mean, from my perspective, I
4 assume the town is in the best position to determine
5 how its roads should be -- and it's a public way -- so
6 it should be designed and constructed -- so I defer to
7 the town on this matter.

8 MR. SCHWARTZ: Mr. Chairman, just a couple of
9 very brief comments.

10 MR. JESSE GELLER: Sure.

11 MR. SCHWARTZ: Especially with the changes
12 that are being proposed by town staff, our primary
13 concern is the amount and timing. And I say especially
14 with the proposed changes because now the town is
15 proposing to basically take over the entire process, so
16 we have absolutely no control as to the cost or the
17 time.

18 So if the town desires to take over the entire
19 process, we need to have, we believe, a cap on what the
20 costs will be. And we can't have it tied to the prior
21 commencement of construction as was originally proposed
22 because we have absolutely no control as to when the
23 town is going to do that. So we would just ask you to
24 take that into consideration.

1 MR. BOOK: This is the point I was
2 questioning, Mr. Ditto, Ms. Morelli. I mean, I think
3 the cost needs to be contained, and certainly it
4 shouldn't be significantly any more expensive than what
5 the applicant had proposed.

6 So the applicant had proposed a complete
7 streets project. That's what our peer consultants --
8 peer reviewer indicated that would be acceptable.
9 Whatever the cost of that is, that really should be the
10 outer limit of what the applicant should have to expend
11 for --

12 MS. NETTER: The town proposed that, I think,
13 right?

14 MR. BOOK: Well, they proposed a number, and I
15 think I heard them say that that was consistent with --
16 so I -- yeah. I think we're --

17 MR. SCHWARTZ: Just to be clear, we think
18 there needs to be a cap on design and construction
19 costs. All in, hard and soft costs. Because the town
20 is going to be doing the design, there needs to be a
21 cap on everything.

22 MR. BOOK: Well, let me ask you,
23 Mr. Schwartz --

24 MR. JESSE GELLER: That was just

1 construction?

2 MR. SCHWARTZ: Well, we're not going to be
3 designing it, so we need to have a cap on soft costs as
4 well.

5 MS. STEINFELD: Allison Steinfeld, Planning
6 Director.

7 To expand upon Ms. Morelli's comments, the
8 town is proposing a maximum of \$350,000. We anticipate
9 that will go completely to the construction because
10 design will be done in-house.

11 MR. HUSSEY: So there will be no charge to the
12 applicant for the design services?

13 MS. STEINFELD: Correct. Okay. That's what I
14 assumed.

15 Is that clear? Okay.

16 MR. LEVIN: If I may, I don't know what
17 bearing my comment will have on your thinking, but it
18 was our anticipation that the plan that was submitted
19 as a combination between our traffic guy and the peer
20 reviewer was going to cost around a quarter of a
21 million -- \$250,000. I think the part of it -- the
22 difference that we have here is that, you know, we can
23 hire the contractors without doing prevailing wage and
24 that's a big component of this. So I just want you to

1 be aware that that is a difference here. That's
2 probably the difference here.

3 MR. HUSSEY: But you would be saving the
4 construction drawing -- the bidding documents --
5 fees -- as well.

6 MR. LEVIN: That's true.

7 MR. HUSSEY: Okay. Thank you.

8 MR. JESSE GELLER: Thank you.

9 So does that satisfy you? I assume it does.

10 MR. BOOK: It does.

11 MR. JESSE GELLER: They're saying that that's
12 a hard number -- soft and hard.

13 MR. BOOK: Yes.

14 MR. JESSE GELLER: And from your perspective
15 of drafting it --

16 MS. NETTER: I'm good. For starters, you'll
17 tell me if I am or not.

18 MR. NAGLER: The other concern was timing.

19 MR. JESSE GELLER: Yes. So --

20 (Inaudible. Clarification requested by the
21 court reporter.)

22 MS. NETTER: Sam, I'm not sure what you're
23 talking about with respect to timing.

24 MR. NAGLER: Mr. Schwartz raised two concerns,

1 timing of the -- in other words, when the applicant is
2 doing it, he can dictate to the applicant when they
3 commenced the process.

4 But if the town is doing it, theoretically the
5 town could start within five years.

6 MR. HUSSEY: That shouldn't be a problem
7 unless we key the completion of the project to the
8 completion of the Independence Drive work. If we
9 deconnect, decouple, then it shouldn't make any
10 difference.

11 MR. BOOK: Right. I mean, if the town is
12 taking responsibility or taking over design and
13 construction, then the applicant can't be held to --

14 MS. NETTER: Yeah. I don't think we have to
15 get into the timing issue.

16 MR. HUSSEY: Okay. Good.

17 MR. JESSE GELLER. Okay. Anything else on A?

18 MR. HUSSEY: I guess I was concerned about
19 some of these details relative to the thickness of the
20 materials, but I gather that's the thickness and
21 materials for this work on Independence Drive. So the
22 town's in charge of it. Okay. All set.

23 MR. JESSE GELLER: Okay. B?

24 MR. BOOK: This is all within the purview of

1 the town now. The town is designing it.

2 MS. NETTER: Right. It seems like we don't
3 need B; right. We don't need to dictate to ourselves
4 what we're going to do.

5 MR. SCHWARTZ: Just one clarifying point. I
6 know you didn't want to get into the timing, but
7 typically what I have seen in a context specifically
8 where the town has decided to take over total control
9 of this type of thing is that the applicant would be
10 committed to making a -- putting in escrow a certain
11 amount, whatever that amount ends up being. The town
12 would then have a certain period of time, years,
13 whatever it might be, to complete that work and use the
14 funding. Failing that, the money would come out of
15 escrow. This should not be something that continues
16 indefinitely where the town does not make use of the
17 money, that the money is tied up in escrow and not
18 being used.

19 MR. BOOK: That seems reasonable to me.

20 MR. JESSE GELLER: We have, in fact, seen it
21 that way in a number of projects.

22 MR. BOOK: Perhaps we should ask either
23 Mr. Ditto as to outside date --

24 MS. NETTER: I would say two issues. We

1 haven't discussed the issue of at what point in time do
2 we want to see the money for the construction. I don't
3 know if there's any -- want to get Mr. Ditto's input.

4 MR. JESSE GELLER: Application for the
5 permit.

6 MR. LEVIN: You know, that -- if it were
7 worded so that the time frame for the work to get done
8 starts when we give the money when it's asked for, that
9 would give the town more -- we just don't want the
10 money sitting there and getting no value for it. We
11 want the work to get done so everybody benefits. So
12 why not set the time and say, okay, we want the money.
13 We're going to do the work within the next two years.
14 Then we put up the money and then --

15 MR. JESSE GELLER: Do you follow?

16 MR. BOOK: I do. But the money -- well, we
17 should ask Mr. Ditto.

18 MR. JESSE GELLER: It's a time question. At
19 the end of the day, it's a time question.

20 MR. BOOK: As to when the work gets done or
21 when the money gets deposited or both?

22 MR. JESSE GELLER: No. I think the money gets
23 deposited when they want their permit because --

24 MS. NETTER: Which permit?

1 MR. JESSE GELLER: The building permit.

2 MR. BOOK: I guess I would have been

3 thinking --

4 MS. NETTER: Why don't we ask Mr. Ditto?

5 MR. JESSE GELLER: Okay. Ask Mr. Ditto.

6 MR. HUSSEY: I think my tendency would be that

7 they would have to fund it once the project has gone

8 out to bid, but I'll let Mr. Ditto respond.

9 MR. DITTO: Really, I don't need the money
10 until I'm ready to go out to bid. When that is,
11 probably depends on their construction schedule for the
12 buildings.

13 MR. BOOK: Would you anticipate doing the work
14 while they're constructing? After? Before? When
15 would you view the appropriate time to redo
16 Independence Drive?

17 MR. DITTO: It would be after this heavy
18 construction is done. I wouldn't want to put tractor
19 trailers over a new road.

20 MR. LEVIN: I think we would be in agreement.
21 You know, the ideal time, from our standpoint, is that,
22 you know, the curbing and a lot of this work would be
23 done concurrent with our construction but that, in
24 fact, the final paving -- just as we would do on any of

1 our roads -- would happen after, you know, we were
2 substantially complete so that it doesn't get -- as
3 Mr. Ditto said, it doesn't get damaged by any further
4 construction. So our preference would be that it would
5 be done -- it would be coordinated with our work.

6 MR. JESSE GELLER: Forgive my ignorance but,
7 Mr. Bennett, this may be a question for you.

8 So could you walk through for me how COs will
9 be issued on this project? It's not a phased project.
10 What COs will issue? At what points in time? Can they
11 seek a CO for one portion of this project?

12 MR. BENNETT: Yes. As long as they have
13 proper access for the fire department to any one of the
14 buildings, we could start issuing certificates of
15 occupancy. We will issue a CO for the entire building
16 and then one for each unit. At some point in time,
17 we'd probably sit down with the contractor or the
18 applicant and try to work out a plan of how they
19 propose to construct the project -- is it -- all be at
20 once? Are they going to start in the west lot or the
21 apartment building -- and back into a way to issue the
22 permits. I would think they'd probably start inside
23 the lot and work their way back. I'm not sure how they
24 propose to do that.

1 We would -- prior to issuing a certificate of
2 occupancy, obviously they have to meet all building
3 code, life safety, and then access. So the fire chief
4 would be involved in the signing off of the CO. If he
5 feels that he can't get in there because some parking
6 area or driveway isn't constructed, then we couldn't
7 issue a CO, temporary or otherwise.

8 MR. JESSE GELLER: So if COs are issued on a
9 building-by-building basis and are occupied and used on
10 a building-by-building basis, when Mr. Ditto is
11 referencing the fact that the finish coat at least
12 wouldn't be completed until the issuance of a CO, I
13 assume that we're talking about the end of the project,
14 but -- so you're -- I'm just sort of playing out the
15 time line.

16 MR. BENNETT: I'm trying to -- you know, for
17 Olmstead, which is the most recent larger development
18 that we've worked on -- I came more towards the end of
19 that project -- we did issue certificates of occupancy
20 and we can issue certificates of occupancy with just
21 the binder course on. It doesn't have to be finished.
22 And just at a later date, that would become -- it
23 becomes a little inconvenient for the residents, for
24 the people that are living in the property. But that

1 sometimes is the way, you know, we go.

2 But that would be up to Peter on how -- he and
3 I could coordinate that with the applicant to make sure
4 that we're doing it in the least disruptive way to the
5 new residents and the existing residents on Russett and
6 Beverly. We're not talking just on the private
7 property, but on the neighborhood.

8 MR. JESSE GELLER: I think we sort of need to
9 think this through because there will be usage of the
10 roads. And you could have COs and you could have the
11 occupants using the roads up to a point, you know,
12 where a significant portion of these improvements have
13 been completed. And although we may have the dollars,
14 right, we've taken out the bids, the proposals, you're
15 not going to want to use it yet. And yet you've got
16 people who are utilizing the roads.

17 MR. ZUROFF: So theoretically, what happens if
18 they want to put, like, a pedestrian walkway signal in
19 while the project is being occupied, so there might be
20 a need for some money?

21 MR. BOOK: Can I make a suggestion?

22 MR. JESSE GELLER: Sure.

23 MR. BOOK: How about if the funding -- the
24 monies be provided to the town at the time -- prior to

1 the time of going out to bid. Mr. Ditto will indicate
2 when that will happen. But in any event, no later than
3 the -- prior to the issuance of the first certificate
4 of occupancy for any building, and that the monies, if
5 there are any left over, they will be returned no later
6 than -- I don't know -- a year, year and a half after
7 the last certificate of occupancy is issued.

8 MR. JESSE GELLER: Well, let's first make sure
9 that the one-year time period after the issuance of the
10 last CO is an appropriate time frame.

11 MS. NETTER: I think you should give yourself
12 a little more latitude because the reality is -- I'm
13 getting more involved, but I'm just -- you know, maybe
14 planning staff or Mr. Ditto wants -- I'm about to say
15 they need to loosen up a little bit, but does somebody
16 else want to speak? It's more the town's domain than
17 mine here.

18 MR. JESSE GELLER: As long as we've created a
19 process that works.

20 MR. BOOK: We need to have a beginning date --

21 MS. NETTER: Query whether you do or you
22 don't. Right? I mean, you -- really. I mean, do you
23 want to start writing something? Then we're going to
24 have to put acts of God in there and blah, blah, blah.

1 I mean, the town's going to start building a road.
2 What are they going to do, go run away and say we're
3 done, you know, we don't like this project anymore?
4 I'm being glib.

5 MS. STEINFELD: I would suggest perhaps staff
6 and the applicant could work it out a little bit. I
7 mean, it's just a question of flexibility. It's to the
8 town's advantage to build a road as soon as we can and
9 to coordinate with the developer. And the same goes
10 true for them. We don't need the money until we go out
11 to bid, and we certainly can't sign a contract until we
12 have the money.

13 MS. NETTER: And once you go out to bid and
14 you get the work done, I don't think you're going to
15 just turn around and say, we're not going to finish the
16 project.

17 MS. STEINFELD: No. Of course. It's to
18 everyone's advantage to build a road as soon as
19 possible, to design it as well as possible, and to
20 coordinate the construction. But we're simply not
21 going to build it unless the money is in place, because
22 we can't execute the contract.

23

24 MS. NETTER: Right. But once the money is in

1 place and you're going to build it, you're going to
2 finish it.

