

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

APPEALS COURT
NO. 2005-1721

M. HANIF BUTT,
Plaintiff- Appellant,
v.

ZONING BOARD OF APPEALS OF THE CITY
OF SOMERVILLE, PHILIP J. ERCOLINI,
GERALD MCCUE, HERBERT F. FOSTER, JR.,
MARYANN HEUSTON, MARY JEKA, ESQ.,
RICHARD J. DALEY, JR. and STUART J.L.
GARDNER, as they are members of the ZONING
BOARD OF APPEALS OF THE CITY OF
SOMERVILLE, MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY and
EMERALD DEVELOPMENT GROUP, INC.,
Defendants-Appellees.

BRIEF OF PLAINTIFF/APPELLANT
M. HANIF BUTT
AND RECORD APPENDIX (Pages A.0001 - A.0077)

On Appeal from a Judgment of the Superior Court

By his attorney,

Douglas H. Wilkins
BBO #528000
ANDERSON & KREIGER LLP
43 Thorndike Street
Cambridge MA 02141
(617) 252-6575

Dated: January 9, 2006

STATEMENT OF THE ISSUES

1. Does an abutter have standing as an aggrieved person under G.L. c. 40A, § 17, to challenge the special permit for a project that already has involved a trespass onto his property, will cause vibrations on his property, will block sunlight and view to a portion of his property, and will place buildings within 0.55 feet of his property line?
2. May a Special Permit Granting Authority ("SPGA") defer and delegate the determination of the setback between the Project and the plaintiff's property?
3. Did the Court err as a matter of law, and apply the wrong legal standard, in determining whether the Project violates Somerville's rear lot line setback requirements, where its design includes elements less than 18 feet from the most distant property line parallel to the street at the relevant location?
4. Did the SPGA omit mandated findings and abuse its discretion by failing to determine whether the Project minimize the impact upon Dr. Butt's adjoining property?

STATEMENT OF THE CASE

Proceedings

This is an action pursuant to General Laws Chapter 40A, Section 17, to annul a decision (the "Decision") by the Zoning Board of Appeals of the City of Somerville (the "Board") granting a special permit with site plan review, with conditions for defendant Emerald Development Group, Inc. ("Emerald") to construct a new, 14-unit condominium complex (the "Project") at 343-349 Summer Street, Somerville, Massachusetts (the "Site"). A. 8-27. The defendant, Massachusetts Bay Transportation Authority (AMBTAA"), once owned, but no longer owns, the Site. A.208.¹

Dr. Butt directly abuts the Site. A. 50. He resides and conducts his profession at 341 Summer Street, Somerville, Massachusetts, which shares boundaries along the Site=s easterly and northerly lot lines. Id.

On March 26, 2003, Emerald moved for summary judgment on standing, which the Court denied on May 6,

¹ The site was conveyed to Dakota Partners LLC by deed dated December 13, 2002, recorded on December 18, 2002 in Book 37414, Page 63. A. 52. The manager and 100% owner of Dakota Partners LLC is defendant Emerald Development Group, Inc. Id.

2003, after hearing. A. 5, 30-31. On October 22, 2003, the Court granted Emerald's motion to continue the trial. A. 5. On December 29, 2003, Emerald moved for a limited remand to the ZBA "for the limited purpose of clarifying certain conditions in" the Decision. A. 34. The Court granted the motion, over opposition, on January 6, 2004. A. 5.

On remand, Emerald presented a new plan, showing setbacks of 3 feet, where the prior plans showed a 0.55 foot setback. A.336; Tr. III-97. The plaintiff did not oppose an increased setback; he argued that the setback should be increased to 15 feet. A.346. The Planning Board declined to issue a recommendation on remand. A. 53². Emerald withdrew its remand application to the ZBA, after hearing. A. 53, 343; Tr. III-69.

At trial in April 2004, the parties presented witnesses and stipulated to the admissibility or limited admissibility of exhibits, as set forth in the index to the binder of exhibits. Tr. III-74.

² Actually, the Court's findings refer to a 10 foot setback that Dr. Butt wanted at trial in April, 2004. A. 53. The Court stated that "as a result", the Planning Board refused to recommend an increased setback, but that refusal occurred before the trial. This anomaly duplicated Emerald's proposed findings of fact. A. 46-47.