3 MS. STEINFELD: Right. And I do think that we
4 can work out the details.

5 MS. NETTER: Good.

6 MR. JESSE GELLER: Okay. 21. Is there a
7 separate section that provides for maintenance and
8 replacement for porous pavement?

9 MS. MORELLI: Yes. That would be in the
10 operations and management plan and the stormwater
11 report.

12 MR. JESSE GELLER: Okay, thank you. So 21.

13 MS. NETTER: So Ms. Morelli, prior to the
14 issuance of the building permit, the applicant shall
15 submit a transportation access plan prepared in
16 accordance with the access plan guidelines?

17 MS. MORELLI: That's what we have, yes, in the
18 original draft.

19 MS. NETTER: And that's what you want to stay
20 in?

21 MS. MORELLI: Yes. We want that reinstated.

22 MR. JESSE GELLER: What about the question
23 that was asked about expanding the existing shuttle and
24 the question of how is that decided and that process?

1 So the question is: How and when is it
2 decided that the shuttle service needs to be expanded?
3 I hate to quote the applicant, but I think Mr. Levin
4 raised the question of, you know, if they're mandated
5 to increase the shuttle and nobody uses the shuttle,
6 they're running bus service but no -- and that's
7 certainly not our intention. So it seems to me that it
8 is left wide open here.

9 MS. MORELLI: Well, you know, I think the
10 issue is that as it is, it's pretty open ended as well.
11 And I think that if they're -- probably, if we were to
12 go back to the September 15th hearing, there might have
13 been some suggestions about frequency, maybe an
14 additional shuttle bus. And also in that hearing, I
15 believe Mr. Michaud spoke of -- I'm not sure if there
16 were additional stops. So we can certainly look at
17 that, but I think there needs to be more specificity
18 because as it is, we're not even sure the applicant
19 would try for that. So, you know, it's certainly -- we
20 do need a threshold.

21 MR. HUSSEY: A threshold of what?

22 MS. MORELLI: Concerning frequency and stops.
23 For instance, there's a commuter rail that's down the
24 street. That's probably closer to Hancock Village than

1 Cleveland Circle is. I'm not sure if that's within the
2 loop of the shuttle route. And that's certainly a
3 pretty actively -- you know, well-populated commuter
4 rail service that goes into South Station. That's one
5 consideration. And I wonder if there are also any
6 predictions that the applicant could make.

7 MR. JESSE GELLER: Well, don't you either have
8 to make an assumption based on the increase in number
9 of units, based on prior experience of a certain
10 percentage that will utilize their services? And then
11 you make a determination based on that guesstimate
12 whether that population warrants an increase of one bus
13 per hour, two busses, whatever the time period is.

14 The alternative way to do it is you, frankly,
15 have them build it out, you put a general statement, as
16 you've got here, and there's an audit at intervals
17 after it's 90 percent occupied or 100 percent occupied
18 and you determine whether there is the demand. It
19 seems to me, those are the two options of trying to
20 figure this out.

21 MR. HUSSEY: And how often do you do that
22 audit? Every year? Every five years? Every twenty
23 years? Every fifty years?

24 MR. JESSE GELLER: Well, you can't do it in

1 perpetuity.

2 MR. HUSSEY: Why not? I mean, I think this is
3 micromanaging, quite frankly. I'm in favor of the
4 developer being allowed to adjust the shuttle service's
5 demand -- required. They're going to be losing tenants
6 and having trouble getting tenants if they don't have
7 sufficient transportation options.

8 MR. JESSE GELLER: But does the town have any
9 oversight?

10 MR. HUSSEY: We can demand as much oversight
11 as we want, but how do you define the oversight?
12 You're going to have to lay out a full contractual
13 arrangement as to how often you have that oversight,
14 who does it. I'm trying to avoid that. I think that's
15 micromanaging.

16 MR. LEVIN: If I may, at some point in time,
17 I'd have to say I would appreciate at a grand level the
18 fact that -- a recognition that without any
19 requirements from any town board or agency, we
20 instituted, unlike many other housing developments, a
21 shuttle service.

22 Why?

23 Because we believe that it's a good thing.
24 And we have -- that it's a good thing for any number of

1 reasons, from a marketing standpoint, from a
2 convenience to a resident's standpoint, from a green
3 standpoint, which we are committed to. We do many
4 things that reflect that.

5 To have language in there that commits us to
6 maintaining a shuttle service as demand warrants, I
7 think that -- that's what we do. And I think that
8 that's the appropriate -- I mean, at a certain point in
9 time, you know, if everybody is using jet packs or
10 whatever, shuttle service may become obsolete for great
11 reasons, that nobody would want us to run a shuttle
12 service. You know, so I think that it has to be based
13 on demand.

14 How you measure that, at some point you have
15 to rely on -- you have the language that you can -- you
16 know, I don't know how the enforcement ultimately
17 works. Will you say, well, gee, you know, the bus is
18 packed? Why aren't you adding another one? And I just
19 think that there has to be something that would give
20 that credence. But beyond that, what Mr. Hussey says
21 about it being micromanaging is true and it would just
22 be -- it would create an inefficient outcome, and it
23 goes beyond meeting demand.

24 MR. JESSE GELLER: Thoughts?

1 MR. ZUROFF: Well, I congratulate Chestnut
2 Hill Realty for addressing the need that it developed,
3 and we appreciate the fact that you, as members of the
4 community, provide the shuttle service.

5 Fifteen years from now, the administration of
6 Chestnut Hill Realty may not be there. It may be a
7 whole different type of management team. You may
8 decide to sell the project. I don't know. There's
9 always the possibility that that perspective could
10 change.

11 And, again, I agree with Chris that we don't
12 want to micromanage the services that you provide to
13 your tenants.

14 On the other hand, it's our intent to do as
15 much for the town as we can within the context of this
16 new development, so -- and I'm not capable of
17 delineating that kind of restriction because I don't
18 understand the kinds of transportation requirements
19 that may come up. But I do think it should be part of
20 our decision in some way, shape, or form. And we can
21 make recommendations that may be subject to monitoring
22 later on. Obviously, we want to the address the needs
23 of your tenants.

24 I would like to see us address the needs of

1 the area as best as possible, which is why I once
2 suggested that maybe there be a shuttle running out to
3 pick up students to take them to school to ameliorate
4 the traffic that's running up to the school. It's a
5 suggestion. I don't know how we quantify it or qualify
6 it as a requirement, but I do think we have to address
7 it in some way.

8 MR. JESSE GELLER: I'm simply asking the
9 question because we need to give direction to
10 Ms. Netter on language so that either -- as drafted,
11 it's fairly broad and it's not spelled out, and that's
12 intentional. And what I want to know is whether
13 anybody has any comments about that or wants to define
14 that further.

15 MS. NETTER: Perhaps even Ms. Morelli or
16 Ms. Steinfeld or whoever will very briefly say what the
17 role of the TAP is so that people here understand how
18 that all comes together.

19 MS. MORELLI: Before I answer that, if I may,
20 I think -- I certainly understand what the developer is
21 up against. We do not want to be bureaucratic. The
22 point is that there are certain things that the
23 developer can't figure out until postoccupancy, much
24 like the rubbish plan. Honestly, it cannot be

1 delineated until postoccupancy. Because that cannot be
2 submitted to the town beforehand, it does require the
3 town to touch base with the developer postoccupancy to
4 review that rubbish plan.

5 And not to be unreasonable -- it's simply to
6 be practical -- but if postoccupancy -- if the
7 applicant, in full faith, is willing to do its best to
8 assess demand and how much the shuttle service needs to
9 be increased, then maybe there should be language that
10 the town will just review that particular shuttle plan
11 with the applicant. At least there's a touchstone and
12 it's not an open-ended -- again, it's not meant to be
13 unreasonable, but there does need to be something -- a
14 little bit more than what we currently have.

15 MS. NETTER: But also, the applicant did
16 indicate -- if I recall, I think -- I didn't know it
17 was the September 15th hearing -- you did make some
18 representations with respect to additional shuttle
19 service that would be provided.

20 MR. LEVIN: As demand warrants.

21 MS. NETTER: I think it was more specific.

22 MR. LEVIN: As demand warrants. We're not
23 going to add shuttle services to run empty buses.

24 MS. NETTER: I'm not going to make -- I don't

1 recall what was said.

2 MS. MORELLI: I'm happy to pull out the
3 transcripts. But we simply want to be practical and
4 achieve what is best for the town. And certainly there
5 is incentive for the developer to expand the shuttle
6 service. We're just saying that it really cannot be
7 assessed until postoccupancy. And it's consistent with
8 other plans that the town would be reviewing
9 postoccupancy. If we could review that shuttle plan
10 postoccupancy with the applicant, we would recommended
11 that.

12 MR. JESSE GELLER: I think Ms. Morelli's term
13 is actually a good one, which is a touchstone. It
14 essentially makes them come back and at least show you,
15 here's what we've got.

16 MS. NETTER: Sure.

17 MR. JESSE GELLER: Any comment on separate
18 fee? I know you started a conversation about that.
19 Anybody else?

20 Shaking your head means --

21 MR. HUSSEY: Sorry. No, I don't have any
22 comment on it.

23 MR. JESSE GELLER: So you have no issue with
24 the requirement that there be a charge for a separate

1 fee?

2 MR. ZUROFF: Could we make it subject to,
3 again, postoccupancy review?

4 MR. SCHWARTZ: Can I ask the planning staff to
5 give examples of when this has been imposed ever in the
6 history of the Town of Brookline for any residential
7 project -- or a commercial project, for that matter --
8 but certainly for a residential project? Is there any
9 history of this ever having been imposed, ever?

10 MS. MORELLI: I believe, Mr. Bennett, you
11 mentioned something about Brookline Place. Would you
12 like to speak further about that?

13 MR. SCHWARTZ: I'm not talking about what may
14 happen in the future. I'm talking about a history of
15 this having been imposed on any other project.

16 MR. BENNETT: With respect to history of this
17 being imposed on any other project, we don't have any
18 because we've never had a project like this. So I
19 think the uniqueness of this project has -- we're
20 looking at it a little differently because, again, it's
21 a large scale. 161 units is large. In our bylaw, we
22 do have a provision that speaks to 100 units or more --
23 you do a transportation access plan. So this is the
24 first time it's come in front of us, and we're trying

1 to deal with it appropriately.

2 Unfortunately, it's under a 40B, so we're
3 trying to do our best to impose some sort of condition
4 that would mitigate the traffic -- you know, trips,
5 cars -- and look to other modes of transportation:
6 transit, shuttle, bicycle, those types of things.
7 That's what the TAP is about.

8 MR. JESSE GELLER: But I don't think
9 Mr. Schwartz' question is about the TAP. His question
10 is specific to the charge of an additional fee.

11 MR. SCHWARTZ: And with all due respect, the
12 town has approved other residential projects that,
13 frankly, are in other parts of town that are less
14 automobile dependant than this part of town and, to my
15 knowledge, has never required this.

16 So I just think that this is -- I understand,
17 you know, there are folks here who think that this is,
18 you know, a unique project. We respectfully disagree.
19 If anything, given the location of South Brookline,
20 charging for parking here and not charging for parking
21 in other parts of town makes even less sense.

22 The applicant will do what makes sense for
23 them from a marketing point of view, from a convenience
24 of tenants point of view. But honestly, to impose this

1 for the first time on this project is not appropriate.
2 I don't think it's legal either.

3 MR. NAGLER: Just a clarification,
4 Mr. Schwartz. Are you referring to a line of cases
5 under 186 15B?

6 MR. SCHWARTZ: I wasn't referring to that. I
7 referred to that before, whether requiring -- I don't
8 want to make any representation as to whether it would
9 violate 186 to impose a parking fee. I'm just not sure
10 about that.

11 What I'm referring to when I talk about the
12 legality of it is imposing a condition under 760 CMR,
13 imposing a condition that has not been imposed on other
14 non-40B projects.

15 MR. JESSE GELLER: Okay, thank you.

16 MR. HUSSEY: I think I will make a comment. I
17 think that if you're going to add this rental fee, in
18 order to be effective, you've got to set the rental fee
19 and then you've got to have a mechanism for updating
20 it. That doesn't make -- you can't do that.

21 MR. BOOK: I don't support that.

22 MR. ZUROFF: I think it won't impose any
23 conditions on the developer that they can't get around.
24 I mean, they can put it into their rental, or they can

1 take it off --

2 MR. JESSE GELLER: That was Mr. Book's --

3 MR. ZUROFF: I don't know that it makes any
4 sense in terms of accomplishing anything.

5 MR. BENNETT: Just one other comment. Again,
6 I've only been here for two and a half years. I'm not
7 aware in that two-and-a-half-year period of any type of
8 permit parking requirement with rent or extra charge.
9 But the applicant has numerous properties. I don't
10 know -- do they do this voluntarily on any of their
11 other properties? That could help guide the board.

12 MR. LEVIN: Some we do, some we don't. We try
13 to make a judgement from the property.

14 MR. JESSE GELLER: I think, generally, the
15 board senses that this is -- with all due respect to
16 planning -- that this is something that probably needs
17 to be taken out.

18 Okay. Anything else on this section?

19 MR. BOOK: On 21?

20 MR. JESSE GELLER: 21.

21 MR. BOOK: Yeah. I have -- we're going to
22 discuss not just Ms. Morelli's comments, but anything
23 else we have?

24 MR. JESSE GELLER: Correct.

1 MR. BOOK: So I have some notes I just wanted
2 to vet with this group. We received, at some point in
3 the past month or so, a letter from a resident
4 suggesting that the project include some spaces for
5 mopeds and scooters, that that was a mode of -- common
6 mode of transportation or becoming a more common mode
7 of transportation. And while there's provision for
8 bicycle spaces, there should be some inclusion of some
9 spaces for motorcycles and scooters.

10 I know you're making a face, Mr. Levin.

11 MR. LEVIN: Well, my initial reaction would
12 be, are you offering us more parking spaces, albeit
13 smaller ones, for these mopeds, or are we going to be
14 giving up parking spaces that exist for the demand in
15 parking that we believe would be there?

16 MR. BOOK: My thought wasn't to take away
17 vehicular parking. That was not my thought.

18 MR. ZUROFF: I don't think we want to increase
19 the number -- or the amount of paved parking, do we?

20 MR. BOOK: No. I'm saying the opposite of
21 what you're saying.

22 MR. ZUROFF: You're saying more paving?

23 MR. BOOK: Yeah. We're not talking about a
24 lot -- I mean, this is not -- yes, I'm talking about

1 more paving.

2 (Multiple parties speaking.)

3 MR. JESSE GELLER: -- a moped or a motor
4 scooter or a motorcycle, that it would give somebody
5 who otherwise would use a car an alternative means of
6 transit?

7 MR. BOOK: Sure.

8 MR. JESSE GELLER: As opposed to a
9 supplemental use of transit?

10 MR. BOOK: No. There's two things. There's
11 having a car and then there's using a car. And maybe
12 it would be supplemental. Maybe somebody would own a
13 car, but they would be more apt to take their moped.

14 MR. JESSE GELLER: I don't know.

15 MR. BOOK: I'm raising it as a thought. I'm
16 not getting any traction with this group.

17 MR. HUSSEY: No. In many cases, they can use
18 their allowed space for mopeds and motorcycles or they
19 can share, with somebody else, two spaces.

20 I remember when I was -- I won't get into
21 that -- but there was a European mode of some extent
22 many, many, many years ago and it's never, seems to me,
23 caught on in this country, so I don't expect it to
24 now.

1 MR. JESSE GELLER: Was it the age of sail?

2 MR. HUSSEY: Just barely.

3 MR. BOOK: Okay. So moving on. I also wanted
4 to just follow up on something that Mark had
5 mentioned. And this came up in a prior hearing when we
6 talked about -- that someone had talked about. I don't
7 think we did -- about the shuttle being available in
8 the morning to make a trip to pick up the kids and take
9 them to school, thereby alleviating parents getting in
10 their cars and driving the kids to school.

11 Again, Mr. Levin is shaking his head.

12 MR. LEVIN: I suppose that is -- you know, you
13 could ask us to run a school bus service as an off-site
14 mitigation.

15 MR. BOOK: Well, no. I mean, I think it was
16 the idea that they would have the shuttle and maybe
17 it's during a time that you're not running adults up
18 to -- it's first thing in the morning, 8:00 in the
19 morning, before --

20 MR. LEVIN: That's when we're providing a
21 shuttle service to our residents to get to work.

22 MR. ZUROFF: My purpose in proposing that is
23 that it's obviously a concern of the neighborhood that
24 there is considerable traffic on Beverly Road in the

1 morning, most of which is driven to the Baker School.

2 So there's two aspects of running a shuttle to
3 the school. One is, we've got 161 units that may bring
4 in considerably more children, may not. We don't know
5 yet. But you also have the remaining apartments in
6 your complex where I know that there are a considerable
7 amount of children that go to the Baker School.

8 To ameliorate the traffic that everyone in the
9 neighborhood seems to fear, it would seem to be a
10 useful solution to run a school bus type of shuttle
11 just those hours when the students are being taken to
12 school and maybe being picked up and brought home.

13 MR. LEVIN: I think that -- we're pretty
14 confident that the proximity to the school is that they
15 walk.

16 MR. ZUROFF: But they don't. As a practical
17 matter, we know that they don't. The people in the
18 neighborhood drive their kids to school and they pick
19 them up.

20 MR. LEVIN: Our residents primarily -- the
21 vast majority of our residents walk to school.

22 MR. ZUROFF: Maybe they're socioeconomic. I'm
23 not going to speculate. But I do know that people that
24 live in the neighborhood -- because I live in the

1 neighborhood. I know.

2 MR. LEVIN: I don't doubt that there are
3 people who live in the neighborhood who drive their
4 children to school. I'm saying that our residents walk
5 because they're right there. You see in the morning,
6 all the residents are -- the children are walking
7 through our property to get to the Baker School.

8 MR. ZUROFF: I'll take your word for it. I
9 don't know. I'm just putting that out as a constant.

10 But, again, to ameliorate the traffic
11 congestion in the neighborhood, the traffic up
12 Independence Drive, the traffic on Asheville, the
13 traffic on Beverly, that it would be -- possibly would
14 be helpful to the neighborhood to take some of those
15 cars off the street by grouping the students together.

16 MR. JESSE GELLER: Are you proposing -- I
17 thought that you were proposing that they run a
18 shuttle -- basically, a student bus service to the
19 school from within Hancock Village.

20 MR. ZUROFF: Well, there's two ways to
21 approach that. Yes, that was my original plan.

22 MR. JESSE GELLER: I think -- without
23 volunteering this. I don't want to suggest that you
24 were -- but I think the question that Mr. Levin was

1 asking is whether you were talking about a --
2 essentially a student bus service for outside Hancock
3 Village to alleviate the flow of traffic to the school,
4 which raises lots of other questions. But I just want
5 to get your question -- I'd like to be clear what the
6 question is.

7 MR. ZUROFF: When I originally threw that idea
8 out, I didn't think about the implications that you're
9 running a public transit service. Forgive me for that.
10 That was my original idea, that there would be a bus
11 running up and down Asheville and Walcott and Wallis
12 and all of those neighborhood roads to take some of the
13 traffic off of those roads in the morning. That may
14 not have a great deal of merit and may raise issues
15 that I don't want to explore.

16 But the other side of it was to run it from
17 the project itself and from the adjacent project,
18 again, just to take traffic off the streets. That's --
19 those were my thoughts.

20 MR. JESSE GELLER: The simplified version of
21 that is to say to them, you know, let the town make
22 arrangements for a bus and you subsidize the cost of
23 it. That's your ask. That's really your ask. They're
24 not going to run the transit service.

1 MR. LEVIN: Or maybe we would set up some
2 rules of the school that says if you live within a
3 certain distance, you don't have a permit to drive your
4 kids and drop them off. I mean, if that's a real
5 issue, then it's within the control of the town to do
6 something about it.

7 MR. ZUROFF: And maybe a supplemental
8 assessment would be appropriate. I don't know.

9 MR. BOOK: I don't think that we can -- and
10 I'll turn to counsel for confirmation -- I don't think
11 we can impose conditions that talk about -- that have
12 nothing to do with the --

13 MR. JESSE GELLER: Outside site.

14 MR. BOOK: -- outside site that have nothing
15 to do with the inside --

16 MS. NETTER: This is a negotiation here, I
17 mean, in part.

18 MR. BOOK: Yeah.

19 MS. NETTER: And you have the authority to
20 impose conditions. And what I would suggest to you,
21 you never lose by asking. I'm not suggesting you
22 impose such a condition, but you can ask if you want
23 to. I'm not telling you to or not.

24 MR. BOOK: I don't know. This strikes me --

1 this is in the line of saying we'll approve the project
2 if you buy the town a fire engine. I mean, it has
3 nothing to do with --

4 MR. ZUROFF: We are changing the layout of
5 Independence Drive, which is a public way, in order to
6 make the traffic flow better not just for this project,
7 but for everybody who drives through the area. It's a
8 public benefit that doesn't necessarily benefit Hancock
9 Village or the residents. It's the same kind of
10 thing. We're asking the applicant to provide a public
11 benefit, and that is certainly within the purview of
12 760 as I see it.

13 MR. NAGLER: It's certainly permissible to
14 ask. Let's start with that.

15 MR. ZUROFF: Right. And as Ms. Netter said,
16 it's a negotiation.

17 MS. NETTER: I actually want to
18 recharacterize. That aspect would be -- I mean, what
19 you are doing is working within the parameters of the
20 law. You're taking evidence from people. I spoke much
21 too loosely. But with respect to what we're talking
22 about now, that's exactly what that is. It never hurts
23 to ask if you want to.

24 MR. JESSE GELLER: Mr. Hussey, do you have a

1 thought on this?

2 MR. HUSSEY: My thought is that there was --
3 it seems to me -- I can't find it -- that there was a
4 recommendation by the DPW that a pedestrian light be
5 added somewhere on Independence Drive. And I would
6 think that would be more useful than some sort of
7 shuttle service, which is going to be --

8 MR. ZUROFF: It's already in there.

9 MR. HUSSEY: That's in here as a condition?

10 MR. ZUROFF: I believe that's part of the
11 transportation recommendation.

12 MR. HUSSEY: Yeah. I saw it someplace. I
13 think that's, frankly, more useful.

14 MR. JESSE GELLER: I think it's an interesting
15 thought, but, at the end of the day, I actually agree
16 with Mr. Hussey on this.

17 Are you in favor of making the kids walk to
18 school or --

19 MR. BOOK: No. I'm mindful of -- the idea, in
20 my mind, when we were talking about picking up the
21 kids, it was the kids from Hancock Village. But if
22 they're not being driven, if they're walking, then they
23 should keep on walking. I didn't view this as an
24 opportunity to provide bus service to the

1 neighborhood. I was looking within the confines of
2 Hancock Village.

3 MR. JESSE GELLER: I think that was
4 Mr. Zuroff's original sort of idea that he was thinking
5 about.

6 MR. ZUROFF: It was. Next I was going to ask
7 about a fire station, but -- no.

8 But to be serious -- and I'm sorry for being
9 glib -- the idea was to provide a public benefit that
10 benefited the project as well as the neighborhood.

11 MR. JESSE GELLER: Okay. Thank you, though.
12 That was interesting.

13 Anything else on that section?

14 (No audible response.)

15 Okay. 22. I don't think you need to say, "as
16 quickly as feasible."

17 MS. NETTER: Where are you looking?

18 MR. JESSE GELLER: 22.

19 MS. NETTER: Yeah, no.

20 MR. JESSE GELLER: Okay. Anybody else,
21 comments?

22 MR. BOOK: 22?

23 MR. JESSE GELLER: Uh-huh.

24 MS. NETTER: I was going to say the town

1 recommended "apply for" --

2 MR. JESSE GELLER: Right.

3 MS. NETTER: Okay.

4 MR. BOOK: Yes. This is the applicant's curb
5 cut. I think that the applicant should be making the
6 application with the support of the town. That seems
7 reasonable, especially if the town is indicating that
8 as well.

9 MR. SCHWARTZ: Mr. Chairman, we strongly
10 object to a requirement that this application be made
11 before this permit becomes final, meaning that if
12 there's an appeal filed, we do not believe we should be
13 held to a requirement that this be filed when it's
14 filed with the town clerk. It should be within a
15 timing of after the permit becomes final. There's no
16 other condition that should be imposed.

17 If there's an appeal either by the applicant
18 or, more likely, by the abutters, this timing would
19 impose a requirement that we file for this permit even
20 while that appeal is pending and even while the town
21 appeal of the project eligibility letter is pending,
22 number one.

23 Number two, with regard to the timing, it may
24 not make sense to file within a certain period of

1 time. It may make more sense to doing some lobbying or
2 politicking with the town's help, sitting with DCR or
3 the Department of Transportation. And imposing an
4 artificial deadline of any kind like this doesn't seem
5 to be the most productive way to go. We understand
6 where the board is coming from in terms of saying it
7 will be the applicant doing it, and we accept that, but
8 we do not accept the imposition of this timing.

9 MR. HUSSEY: You're referring to the 30 days
10 after the filing with the clerk?

11 MR. SCHWARTZ: That's correct.

12 MR. HUSSEY: Okay.

13 MR. JESSE GELLER: I guess my sense is -- I
14 asked the question of -- so they're forced to make
15 application before expiration of appeals period.
16 What's their downside? Right? They withdraw it or
17 they don't open the curb cut. What's their downside?

18 The issue is if they wait until expiration of
19 appeals, then those appeals may go on for years. And
20 the notion that we would wait years before they would
21 make an application for a curb cut makes absolutely no
22 sense to me.

23 MR. LEVIN: But we're not building anything
24 until those appeals --

1 MR. JESSE GELLER: Understood.

2 MR. ZUROFF: There's no requirement that you
3 actual pursue it.

4 MR. LEVIN: What are we going for a curb cut
5 for if we don't have a project?

6 MR. JESSE GELLER: Because if you get it and
7 you have a project, you'll be able to open the access
8 and egress sooner rather than wait the time. And if
9 you don't have a project, simply don't open a curb
10 cut. Right? If you don't have a project, then there's
11 no purpose in it. You've wasted the time of the
12 application.

13 MR. LEVIN: The time and the money is wasted
14 and clearly --

15 MR. JESSE GELLER: But the alternative is that
16 we wind up -- let's say you prevail -- assuming there
17 are appeals and you prevail, then we might be two years
18 from now before you make your application.

19 MR. LEVIN: Right. But we would be two years
20 before we finished construction.

21 MR. JESSE GELLER: I understand. But we want
22 to -- our notion is that you get this as quickly as
23 possible.

24 MR. LEVIN: Listen, I appreciate that. I

1 think the overriding consideration is winning. That's
2 the overriding consideration. And we've made our
3 feelings clear that it doesn't take much to accept that
4 those feelings are rooted in our own self-interest and
5 that we would, in fact, want to pursue that. I mean,
6 we stated that clearly and it's obvious why we would
7 want that.

8 So we really want to be able to do it in the
9 way that it's going to win and not, as Steve suggests,
10 at some artificial time that is maybe not the best time
11 to win. I mean, that's what it's all about here. It's
12 not -- you know, it's, what, 50/50, and we want to tee
13 it up so that we can actually get it. We want it as
14 much as anyone else.

15 MR. JESSE GELLER: Is there a way to word it
16 so that it's a period of time but, obviously, it can be
17 extended with the --

18 MS. NETTER: Everything is subject to
19 extension.

20 MR. JESSE GELLER: So I'm not sure --

21 MS. NETTER: They can come back for an
22 amendment.

23 MR. SCHWARTZ: Well, we'd be coming back for
24 an amendment a few weeks after this permit is

1 finalized, just to be clear. I mean, and that just
2 doesn't seem to make much sense to me.

3 MS. MORELLI: I just wanted to add, this
4 wasn't an arbitrary -- there was, actually, a practical
5 reason. And Mr. Ditto can correct me if I'm wrong, but
6 I think the application process could take a year with
7 the state. And we were just keeping that in mind and
8 thinking that it would be beneficial to have this curb
9 cut before construction because it actually could be
10 included in one of the truck routes and it could
11 alleviate some of the trucks routes, the commercial
12 vehicles going through the neighborhood. So it's
13 really just a practical reason.

14 MR. JESSE GELLER: Mr. Levin's head is behind
15 you spinning around.

16 MR. LEVIN: The VFW is not an acceptable truck
17 route. We can't use the VFW for the construction
18 trucks.

19 MR. JESSE GELLER: Not an acceptable truck
20 route from whose perspective?

21 MR. LEVIN: DCR. So it's not going to --
22 let's go back. Once we get the permit and we file -- I
23 mean, tie it to when we get to go, the green light --
24 it's going to take us a minimum of two years before

1 that would get used. We have to file for the building
2 permit, we have to build the project. So if it takes a
3 year, then that's well within the time frame of the
4 schedule.

5 MR. HUSSEY: I would tie it to the application
6 of the building permit, I think.

7 MS. NETTER: Tie what? That they make their
8 application?

9 MR. HUSSEY: Yes. As quickly as feasible. In
10 no event later than 30 days after the filing of the
11 building permit -- filing for the application for the
12 building permit.

13 MR. NAGLER: Can I ask a question? Is your
14 argument that the cost of filling out the application
15 for a state curb cut is so expensive that --

16 MR. SCHWARTZ: Well, it's not the cost of
17 filling out a form. It's the cost of preparing plans
18 that the state is going to review for that and for the
19 necessary consulting work to support the application,
20 all of which we're going to pay for regardless of the
21 timing or who the applicant is. We've committed to
22 that. But there's a lot of work that goes into one of
23 these. It's not just filling out a two-page form.

24 And in my experience, at least, it doesn't

1 succeed unless you've really done your spadework --
2 meeting with the right people, hiring the right
3 consultants. You know, it's not an issue of just
4 filling out a two-page form and filing it with the
5 state and then holding your breath for a few days to
6 see what happens.

7 MR. LEVIN: Aside from whatever heavy lifting
8 there may be involved, when we're sitting across from
9 them and they say, do you have a permit? I mean, if we
10 grant you this, are you going to be able to proceed?

11 We go, well, gee, we don't know. It's under
12 appeal. We'll come back to you in a couple years when
13 it gets settled. It just -- that's not a winning
14 conversation. We want to say we have the permit, we're
15 ready to go, we need the curb cut. And having done the
16 politicking, you can be sure that we will be doing that
17 in advance to ensure a win.

18 MR. ZUROFF: Mr. Levin, is there any
19 disadvantage to your getting this curb cut before you
20 build this project? Doesn't it benefit your entire
21 project?

22 MR. SCHWARTZ: No. But we're not convinced
23 that this is the best way of going about it. It's the
24 goal -- everybody's goal is getting the permit,

1 honestly. I think this an imposition of a requirement
2 that seems more like sticking it to the developer than
3 it does maximizing the chance of getting this permit,
4 in our judgment.

5 MR. LEVIN: I don't believe -- I don't feel as
6 though it's being stuck to us. Okay? I feel as though
7 it's an issue that's very important to the neighborhood
8 and that you guys are sensitive to that. And I respect
9 that and appreciate it.

10 I believe that -- like I said, I want to set
11 this up so that we succeed and that we're not going in
12 there looking like idiots saying, gee, we would like
13 this. If we get this project approved, we would like
14 this, as opposed to them knowing that they're dealing
15 with a real project. Who in government is going to
16 want to deal with some hypothetical project? Because
17 they have to do their due diligence, and they're going
18 to have to go through their process. Why would they do
19 it on a hypothetical? They won't.

20 MR. JESSE GELLER: Mr. Levin raises a fair
21 point about that, which is I don't know how they will
22 react in this case. I don't know what feelers have
23 been put out already about this. But my sense, just
24 based on experience with other governmental agencies,

1 is that they are less likely to react, let alone react
2 in a positive fashion, on a prospective project than
3 something that at least has some indication of
4 proceeding.

5 So I hear what you're saying. Being sensitive
6 to that, I still want to push for the earliest date to
7 get the process moving, so there is sort of this
8 tension there.

9 MR. ZUROFF: Isn't it also true that the state
10 might act more quickly if they know that there's a
11 local agency like us that's compelling the developer to
12 make diligent efforts to get this curb cut? Again, I
13 know it's politics, but sometimes the politicians
14 respect the fact that a local agency is pushing the
15 applicant.

16 MR. BOOK: So why isn't pushing them -- why
17 isn't, you know, within X number of days or
18 concurrently with filing the application for a building
19 permit --

20 MR. ZUROFF: But I understand Mr. Geller's
21 position that we want this to happen as quickly as
22 possible.

23 MR. LEVIN: As I said, it's a two-year
24 construction, and there's a couple of months -- it's a

1 couple of months in advance of that, you know, for a
2 plan review and such so that when we file for that
3 building permit, there's going to be -- I believe
4 there's going to be ample time for us to succeed before
5 we start occupying the buildings. We'll win or lose
6 within two years.

7 MR. ZUROFF: Is there any benefit to you doing
8 some politicking in advance of --

9 MR. LEVIN: We'll figure that out. We'll
10 touch base with the people who -- you know, who we know
11 as decision makers or influencers and try to, you know,
12 tee it up in a way that it's going to win.

13 MR. HUSSEY: I agree with the applicant on
14 this. Let's say they make this application within 30
15 days with the clerk and then the hearing is set. Then
16 they're going to have to ask for a postponement of the
17 hearing. They're probably going to have to ask for
18 another postponement of the hearing. And there will
19 come a certain point where the state agency is going to
20 ask them to withdraw the application. Come back to us
21 when this is --

22 MR. ZUROFF: We really don't know how it
23 works.

24 MR. JESSE GELLER: Okay.

1 MS. NETTER: "As quickly as feasible and in no
2 event later than application for building permit, the
3 applicant shall ... "

4 MR. JESSE GELLER: And the notion is access
5 and egress to and from VFW Parkway to the site for full
6 vehicular usage.

7 MS. NETTER: The original language.

8 MR. JESSE GELLER: Well, I don't want
9 Mr. Levin putting mopeds -- just mopeds through there.

10 MR. SCHWARTZ: Mr. Chairman, we'd like you to
11 take a look at our suggested language with regard to
12 what is being promised here, what the obligation is.
13 What we said is that we would use all reasonable
14 efforts to obtain a permit.

15 This language is considerably stronger, and if
16 I were reading this as -- perhaps as counsel to a
17 construction lender, I could read this as actually
18 mandating the permit, which I know is not the board's
19 intent. But it's taking all steps necessary, including
20 submitting a complete application, to secure a curb
21 cut. I would respectfully suggest to you that that
22 language is too strong given the undertaking that's
23 here that we do our best to get this permit with the
24 assistance of the town, but we're not guaranteeing that

1 it's going to be successful.

2 MR. JESSE GELLER: Okay. Anything else?

3 (No audible response.)

4 MR. JESSE GELLER: 24.

5 MR. HUSSEY: 23.

6 MR. JESSE GELLER: 23, right.

7 MR. BOOK: I'm in agreement with Ms. Morelli's
8 clarification.

9 MR. SCHWARTZ: Mr. Chairman, just one thing on
10 the insubstantial change, which I know Ms. Morelli
11 objected to.

12 There's really two possibilities for these 10
13 spaces. One is that we open up a brand-new public
14 hearing with notice, full public hearing. The other is
15 that it's deemed to be an insubstantial change. Those
16 are the two options.

17 There are 10 spaces that were shown
18 specifically on a plan that the board has seen. And
19 the quid pro quo for obtaining the curb cut on the VFW
20 Parkway and removing the parking spaces that were
21 removed towards the end of the hearing were that these
22 spaces would be restored. That's why we suggested the
23 "insubstantial change" language. It's not to say that,
24 you know, the specifics of what the plan is going to

1 look like can't be and won't be reviewed, but the
2 notion that there would have to be a brand-new public
3 hearing in order to restore these 10 spaces doesn't
4 seem right to me.

5 MR. JESSE GELLER: Ms. Netter, do you want to
6 speak to that?

7 MS. NETTER: Yes. But first I'd ask
8 Ms. Morelli to speak, please, in terms -- I mean, I
9 generally -- well, let me ...

10 MS. MORELLI: First of all, there isn't an
11 alternative plan regarding where those 10 additional
12 spaces will go. Okay? And that -- we certainly can't
13 just accept what the applicant is going to give us
14 without a review and that's largely because it's not
15 very specific about where those 10 spaces will go.

16 And if other town staff wants to add to
17 that -- I think Mr. Bennett has something to say.

18 MR. SCHWARTZ: Just to be clear, we have
19 absolutely no problem whatsoever with making sure that
20 the plan is acceptable to the town. None. We have --
21 we're fine with that.

22 What our objection is to is requiring a brand-
23 new public hearing, full notice, the whole nine yards
24 in order to restore these spaces. We don't think that

1 was part of the bargain.

2 MS. NETTER: Can I clarify something in terms
3 of how amendments -- I think we've discussed this
4 before, so you can all put your head down and snooze if
5 you've heard this 100 times -- but what the process is
6 for an amendment subsequent to a comprehensive permit.

7 What the regulations provide is that the first
8 thing that happens is the applicant seeks an
9 amendment. And the board's first role is to make --
10 this is at a public meeting -- is to make a
11 determination whether that amendment is substantial or
12 insubstantial. If the board -- so in doing that, the
13 applicant would present its plans.

14 In making that determination, what you're
15 doing, in effect, is if you rule it's insubstantial --
16 which you do at a public meeting -- then the changes
17 become automatic. They're all incorporated into the
18 plan. End of story.

19 If you determine that they're substantial,
20 then only under those circumstances do you go to a
21 public hearing.

22 MR. BOOK: You mean another public hearing?

23 MS. NETTER: Another public hearing, correct.

24 MR. BOOK: And can we say now, today -- can we

1 perspectively say that something is going to be
2 insubstantial?

3 MS. NETTER: Well, that's not something --
4 now, Mr. Nagler may have a point of view on this. We
5 haven't discussed -- at least not that I remember. But
6 I generally don't recommend -- I have not seen -- maybe
7 other people have -- in decisions where you
8 predetermine what a substantial or insubstantial change
9 might be. There may be other -- the composition of the
10 board might be different in the future and people may
11 have different points of view on what's substantial and
12 what's insubstantial. And it's not something that's
13 contemplated by the regulations either.

14 MR. BOOK: But hasn't -- the applicant has --
15 I heard Mr. Schwartz say that they're amenable to
16 deferring to the town and letting the town approve
17 where these spaces are going to go. I'm finding it
18 hard to believe that the town's best interest would be
19 served -- still would be served if we allowed that to
20 happen. Is this something that is so -- it seems
21 relatively insignificant where these 10 spaces are
22 going to go. Does this board need to be brought back
23 in, or can't we --

24 MS. NETTER: Well, the question -- I think

1 what the applicant, in effect, is saying here is that
2 you're approving this permit now. We're allowed to
3 have 10 spaces, and we can -- I'm not paraphrasing
4 deliberately wrong or -- I'm trying to be correct --
5 but we can have these spaces generally where we want
6 because -- at least as Ms. Morelli is saying -- they
7 have not yet presented the plan as to where the 10
8 spaces will be.

9 I think there were also some concerns with
10 whether or not the --

11 MR. SCHWARTZ: That's absolutely not what
12 we're saying. That's not what we're saying. We're
13 saying we're happy to have town staff approve a plan
14 that shows where the spaces are.

15 MR. BENNETT: I think the staff's concern here
16 was that we have not seen any plan for the curb cut,
17 how the driveway and access would go to that
18 turn-around. And there will have to be a modification
19 to the lease lot line when this plan is developed
20 because right now a portion of that property, the
21 access would be over the 40A line.

22 MS. NETTER: So are you saying that there may
23 be -- I'm using the word not in the legal sense --
24 significant changes that you may want to have go back

1 to a public hearing?

2 MR. BENNETT: I think there was enough of a
3 concern that the board had not seen anything that we
4 felt that it would be in the board's best interest to
5 look at that. Otherwise, the only other alternative
6 would have had a plan presented, saying in the
7 alternative, you build this and have it all done and
8 prepared Scheme A if it was to be approved somewhere
9 down the road.

10 MR. ZUROFF: Can that be done?

11 MR. LEVIN: Well, just as a matter of
12 context --

13 MS. NETTER: But not at this point.

14 MR. LEVIN: -- not at this point because we
15 don't know what DCR is going to require. So what that
16 design looks like -- maybe we end up reorienting that
17 building to accommodate some DCR requests, in which
18 case the parking -- obviously, we'd have to maintain
19 the turn-around for the fire truck, or maybe not. I
20 mean, that could go away, actually. So, in fact,
21 there's an opportunity to redesign that little area
22 there. And during that redesign, 10 spaces will be
23 added and fire access would be created out to the VFW.
24 I mean, we --

1 MR. SCHWARTZ: I just want to point out one
2 other thing, which is if you do require a new public
3 hearing, the possibility and the likelihood of an
4 appeal is there, which is, at least, unclear for
5 approval of something as an substantial change. And I
6 don't think it's in anybody's interest and certainly
7 not the way we understood it that, yes, absolutely, the
8 specifics of how these 10 spaces get placed should be
9 approved by the town staff. We're not saying we can
10 put it anywhere we want.

11 All we're saying is that a whole new hearing
12 for the purpose of restoring 10 spaces with notice,
13 with possibility of an appeal by third parties, that
14 was something that we really wish to avoid. We're not
15 looking to avoid review by town staff or to put these
16 spaces anywhere we want. I just want to clarify that.

17 MR. HUSSEY: It gets complicated because if
18 this does get approved, it could be a year or two from
19 now. It's going to be a different board that this
20 decision is going to be before, and that, I would
21 suspect, is problematic.

22 MR. ZUROFF: I don't think that we can make a
23 judgment now as to whether it's insubstantial because,
24 as Mr. Levin said, there could be a reconfiguration of

1 the turn-around and they may want to reorient the
2 building. It could be substantial.

3 MR. NAGLER: The part that I'm missing is we
4 never say it is a substantial change. We're silent on
5 that.

6 MR. SCHWARTZ: Right. I acknowledge that.

7 MR. NAGLER: And there's a body of law that
8 determines --

9 MR. SCHWARTZ: My impression is that, for
10 something like this, the law is very ambiguous.
11 There's really not a lot of -- I mean, it's all over
12 the map. So I think there's a lot of discretion given
13 to the board, frankly, for making a determination of
14 whether it's substantial or insubstantial for something
15 like this, which HAC is likely to defer to.

16 And so we were just looking for some
17 clarification that this restoration of these spaces
18 would be something that would not require a whole new
19 public process.

20 Look, I've said my piece.

21 MS. NETTER: I have another thought. I don't
22 agree with you that the law is -- the law is spelled
23 out very clearly, I believe. But there's another idea,
24 should you want to do it -- this is not a proposal --

1 which is to delegate the staff -- and maybe staff
2 doesn't want this delegation. Let me just finish the
3 sentence. I saw your face, but not everybody did --
4 this review, but ...

5 MS. STEINFELD: As staff, I'm reluctant to say
6 that we would be willing to administratively approve a
7 change in the plan. I wouldn't presume to tell you
8 that the change is substantial or insubstantial, but
9 it's possible that staff would want to see the Zoning
10 Board of Appeal's opinion. I'm just not sure we'd want
11 that responsibility.

12 MR. JESSE GELLER: Let me say that the
13 problem that I have with this is that we're at a
14 simple -- as Mr. Schwartz' expression of it is, you
15 know, we're just going to plump 10 more spaces in
16 there. If it were that simple of just fitting 10 more
17 spaces in, then I sort of would be more inclined to
18 agree with your notion of deeming it insubstantial.

19 The problem I have is, we really don't know
20 what the ramification is. We don't know how this
21 impacts the turn-around. We don't know how the outlet
22 impacts the turn-around. There's more going on here,
23 and therefore, I think it is unlikely that what he's
24 going to do is simply add 10 spaces somewhere and it's

1 that simple. I think it's more complicated than that.
2 And since I can't say what will happen in the future,
3 my sense is that I can't put in today that it is
4 insubstantial. I can't deem it insubstantial. And I'm
5 not -- believe me, I'm not trying to layer complexity
6 on this. I just think there's more going on.

7 MR. LEVIN: I think that, on the one hand,
8 whatever potential changes might be in store as a
9 result of getting what we all want would be positive,
10 whether the circle is now eliminated as more green
11 space, maybe enough green space to compensate the extra
12 10 spaces, the fire access is created. It's all good.
13 I mean, it's all good.

14 MR. JESSE GELLER: But you're talking about
15 maybe moving buildings and maybe moving the circle.

16 MR. LEVIN: Maybe after reorienting it's all
17 good. It's all good. Right?

18 Now, is it insubstantial? Whatever.

19 What Attorney Schwartz is suggesting, though,
20 is that now what happens if that does -- I think what
21 rang a bell for me is we want to create a process to
22 approve this that would not be subject to an appeal,
23 because then you're -- somebody who's ill motivated
24 would be hurting an aspect of the project -- it

1 wouldn't be stopping the project, per se, but it would
2 be hurting the project that we all want, a component
3 that we all want. So we just want -- whatever that
4 process may be, it's just something that isn't
5 appealable. That would be asking -- I don't know.

6 MR. ZUROFF: Does it make sense for our
7 decision to say that as part of the requirement that
8 they make diligent efforts to get the curb cut, but we
9 acknowledge that part of the incentive for them to do
10 that is that we have approved the addition of 10
11 parking spaces? It sort of deems it for the future
12 board, if none of us are sitting here, to say that's
13 part of the deal.

14 MR. JESSE GELLER: I think that's already
15 understood within the language. They have a right to
16 earn another 10 spaces --

17 MR. ZUROFF: Well, I don't disagree with you.
18 I can say -- because I sat in this chair on the last
19 40B, the Marion Street. That was actually a
20 substantial change, but it was positive for the
21 neighborhood. It reduced the size of the building.
22 Polly can substantiate that as well. There was no
23 problem with getting that approved. It was clearly for
24 the benefit of the town, and this is clearly for the

1 benefit of the project. That's just my opinion.

2 MR. JESSE GELLER: Further thoughts?

3 MR. HUSSEY: Well, I appreciate the
4 applicant's concern that they could get stuck. The
5 only thing that I can think of is to have appended to
6 these plans an alternate plan that shows where these 10
7 spaces are going to be.

8 MR. ZUROFF: They're saying there are other
9 factors.

10 MR. HUSSEY: I know. There could be other
11 factors even with that alternate plan. I understand
12 that. So it's a bit of a conundrum.

13 MR. JESSE GELLER: So, Edie, in terms of ...

14 MS. NETTER: I'm just making sure Attorney
15 Nagler has the same point of view as I do.

16 MR. JESSE GELLER: And?

17 MS. NETTER: He does.

18 MR. JESSE GELLER: He does. Okay. So what is
19 the consensus?

20 MR. ZUROFF: I don't think we can deem this
21 insubstantial.

22 MR. BOOK: Yes.

23 MR. JESSE GELLER: Yes.

24 Anything else on 23?

1 (No audible response.)

2 MR. JESSE GELLER: Isn't construction of the
3 VFW curb cut a prerequisite to permitting,
4 installation, and use of 10 spaces? I have no interest
5 in them tearing up green space.

6 MS. NETTER: I'm sorry. You want to include
7 that?

8 MR. JESSE GELLER: Yes. There's a record of
9 transportation, engineering.

10 MS. NETTER: Why don't we look at all the
11 language here. I mean, I don't know that you need --
12 "it is understood in no event securing a curb cut shall
13 be a condition," blah, blah, blah, but if you want
14 that, let me know.

15 Number 23. The applicant --

16 MR. JESSE GELLER: Yeah, I wouldn't -- that
17 first sentence, I wouldn't -- I don't know what it
18 serves.

19 MS. NETTER: So that's not in there?

20 MR. JESSE GELLER: No.

21 MS. NETTER: I don't think so either.

22 I guess I want to know if you want the
23 original language, or do you want any of the
24 applicant's requested changes? Do you want to see the

1 original language?

2 MR. JESSE GELLER: No. I'm looking at it.

3 I've got it in both formats.

4 MR. ZUROFF: It's the same language almost.

5 MR. JESSE GELLER: I don't object to the
6 second sentence other than the --

7 MR. ZUROFF: Take out his first sentence. The
8 second sentence is basically what was there before.

9 MS. NETTER: So basically leave the original?

10 MR. JESSE GELLER: But if you leave it in,
11 again, in the last sentence where you're making a
12 provision for construction of the VFW curb cut to the
13 satisfaction of --

14 MS. NETTER: To the use?

15 MR. JESSE GELLER: As a prerequisite to
16 permitting, installation, and use of 10 additional
17 parking spaces.

18 MR. SCHWARTZ: Just a clarification. The
19 issue -- not to dredge the subject up again -- but the
20 issue of the location of the VFW curb cut as it relates
21 to the 10 spaces, I just want to understand where the
22 board is coming from because -- is it the board's
23 position that I'm hearing that the VFW curb cut itself
24 could result in something that would be deemed to be a

1 substantial change?

2 MR. JESSE GELLER: No. We're not telling --
3 no. That is not our -- well, that is not my position.

4 MR. SCHWARTZ: Well, I mean, I'm just --
5 because the language that I suggested in my mark-up
6 said if this package deal, when we go in with the VFW
7 curb cut -- assuming that we are able to obtain that --
8 and the associated 10 spaces that are going to go along
9 with that and the reconfiguration of the drive,
10 et cetera, seen as a package, would be reviewed and
11 approved by this board presumably as an insubstantial
12 change.

13 And the reason I mention that is because
14 absent that, the VFW curb cut itself -- where the town
15 is cooperating with us and we're going in and paying
16 for a VFW curb cut -- absent that, the board is
17 supposed to have the discretion to decide whether it's
18 substantial or insubstantial. But if it deems that to
19 be a substantial change, the board is then opening that
20 up to an appeal, which is not, I assume, in anybody's
21 interest.

22 MR. JESSE GELLER: I can't think of why the
23 board would do that.

24 MR. SCHWARTZ: So I just want to clarify that

1 if we come back in, it could be part of the package,
2 this is the VFW curb cut that was approved by the state
3 and this is how it affects the plan as a whole. Then
4 it would be at your discretion to decide what to do
5 with that.

6 MR. JESSE GELLER: That's correct.

7 MR. LEVIN: And that's the way it would
8 transpire.

9 MR. JESSE GELLER: Right. And you don't know
10 the answer of what it may impact in terms of the design
11 of the rest of the parking, the turn-around, the
12 location of the building. There are many things that
13 this may -- it may affect none of them. You may find
14 the space and say, hey, this is where we're going to
15 plump 10 spaces, and it truly may be insubstantial.

16 It's more likely going to impact many more
17 portions of the improvements, and it's going to be up
18 to whoever convenes that board to make the decision.

19 MR. LEVIN: But I guess I'm not sure --
20 correct me if I'm wrong, though -- if that can be
21 called an insubstantial change, does that then -- even
22 though we're coming -- do this -- you know, does that
23 preclude the possibility of an appeal?

24 MR. JESSE GELLER: Does it preclude it?

1 MR. LEVIN: Yes. Can it be done in such a way
2 that it's not appealable?

3 MR. JESSE GELLER: Only if it's found to be an
4 insubstantial --

5 MR. LEVIN: Can we get your approval for an
6 insubstantial change? We don't have a problem getting
7 approval for the design.

8 MR. JESSE GELLER: Are you asking me a
9 technical question of whether it's feasible in the
10 future for that to happen?

11 MR. SCHWARTZ: I think what we're saying is
12 this: If this proposal comes in as a package -- this
13 is the VFW curb cut that was approved by the state,
14 this is what it means in terms of the parking spaces,
15 the layout, et cetera -- absent the language that we
16 have suggested, it would be the board's -- whether it's
17 the current board members or future board members --
18 prerogative to deem that to be substantial or
19 insubstantial.

20 MR. JESSE GELLER: It will.

21 MR. SCHWARTZ: If it deems it to be
22 substantial and somebody takes an appeal -- I just want
23 to be clear -- and that appeal is going to -- we're not
24 going to hold off on building the project for two years

1 while that appeal or that change winds its way through
2 the courts. We're going to build our original plan
3 without the VFW curb cut. And so that is something
4 that I think everybody should just understand.

5 And my only -- I respectfully suggest to you
6 that by clarifying that this is an insubstantial
7 change, you're giving some direction to a future board
8 as to what your intention is in this matter.

9 MR. JESSE GELLER: Ms. Netter, let me ask you
10 a question.

11 MS. NETTER: Sure.

12 MR. JESSE GELLER: Could the ZBA deem the
13 simple act of a curb cut as an insubstantial change as
14 independent of whatever other changes they may make?

15 MR. ZUROFF: Jesse, what happens if the curb
16 cut is required by the state to come in at such an
17 angle that it interferes with the existing building
18 plan?

19 MR. JESSE GELLER: I'm just asking a question.

20 MR. ZUROFF: I know. But if you're asking a
21 theoretical question, we don't have an answer for it.
22 Right?

23 MR. NAGLER: I've just never seen someone
24 precharacterize -- prelabel something an insubstantial

1 change. That just seems -- I'm really having trouble
2 getting my arms around it.

3 MR. JESSE GELLER: Okay.

4 MS. NETTER: But you know what? I mean, I
5 understand what's being said, so let's just give some
6 thought because I don't know that we have a different
7 goal. I just think whether there's a way to get there
8 is the question.

9 MR. ZUROFF: I agree. There's a way to phrase
10 it.

11 MS. NETTER: Let me ask another question. I'm
12 putting everybody on the spot. I heard what staff
13 said, but just so I understand, okay, if, in fact,
14 there was some way to limit the confines to -- if there
15 was a -- if staff were to be willing -- under what
16 circumstances, I don't know -- to review changes,
17 right, would this board be willing to delegate?

18 I know there's a lot of ifs. I get it. I get
19 it. I just want to know, so I can think. Okay? And I
20 don't want to come back at the next meeting not having
21 understood.

22 MR. ZUROFF: What you're suggesting is that
23 planning would then determine our decision?

24 MS. NETTER: No. Planning would do the

1 review. I've got to think about it all. I'm just
2 throwing out a range of options, okay, just to give
3 some thought.

4 MR. ZUROFF: They review now and make
5 recommendations to us.

6 MS. NETTER: Yeah. But you would not get it
7 back.

8 MR. HUSSEY: But they also review plans after
9 we've approved them. They review the final landscaping
10 plans and materials and various things without them
11 coming back.

12 MR. ZUROFF: Yes, that's true.

13 MS. NETTER: So that's my question.

14 MS. STEINFELD: Unless we deem it
15 substantial.

16 MS. NETTER: No. You don't deem anything --

17 MS. STEINFELD: No. In a 40A we can and we
18 have, and we have to go back to the board.

19 MS. NETTER: I'm just talking 40B right now.
20 That's another idea you're throwing out, but let me
21 just get their parameters so we can all think more
22 fully.

23 So I guess I just want to know, if there were
24 a possibility to do it in a way that was satisfactory

1 to the town, is this something you'd be willing to
2 delegate?

3 MR. HUSSEY: Let me get a quick clarification
4 from the Planning Department.

5 So if we did allow them to review and approve
6 the additional 10 spaces --

7 MS. NETTER: And they felt they had enough
8 flexibility.

9 MR. HUSSEY: -- even if you had that
10 responsibility written into the decision, could you not
11 still say if it came out in your review that it was
12 potentially substantial that you could still kick it
13 back to this board? Do you follow me?

14 MS. STEINFELD: I would like that flexibility.

15 MR. HUSSEY: Yeah. I would -- okay. I think
16 that's the way to handle it.

17 MS. NETTER: I'm just asking planning type
18 questions.

19 MR. HUSSEY: Assign it to the Planning Board
20 and then it's up to them. If they think it needs to
21 come back to the board -- if it could be worded that
22 way, then that gets you off the hook, gets us off the
23 hook -- doesn't get us off the hook.

24 MR. NAGLER: The Planning Board or the --

1 MS. STEINFELD: Department.

2 MR. SCHWARTZ: I mean, it always comes back to
3 the board. The board -- as I think Ms. Netter pointed
4 out, the planning staff is not going to make the
5 decision, ultimately, to approve this. Whether it's
6 under the rubric of substantial or insubstantial, the
7 Board of Appeals has to approve it.

8 I think what is being suggested is that there
9 be an initial delegation and review of the plan by
10 planning staff, you know, for their determination as to
11 the magnitude of the change, and we're certainly fine
12 with that. But just to be clear, it is going to come
13 back to the board -- whether it be under -- this board
14 is going to vote on this up or down.

15 MR. BOOK: So if this board is going to vote
16 on it one way or another, is that not an appealable
17 decision?

18 MR. SCHWARTZ: If the board -- my
19 understanding is if the board determines that it's an
20 insubstantial change, the appealability of that is
21 extremely limited. So if the board makes a decision --
22 it's a two-stage process. If the board makes a
23 decision it's a substantial change, the implication of
24 that is it's a new hearing, brand-new hearing as though

1 this were a new application, and then that's all
2 appealable.

3 MR. HUSSEY: It seems to me the fall-back
4 that -- the fail-safe position in that condition -- the
5 situation is that -- I can't imagine the neighbors not
6 wanting to have that VFW go through. And so if it
7 comes to this board and there's a chance that this
8 board would do something that's appealable, I can't
9 imagine -- you know, people will do what they will do,
10 but nevertheless, it's in everybody's interest for this
11 VFW to go through. If something gets in the way, they
12 will just bag the VFW cut and proceed with the original
13 plan. And that's going to be their argument at the
14 time.

15 MS. NETTER: If it would be okay with you, can
16 we defer this and can we talk with the town staff and
17 think it through a little bit and come back with
18 something?

19 MR. HUSSEY: Sure.

20 MR. JESSE GELLER: Sure.

21 Should the certification be at least 90
22 percent of the units or 90 percent of the bedrooms?

23 MR. ZUROFF: Are you talking about --

24 MR. BOOK: 24.

1 MR. HUSSEY: 90 percent of the units
2 occupied. That's the way it was written.

3 MR. JESSE GELLER: I'm asking a question about
4 that language.

5 MR. HUSSEY: Oh, you want to change it to
6 bedrooms?

7 MR. JESSE GELLER: I'm simply asking the
8 question.

9 MR. HUSSEY: No. Because the occupancy
10 relates to the units.

11 MR. JESSE GELLER: No. I understand that.
12 The notion of a traffic study, though, is whether there
13 are any impacts from increased number of occupants.
14 Right? We won't know full occupancy until bedrooms are
15 occupied.

16 MS. NETTER: It's very hard to enforce. We
17 had this discussion amongst town staff, if I recall
18 correctly. A little bit hard -- you have to find a
19 measurable point.

20 MR. JESSE GELLER: So it's too hard to know --

21 MS. NETTER: Yes. You can ask them to
22 certify, but still ...

23 MR. JESSE GELLER: So the risk you run is that
24 your study does not have true information.

1 MR. HUSSEY: By a minimal number. So what's
2 the word? Di minimus?

3 MS. NETTER: But there were changes that were
4 proposed by the town, I believe, here. Correct,
5 Ms. Morelli?

6 MS. MORELLI: Yes.

7 MR. SCHWARTZ: As we understand the town
8 changes, which is that the money could be used for
9 other traffic calming measures other than ones that
10 were specifically identified in the course of the
11 hearing, if that's what town staff determined, we have
12 no objection to that.

13 MR. HUSSEY: And also that the Transportation
14 Board be involved in the review, as I understand it,
15 right? That was your --

16 MS. MORELLI: Yes.

17 MR. SCHWARTZ: We would just ask that you
18 consider our changes, that there be a time limit on --
19 that it needs to be either used or returned within a
20 specified time.

21 MS. NETTER: Any particular time you want to
22 impose? You want me to just draft something?

23 MR. JESSE GELLER: Yes.

24 Anything else on that?

1 (No audible response.)

2 MR. BOOK: Skipping to 41?

3 MR. JESSE GELLER: Yes. Thoughts?

4 MR. BOOK: Well, we talked about A -- start
5 with A -- site plans and the architectural landscaping
6 plan has been approved. This was the discussion that
7 we started to have last week -- or I think it's the
8 same discussion -- about whether it's simply review or
9 review and approval.

10 MS. NETTER: The intention behind A through D
11 is to just reincorporate what's already been said
12 elsewhere, not to impose -- so I guess I would propose
13 for this that I just review -- when we finish the
14 decision, that I review everything you've said before.
15 It's just to put this in a checklist form, which I
16 generally do for towns, but also Mr. Bennett has said
17 it's useful here because then when they're reviewing
18 building permits, they just check this off. So nothing
19 is new here, at least in terms of A through D, so long
20 as I make it consistent with everything else.

21 MR. BOOK: Okay.

22 MR. HUSSEY: The note I made is that I
23 wouldn't mind substituting "review" for "approval"
24 because it all has to be approved by the building

1 commissioner at the end in order to --

2 MS. NETTER: All I'm saying is that we'll make
3 those adjustments in the original.

4 MR. HUSSEY: Right. Okay.

5 MR. NAGLER: I think the same applies to G as
6 well -- referenced elsewhere.

7 MS. NETTER: Okay. It's not that we wouldn't
8 discuss G, but let's discuss it -- G is elsewhere,
9 Sam?

10 MR. NAGLER: Yes. We had talked about that at
11 last week's hearing.

12 MS. NETTER: We did? I don't think so.

13 MR. SCHWARTZ: I think we discussed -- just to
14 clarify, I think we discussed -- in G, we discussed II
15 and III. We did not discuss the easement, which is the
16 first item.

17 And I would just say on the easement, my
18 understanding for the need of the easement is because
19 this cross -- the easement for emergency access crosses
20 from the 40B lot to the 40A lot. And so the suggestion
21 that we had is -- this isn't a question of, you know,
22 providing the town -- obviously, the town, for
23 emergency vehicles, has the right to use any of these
24 roads for any purpose. This is so that the board is

1 satisfied that there exists a legal document which
2 provides the necessary easement, which is the comment
3 that we provided elsewhere in the decision. In our
4 judgment, that doesn't require any special review and
5 approval because the town isn't going to be the
6 beneficiary to that easement, per se.

7 MS. NETTER: But we absolutely should talk
8 about I.

9 MR. NAGLER: I'm sorry. Isn't Condition 26
10 the same as subparagraph 1, subparagraph Y, and B, or
11 are those two different things?

12 MR. SCHWARTZ: That's the same thing. I think
13 that goes to what Ms. Netter was saying, that this is
14 supposed to be a checklist, right, so what -- so this
15 comment goes to item 26, which is that this -- our
16 comment says, "needs to provide evidence that easement
17 exists," but it shouldn't require special review and
18 approval.

19 MR. NAGLER: So it's kind of whatever we do
20 with 26.

21 MS. NETTER: Correct. So let's talk about I.

22 Do you, Ms. Morelli, want, perhaps,
23 Mr. Bennett or anybody else --

24 MS. MORELLI: This would be Mr. Ditto's area.

1 MS. NETTER: Well, there are two aspects, I
2 would suggest. Right?

3 MR. JESSE GELLER: Do you want Mr. Ditto? Do
4 you have a question for him?

5 MS. NETTER: No. I think you want him to give
6 you some background on the performance guarantee issue.

7 MR. DITTO: Okay. This one is for a
8 performance bond for construction of on-site utilities,
9 typically 100 percent of the value of the work.

10 MR. JESSE GELLER: So outside of the
11 subdivision context, we typically would require this?

12 MR. DITTO: Yes.

13 MS. NETTER: And inside the subdivision
14 context.

15 MR. JESSE GELLER: No. I understand that, but
16 it's addressed by the subdivision.

17 MS. NETTER: Yes.

18 MR. JESSE GELLER: So that's why I was sort of
19 including that.

20 MS. NETTER: But it's important to understand
21 that this is in your subdivision regulations. It's not
22 something that's been reinvented.

23 MR. JESSE GELLER: Yeah. But I --

24 MS. NETTER: I understood. Your question is

1 in addition.

2 MR. JESSE GELLER: Okay. Any comments on it?

3 MR. HUSSEY: No.

4 MR. SCHWARTZ: Although Mr. Ditto, I think,
5 answered affirmatively that it is required in other
6 contexts -- and, again, we have not done an exhaustive
7 review. I have not seen, in other decisions of this
8 board that don't involve 40B projects, an imposition of
9 this kind of bond. As opposed to a subdivision context
10 in which, you know, the town is ultimately going to
11 take over responsibility for the road to a certain
12 subdivision, these are all privately installed
13 utilities, privately installed infrastructure for which
14 the applicant bears and will continue to have full
15 responsibility forever.

16 So I just am not -- I'm not saying that the
17 town doesn't require a performance bond for
18 nonsubdivisions. We just haven't seen it, haven't seen
19 it in other contexts.

20 And to the extent that it has been imposed in
21 other contexts, we'd like to know how long is the
22 duration of this bond, what are the conditions for
23 release of the bond. I mean, all those things are
24 clear in a subdivision context because there's a body

1 of law that deals with that. It's not at all clear to
2 me in this context what that would all mean.

3 MR. HUSSEY: I think this just goes to the
4 completion of the project as it states in the last
5 sentence, "Performance guarantee will be reduced from
6 time to time as work progresses and at least upon
7 approval of the director of transportation."

8 This project has some of the characteristics
9 of a subdivision.

10 MR. SCHWARTZ: In what regard?

11 MR. HUSSEY: Well, it's got streets and
12 utilities like a subdivision, but it's not -- doesn't
13 fall into the subdivision -- it's not cut up into
14 little lots. But it is, essentially, taking all the
15 characteristics of a public street.

16 MR. SCHWARTZ: With due respect, I think the
17 difference is, in the subdivision context, what you
18 have is a developer who's building a subdivision road,
19 infrastructure, and utilities and needs to post a bond
20 before so that -- to ensure for the town's benefit and
21 also for the benefit of individual lot owners before
22 the lots are sold that the infrastructure, in fact, has
23 been completed and completed properly.

24 Here, this is a 100 percent private project

1 with no town responsibility and no owner or perspective
2 owner other than the developer. Just in my experience,
3 I haven't seen a bond required in that context.

4 MR. HUSSEY: I understand, and I think you're
5 right. But it's a difference without a distinction, I
6 think, as far as the functioning is concerned. But
7 I'll leave it to the lawyers to --

8 MS. MORELLI: If I could just have --
9 Mr. Ditto can speak to cases where this has been
10 required.

11 MR. DITTO: Yeah. Most recently is -- I think
12 it was two years ago on Olmstead Road. That was, I
13 believe, a 40B project also, and there was a guarantee
14 on that project.

15 MR. JESSE GELLER: Okay. Thank you.

16 MR. LEVIN: When does it go away? I mean,
17 when do you demonstrate that it's been --

18 MR. JESSE GELLER: Mr. Ditto, I hate to make
19 you walk back and forth.

20 MR. SCHWARTZ: I'm also -- I'm not sure of
21 this, but I believe that the Olmstead project was a
22 for-sale project, so this is -- and that is different.
23 So it has more to do with being a subdivision than it
24 has to do with a rental project.

1 MR. JESSE GELLER: Let's ask these questions
2 of ...

3 MR. DITTO: I can't respond to Mr. Schwartz'
4 last comment. I didn't get that deeply involved in
5 it.

6 MR. HUSSEY: When does the performance
7 guarantee die? When is it over?

8 MR. DITTO: With the acceptance of the road.

9 MR. HUSSEY: Okay. So the occupancy permit
10 for the full project, basically; right?

11 MS. NETTER: There's no public roads here.

12 MR. DITTO: When the construction is accepted
13 by the town is when we release the bond.

14 MR. SCHWARTZ: The construction of the
15 infrastructure -- and I totally respect what Mr. Ditto
16 is saying, and I don't mean to call into question any
17 of this, so please understand, all respect -- the
18 infrastructure is never accepted by the town. That's
19 the difference. That's why bond is required in a
20 subdivision context and typically not required in this
21 context. So I'm just pointing that out. That's just
22 in my experience.

23 If there are specific aspects of
24 infrastructure that are being done for the town's

1 benefit, in my experience, yes, sometimes you'll see a
2 board requirement, not for all aspects of
3 infrastructure being built for a project like this.
4 That's just my experience.

5 MR. JESSE GELLER: Thoughts?

6 MR. BOOK: I'm a little hard pressed -- the
7 applicant makes a compelling argument. I'm hard
8 pressed as to why this is here.

9 MR. JESSE GELLER: Well, this is why I was
10 sort of asking this question about subdivision control
11 because, as Mr. Schwartz has pointed out, this is
12 governed by statute under subdivision control and there
13 are provisions for all of this. And the road, then,
14 becomes a public road and the city or the town becomes
15 responsible and that's why you want to mandate that
16 there's sufficient dollars or security to make sure
17 that the work is completed.

18 It's a slightly different scenario in that,
19 you know, as he points out, these are infrastructural
20 issues that -- they're always going to belong to the
21 owner of the property. They're always going to be
22 responsible for maintenance, repair, and replacement.
23 It's not going to fall to the town.

24 The question that I have is, given all of

1 that, if, in fact, in the Town of Brookline we have
2 consistently applied a standard where a performance
3 guarantee or other security is required for private
4 infrastructural components, then I think it certainly
5 is within our purview to insist on it in this case.

6 The question -- and I think Mr. Schwartz is
7 asking this question -- is: What are those other
8 projects? Have we actually done it outside of the
9 subdivision control context? I don't know the answer
10 to the question.

11 MS. NETTER: Mr. Bennett is not going to like
12 this, but do you have some familiarity -- I know you
13 have -- or does any other town person, staff person
14 have some familiarity? I remember discussing it, but I
15 don't recall the specifics.

16 MR. JESSE GELLER: The other thing is it's
17 about risk. So if they fill -- you know, they don't
18 put in the phone line, who becomes responsible for the
19 phone line?

20 MS. NETTER: And the things that aren't
21 complete.

22 MR. JESSE GELLER: And the things that
23 aren't complete.

24 MR. BOOK: I mean, isn't this part of the

1 certificate of occupancy?

2 MR. ZUROFF: It is. But it's a little more
3 complicated than that because you've got drainage
4 systems and things that do ultimately --

5 MS. NETTER: But let's ask if there are any
6 similar projects and how they're treated. There may
7 not be similar projects.

8 MR. BENNETT: Within the Town of Brookline, I
9 have not had a similar project. But in a previous
10 community I did five 40Bs, four of which were owner
11 occupied and condos, and one was a rental. And we did
12 impose this type of condition. And it was more for an
13 assurance that the infrastructure was built according
14 to town standards and acceptable to our specifications
15 and details in order to just make sure it was done to
16 the town's standards.

17 MS. NETTER: And I've had that experience as
18 well.

19 MR. ZUROFF: Who signs off when the drainage
20 system is installed? Is it the building inspector?

21 MR. BENNETT: No.

22 MR. NAGLER: I think the idea is you don't
23 want a half coat road.

24 MR. BOOK: There's no road here.

1 MR. ZUROFF: No. We're not talking about
2 roads.

3 MR. BOOK: Mr. Bennett, can I ask a question?
4 Is completion of the infrastructure -- is that a
5 precondition to your issuing of a certificate of
6 occupancy for the buildings?

7 MR. BENNETT: Yes. So depending upon which
8 building it is, you know, you have to make sure with
9 DPW -- all the towns work together -- all the
10 departments work together. We get sign-offs from the
11 fire, from the Board of Health, from the DPW with
12 respect to sewer, water, drainage, that those things
13 have been done in accordance with the approved plan.
14 And then we will come out -- building, plumbing, gas,
15 electrical -- and sign off after the fact and issue a
16 CO once those departments have all approved it.

17 MR. BOOK: So isn't that the town's assurance
18 that the infrastructure has been installed? If it
19 hasn't been, they've now built 12 buildings that no one
20 is ever going to get to live in.

21 MS. NETTER: Which might happen in a falling
22 economy.

23 MR. BENNETT: Building Department staff
24 doesn't inspect the water service or the sewer service

1 or the drainage.

2 MR. BOOK: Understood. But you're not going
3 to issue a CO unless Mr. Ditto has told you that his
4 department has inspected those things and is confident
5 that they've been constructed in compliance with the
6 plans.

7 MR. BENNETT: Correct.

8 MR. BOOK: Thank you.

9 MR. HUSSEY: I think I've come around to the
10 way the lawyers are tending. The bond is not required.

11 MR. NAGLER: If you have, like, a dug up area,
12 you know, and then the property fails, the whole
13 project fails, don't you want somebody to at least pave
14 it over?

15 MR. BOOK: But once they've completed the
16 project, the bond will be released. What I heard --

17 MS. NETTER: Once the project is completed.
18 That's correct.

19 MR. JESSE GELLER: Mr. Nagler is saying, well,
20 what happens if we have another 2008 and the economy
21 deadlines and they decide, you know, the economy is
22 really bad. We're going to just stop where we are and
23 they just leave trenches out there.

24 MS. NETTER: It happens all over the state.

1 MR. BOOK: Is this anything -- leaving half-
2 built buildings?

3 MR. JESSE GELLER: No.

4 MR. BOOK: I guess what I'm struggling with is
5 why we're talking about a performance guarantee for the
6 infrastructure. Why aren't we talking about it for the
7 entire project? By the way, I'm not --

8 MS. NETTER: I'm glad to take it out. I just
9 wanted to give you the option.

10 MR. JESSE GELLER: In the abstract, I like the
11 idea. I just think that, as applied in this case,
12 since there's no precedent that exists, I don't --
13 ultimately, the enforcement is the CO.

14 MR. LEVIN: I think the conversation evolved
15 to a completion bond on the entire project. What if?
16 What if the world comes to an end and you end up with a
17 hole in the ground? And I'm even more confident that
18 there's no precedent for the Town of Brookline
19 requiring completion bonds on projects.

20 MR. NAGLER: Hopefully, your lender will,
21 though.

22 MR. SCHWARTZ: They may or they may not.

23 MR. LEVIN: Certain components, they will.

24 MR. HUSSEY: I mean, public buildings, when

1 they build, they have a performance and payment bond
2 and the whole thing, but this is private.

3 MS. NETTER: Got it.

4 MR. ZUROFF: Where are we?

5 MS. NETTER: I think we're up to 43.

6 MR. JESSE GELLER: Moving right along.

7 MR. HUSSEY: What did the town want to do
8 about 43?

9 MS. NETTER: They want to make sure -- I think
10 they like the language as it is.

11 MR. JESSE GELLER: Subject to approval by --

12 MS. NETTER: Yes. Do you have any problem --
13 if you were to keep "approval" in -- and this is asking
14 the town as well -- is it acceptable to just have one
15 person as the approval entity?

16 MS. MORELLI: I think this covers three areas,
17 the building commissioner and director of
18 Transportation Engineering and the --

19 MS. NETTER: Right. But the one person can
20 shop it around. Doesn't matter; right?

21 MS. MORELLI: I think they would coordinate.

22 Is that correct, Mr. Bennett?

23 MR. BENNETT: Yes.

24 MS. MORELLI: They would coordinate.

1 MR. ZUROFF: It could be subject to the
2 building commissioner.

3 MS. NETTER: But leave "approval" in? Is that
4 okay?

5 MR. BOOK: Okay.

6 MR. JESSE GELLER: Yes.

7 MR. SCHWARTZ: Mr. Chairman, could we ask for
8 a consideration, if the language of approval is going
9 to stay in, that there be a reasonable time frame for
10 acting on a plan? I've seen 30 days oftentimes.

11 MS. NETTER: My understanding is that you very
12 often have this in your special permit conditions. Is
13 that correct? Do you have a time limit in there?

14 MR. ZUROFF: No.

15 MS. NETTER: I would recommend you do the same
16 here.

17 MR. JESSE GELLER: You're saying if there is
18 no time limit, don't have a time limit --

19 MS. NETTER: That's correct.

20 MR. JESSE GELLER: -- but if there is a time
21 limit, then you have a time limit?

22 MS. NETTER: Correct.

23 MR. BOOK: We don't do time limits.

24 MR. JESSE GELLER: We do not.

1 MR. SCHWARTZ: I'm not sure that's entirely
2 accurate. I'll get some decisions that I think --
3 other 40B decisions where you did impose a time limit
4 on the town. I'll get those for you.

5 MR. NAGLER: I don't know how you're going to do
6 that. We're closing the hearing tonight.

7 MR. SCHWARTZ: I'll get them right now.

8 MS. STEINFELD: Do you want to come back to
9 this while he's looking?

10 MR. JESSE GELLER: Yeah. Let's talk about 44.

11 MR. ZUROFF: Ms. Netter, I'm not sure what the
12 meaning of your language is.

13 MS. NETTER: Which --

14 MR. ZUROFF: What was originally there. How
15 do you demonstrate to the Director of Transportation
16 and Engineering that language will be removed?

17 MS. NETTER: Let me just see what the town
18 said. I don't have a problem with "ledge shall be
19 removed at least four feet below the StormTank," but I
20 think the town staff proposed -- oh, go ahead.

21 MS. MORELLI: I wanted to clarify that we are
22 actually revising the original language because we
23 realize what's important is that the ledge removal does
24 need to be inspected physically, that there's no way to

1 demonstrate unless town staff actually inspects.

2 So I'll just repeat that one more time.

3 "Ledge shall be removed at least four feet below
4 StormTank systems and inspected by the town 48 hours
5 prior to installation of said systems."

6 MR. ZUROFF: That's understandable.

7 MR. SCHWARTZ: That language is acceptable.

8 I think, Mr. Chairman -- I'm reading now from
9 the final approval for the Saint Aidan's 40B project
10 which talked about submission of final plans for review
11 by the Director of Planning and Community Development.

12 "Director shall review plan submissions in an
13 expeditious manner and provide final comments to the
14 applicant within three weeks of receipt of each of
15 these submissions."

16 MS. NETTER: Each of what submissions?

17 MR. SCHWARTZ: Of what's referred to as the
18 final plans for architectural details and materials.

19 MS. NETTER: I thought we were talking about
20 construction management plans.

21 MR. SCHWARTZ: Well, there was no construction
22 management plan that was required in that.

23 MR. JESSE GELLER: I think we're on the
24 same --

1 MR. BOOK: We were commenting on -- in our
2 40A -- I was commenting on our 40A projects, that we
3 often have construction management plans and we don't
4 put --

5 MR. JESSE GELLER: We don't put a time frame.

6 MS. NETTER: No.

7 MR. JESSE GELLER: Okay. 66.

8 MR. BOOK: This is just a monetary -- it's a
9 cap issue?

10 MR. JESSE GELLER: Yeah. I think Maria has
11 provided us with a cap of \$27,800.

12 MS. NETTER: Can we put \$28,000?

13 MS. MORELLI: Yes.

14 MR. BOOK: I have no reason to question what
15 the town would feel it would cost.

16 MR. JESSE GELLER: Everybody else okay with
17 that?

18 MR. HUSSEY: Yes.

19 MR. ZUROFF: Yes.

20 MR. JESSE GELLER: Okay. Last one.

21 MR. NAGLER: Are we clear on which language
22 we're using?

23 MS. NETTER: It's going to change completely
24 because -- oh, let me just take a crack at this.

1 MR. NAGLER: Okay.

2 MS. NETTER: So we're up to the appendix. Was
3 this related to the fire and police detail? And you
4 want a comment added, so, actually, we don't really
5 have to read all of this right now.

6 MS. MORELLI: That's right.

7 MR. HUSSEY: And basically, you wanted a fire
8 watch?

9 MS. MORELLI: Yes. There needs to be a fire
10 and police detail.

11 MR. HUSSEY: Yeah. Police detail and fire
12 watch.

13 MR. BOOK: On the days of blasting.

14 MS. MORELLI: Yes.

15 MR. HUSSEY: Okay.

16 MR. ZUROFF: I'm supportive of that.

17 MR. BOOK: I am as well.

18 MR. NAGLER: How do you define a day?

19 MS. MORELLI: You mean, like, hours?

20 MR. NAGLER: Yes.

21 MS. STEINFELD: Collective bargaining
22 establishes that.

23 MR. JOE GELLER: I don't know about that one.
24 I think the fire department's collective bargaining --

1 they're on a 24-hour shift, so I don't think --

2 MS. STEINFELD: Well, there's four-hour and
3 there's eight-hour and there's ten-hour increments.

4 MR. JOE GELLER: So are we saying if it needs
5 to be a four-hour increment, it's a four-hour
6 increment; if it needs to be in an eight-hour
7 increment, it's an eight-hour increment? It's a good
8 question as to what that means by a day. I'm not sure
9 that I understood what you're saying.

10 MS. STEINFELD: For example, if you only
11 blasted two hours in a day, you'd have to pay for four
12 hours.

13 MR. JOE GELLER: Four, okay.

14 MR. JESSE GELLER: Is it four hours, or is it
15 the full day?

16 MS. STEINFELD: Four hours.

17 MR. ZUROFF: So if you're blasting for six
18 hours --

19 MS. STEINFELD: Eight hours, right.

20 MS. NETTER: Is there a standard practice in
21 this field requiring police details? Can we just say,
22 in accordance with the customary and standard practices
23 and --

24 MR. JOE GELLER: I'm sure it's -- did this

1 come from the chief?

2 MS. STEINFELD: The fire chief.

3 MR. JOE GELLER: I'm sure it's the -- because
4 the standard practice is to have the fire watch there
5 during the blasting period. But the way the collective
6 bargaining works is that they get paid for a four-hour
7 shift or an eight-hour shift. So if that's what you're
8 talking about, we'd be doing that anyway and that is
9 the standard in the town anyway.

10 MS. NETTER: The practice is standard in the
11 Town of Brookline?

12 MR. JOE GELLER: Yes.

13 MS. NETTER: How about police detail? Do we
14 know that?

15 MR. JOE GELLER: Well, police detail requires
16 police details to be there whenever there's something
17 happening in the roadway or something like that, and
18 that we have to do anyway.

19 MS. NETTER: So we can say in accordance with
20 the standard -- I'm asking everybody.

21 MR. HUSSEY: Yes.

22 MS. STEINFELD: I think that's -- we haven't
23 spoken with the police chief yet, but I'm sure that's
24 reasonable.

1 MS. NETTER: I'm sure he's not going to do
2 something different for this.

3 MR. HUSSEY: There's fire watch they have on
4 buildings when they're doing roofing work that requires
5 flame, when they're doing welding work, so there's
6 precedent for this.

7 MS. NETTER: Yeah. I think everybody's saying
8 yes. So good. That's an easy drafting job.

9 MS. MORELLI: Could I just clarify one thing?
10 You asked about what does "all day" mean. And the fire
11 chief wanted to make it clear that as long as
12 explosions are on the site, there would be a fire
13 detail. So it's not just while they're blasting. Is
14 that understood?

15 MS. NETTER: We're assuming this is standard
16 practice in the Town of Brookline. Everybody is saying
17 yes.

18 MR. LEVIN: As I recall from the last -- not
19 the last -- when the blasting consultant was
20 speaking -- and it was the town's because our guy got
21 lost on the way over here -- that dynamite is not kept
22 on the site except when it's being used.

23 MS. NETTER: Okay.

24 MR. JESSE GELLER: Okay. I just want to make

1 sure, does anybody -- Mr. Schwartz, I know you're
2 standing at the podium for a reason.

3 MR. SCHWARTZ: I think we've covered just
4 about all of the various conditions, but I just want to
5 point out a couple. I just want to understand the
6 process now because there's a few more that I just want
7 to comment on. If they're going to be discussed one by
8 one, I'm happy to wait.

9 MR. JESSE GELLER: Well, no. If you have
10 comments on them, we need them tonight.

11 MR. SCHWARTZ: Well, no. I'm saying at some
12 point now or later this evening as you're discussing
13 them, whatever the preference is. Now? What is the --

14 MR. LEVIN: Now.

15 MR. SCHWARTZ: So just a couple of things I
16 just want to point out. In Condition 47, we expressed
17 some serious concerns.

18 (Inaudible discussion.)

19 MR. SCHWARTZ: Okay. So I'm just told by
20 Maria that they're okay deleting that condition, so --

21 MS. MORELLI: I just want to explain, if I
22 may. Enforcement for this is under general bylaw 8.26,
23 which is the stormwater bylaw. And because of that,
24 this condition is not necessary, Condition 47.

1 MR. JESSE GELLER: So we're down to 65
2 conditions.

3 MR. SCHWARTZ: And then one other condition,
4 Condition 68, which we objected to in its entirety.
5 It's the last condition in the permit. We don't
6 believe that this condition is appropriate for a permit
7 as opposed to -- this is more of a contractual
8 provision. I just haven't seen this in the Town of
9 Brookline or elsewhere, frankly.

10 MR. NAGLER: This is word for word. It's an
11 Andover decision that was granted to Avalon.

12 MR. SCHWARTZ: I guess I should be familiar
13 with that one since I did it, but --

14 MR. NAGLER: It's word for word.

15 MR. SCHWARTZ: Okay. It's a long time ago.
16 Nevertheless, I think -- I'm just not -- haven't seen
17 it in the Town of Brookline.

18 The zoning enforcement power of the zoning
19 enforcement official enforces this permit. And the
20 town itself -- the town as a whole does not -- the
21 board does not retain continuing jurisdiction over this
22 permit, so I'm not really sure how this would work.

23 MR. ZUROFF: What if we substituted "building
24 commissioner" for "town"?

1 MR. BOOK: Well, isn't -- under the 40A
2 context, isn't the building commissioner --

3 MR. JESSE GELLER: -- the enforcement.

4 MR. BOOK: Yeah. Do we need this?

5 MR. NAGLER: I thought it was helpful, and I
6 didn't think there would be an objection to it.

7 MR. SCHWARTZ: Well, we object.

8 MR. NAGLER: I didn't think there would be an
9 objection to it, because it was accepted, frankly, by
10 your firm.

11 MR. SCHWARTZ: You know, Sam, honestly, if you
12 went back to -- you know, I've done a lot of these.
13 That decision, I think, was rendered in about 2001. I
14 can't even speak to it. I believe you, but, you know,
15 we also didn't have 68 conditions in that case. It was
16 also litigated for about 10 years. So every case is
17 different. But this is not a typical --

18 MR. NAGLER: So what's your substantive
19 objection?

20 MR. SCHWARTZ: The substantive objection is
21 that the zoning enforcement officer has the ability to
22 enforce this permit. That's the ability to enforce any
23 zoning permit, not for some undefined town body --
24 whether it's this body or somebody else -- to allege

1 that there's a default under the permit and give us a
2 cure right.

3 The ability to issue or not issue building
4 permits and certificates of occupancy and to enforce
5 this permit postconstruction under the building code or
6 under the general powers of the zoning enforcement,
7 that's what the enforcement should be, not this
8 provision.

9 MR. NAGLER: Are you saying it's an unlawful
10 provision?

11 MR. SCHWARTZ: I wouldn't go so far as to say
12 that. I'm not sure if it's lawful or not. I haven't
13 seen it in any other decision of the Town of Brookline
14 that I've reviewed, which, in that regard, may be
15 unlawful under 760 CMR.

16 MR. HUSSEY: You've got the right that it
17 falls under 40B, applicable zoning and the building
18 codes.

19 (Multiple parties speaking.)

20 MR. JESSE GELLER: It says the attorney's fees
21 are Jocelyn.

22 MR. BOOK: Why would the town do anything
23 different than we normally do for a building, zoning
24 issue?

1 MR. JESSE GELLER: No. You know, I think
2 if -- the answer to the question is that the purpose is
3 to give the town the option of engaging outside legal
4 counsel and collecting legal fees to offset what it
5 owes counsel.

6 MR. HUSSEY: Well, I think there could be,
7 perhaps, one, in a sense -- who's representing the town
8 in the suit against the developer now and in the past?
9 Isn't that town counsel?

10 MR. JESSE GELLER: Yeah.

11 MR. HUSSEY: Would that not be something of a
12 conflict of interest to have that counsel --

13 MS. NETTER: No. These fees wouldn't go to
14 town counsel.

15 MR. HUSSEY: I see. Okay.

16 MR. SCHWARTZ: I think -- to answer your
17 question, I'm quite doubtful about the legality of this
18 provision as it relates to attorney's fees. I'm not
19 going to swear on a bible that it is illegal, but I
20 have serious doubts about it.

21 MR. JESSE GELLER: Do you have any thoughts on
22 it, Mr. Zuroff?

23 MR. ZUROFF: I don't know. That's the
24 answer. I don't know whether it's enforceable or not.

1 MR. NAGLER: Could we take it under
2 advisement?

3 MR. JESSE GELLER: Yes, absolutely. But that
4 means that I have to explain what happens come the
5 witching hour of 10:00 p.m. this evening. It's now
6 10:15.

7 So as I stated at the beginning when I was
8 running through administrative details, the notion is
9 that tonight we will close the hearing in this matter.
10 The ramification of that is that once the hearing is
11 closed, no more testimony. So other than for
12 clarification purposes, right, no more questions. To
13 the extent that you have additional questions that
14 either impact findings, conditions, you've got to ask
15 them now. And I'm not referring to questions you may
16 have for legal counsel. But if there is information
17 you require for the applicant or if there is
18 information you need from any other party, this is the
19 time that you have to ask it to get it. Everybody
20 clear?

21 And the applicant -- Marc, you're standing
22 there. This is your last opportunity.

23 MR. LEVIN: Speak now and forever hold my
24 piece.

1 I'd just like to take a moment to thank the
2 planning staff, truly, and the many departments that
3 spent countless hours working to help make this a
4 better plan. Also, special thanks to your efforts and
5 thoughtful consideration throughout this lengthy
6 process. You know, we know this is a thankless
7 challenge, and we really appreciate your efforts
8 throughout.

9 MR. JESSE GELLER: You're welcome.

10 So we are closing this hearing. We will now
11 move into meetings in which we will continue our
12 discussions on conditions. The next meeting is
13 January 26th at 7:00 p.m.

14 And do we want to announce the day after
15 that? Are we certain on that?

16 MS. MORELLI: The other possible dates are
17 January 28th and February 2nd and 4th. And it's not --
18 Mr. Zuroff cannot be here on February 4th.

19 MR. JESSE GELLER: But, Mr. Zuroff, just to
20 make sure you understand --

21 MR. ZUROFF: I know I'm not voting.

22 MR. JESSE GELLER: No, no. As a matter of
23 fact, I was going to tell you something else.

24 So what I have been told by legal counsel is

1 that once the hearing is closed, the fact that you do
2 not attend a public meeting does not impact your
3 ability if you need to step in to vote, so you're still
4 on.

5 MS. NETTER: And to participate.

6 MR. JESSE GELLER: And to participate.

7 MR. ZUROFF: I guess I'm still here.

8 MR. JESSE GELLER: You are. Okay. 26th,
9 28th, February 2nd, February 4th, if necessary.

10 MS. NETTER: It will be.

11 MR. JESSE GELLER: Edie is saying it will be.

12 MS. NETTER: Because I have to come back with
13 revisions.

14 MS. STEINFELD: As a reminder, several of you
15 also gave me some of Thursday's --

16 MR. JESSE GELLER: Correct.

17 And we're going to try and wrap this up
18 quickly, but, Mr. Nagler, I just wanted you to speak
19 briefly about the meeting process. And I've obviously
20 started to talk about that, but I want you to speak the
21 way a lawyer speaks.

22 MR. NAGLER: At the public meetings, the board
23 deliberates in public, in the open, and can consult
24 with your consultant, Ms. Netter, you can consult with

1 legal counsel, you can ask clarification questions from
2 Ms. Morelli, Ms. Steinfeld, the building commissioner,
3 and any town official.

4 Again, you may not accept the testimony or an
5 attempt to persuade you to decide one way or the other
6 on any issue.

7 MR. JESSE GELLER: And explain the
8 ramification.

9 MR. NAGLER: The ramification of -- we have an
10 extension that expires in one hour and forty minutes.
11 And if there is something that is deemed a public
12 hearing -- because we have departed from the ground
13 rules of a public meeting, we don't have any extension
14 beyond that time and that means we run the risk of the
15 comprehensive permit being constructively granted as
16 applied for without all of our conditions.

17 MR. JESSE GELLER: Okay. Thank you.

18 Everybody understand? Anybody have questions
19 for Mr. Nagler on any legal --

20 MR. HUSSEY: No. I only have a question for
21 staff. Could we update this time table now?

22 MS. STEINFELD: Sure.

23 MR. JESSE GELLER: I want to thank everyone,
24 and we will see you on January 26th.

1 MR. SCHWARTZ: Mr. Chairman, if I might, I
2 think you need to actually close the public hearing.

3 MR. NAGLER: That's true. You need to
4 announce it.

5 MR. JESSE GELLER: I now want to state that
6 the public hearing is closed for testimony. Thank you.

7 (Proceedings concluded at 10:20 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 23rd day of January, 2015.

14 _____

15 Kristen Krakofsky, Notary Public

16 My commission expires November 3, 2017.

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