Over a year later, on May 26, 2005, the Court issued its findings, which largely reiterated Emerald's trial memorandum, and entered judgment for Emerald and the City on May 27, 2005. A. 6, 49-62. After the plaintiff's motion to amend the findings and alter the judgment was denied on July 27, 2005, the plaintiff filed a timely notice of appeal on August 8, 2005. A. 6, 72-73.

The Zoning Ordinance

Section 7.11.1.C of the Somerville Zoning Ordinance (Athe Ordinance@) requires a special permit with site plan review to construct a residential building with seven or more residential units in the Davis Square Central Business District (ACBD@) District. A. 134. Section 5.2.5 of the Ordinance requires the Board to make findings on 21 specific issues relating to the impact of the proposal on the neighborhood, the site and the City before issuing a special permit with site plan review. Portions of that section are set forth below in Part II.B of the Argument Section and in the Addendum to this Brief.

Section 8.5 of the Ordinance requires a rear yard setback of 10 feet plus two feet for each above-ground story of the proposed building in the CBD District.

See discussion below, quoting ' 2.2.94 of the Ordinance.

FACTS

The Site is in the Davis Square Central Business District (ACBD@) under the Ordinance. A. 50, 51.

The portion of the CBD District at issue here is a finger, less than two lots wide, extending between residential zones. A. 190. The Site abuts residences to the north and east, Summer Street to the south, and a large parking area on the west. A. 52, 407; Tr. 4-71. The property at the rear of the Site is zoned residential.

The Site consists of the assemblage of three contiguous, vacant parcels of land identified as 343, 345 and 349 Summer Street in Somerville and containing approximately 4,000+ square feet, 6,250+ square feet and 6,550+ square feet, respectively, for a total of approximately 16,800+ square feet. . . and is identified on the Somerville Assessors' plans as Lots 25-D-33, 34 and 35.@ A. 51. AEach of the three lots comprising the Property is rectangular. Assembled together, the Property is roughly rectangular in shape with the exception of the rear corner of lot 343, which extends several feet beyond the adjacent rear

property line" which, in the Court's view, rendered the lot "a lot of odd shape." A. 51. The Site's rear lot lines run virtually parallel to the front lot line in three segments of 44', 42' and 42', respectively. A. 51-52.

The plaintiff's building is 2 stories high, with a gabled attic providing an additional 2 floor. A. 54; Tr. III-32. The other existing residences in the neighborhood are also 2 2 stories tall. A. 279-280; Tr. ; oversized Exhibits 12, 13A.

Emerald applied for a Special Permit/Finding under Section 7.11.1.c of the Ordinance in order to construct a four-story apartment building with 16 units. A. 52. It later reduced the number of units to 14 by locating the two affordable units off the Site. Id. The Project entails placing the proposed new building's exterior wall between 11.24' and 0.55' from the plaintiff's buildings and constructing a 60 foot tall, 4 + story building.³ A. 52, 54, 204; Tr. 111-115. The Project includes building underground elements within one foot of the plaintiff's property line. A. 196; Tr. III-115. The proposal leaves only a

³ It is "4+" stories because a cupola extends above the fourth floor, to approximately a height of 60' above ground level. Ex. 7; Tr. III-117.

10' setback from Dr. Butt=s property line at the rear A.204; Tr. III-117).

The Court found that "[a]bove ground, the proposed new condominium building would not only be visible from the plaintiff=s house, but would block the view to the west by placing the building=s exterior wall between 11.24' and 0.55' from the plaintiff=s buildings." A. 54; Tr. IV-22. The plaintiff lives on the second floor of his building. A. 54; Tr. III-29. The view from, and light to, those rooms would be reduced by the proposed placement of the proposed building. A. 54, 272-278. Views from the first floor of the plaintiff=s building would also be affected by the proposed project. Id. "At certain times during the day and during certain seasons, the Project will cast some shadows on Dr. Butt's building". A. 54, 297-310; Tr. IV-18 to 22.

The plaintiff=s property also includes one story in the rear, containing two apartment units, a storage space, and a lobby area. Butt DX. In the afternoons, the project would block light to the west-facing and south-facing walls of the one story building at the rear of the plaintiff=s property. Id.

During construction, vibration impacts upon

plaintiff=s residence are "possible," and Emerald has advised Dr. Butt to take pictures to document any damage for insurance purposes. A. 311; Tr. IV- 22 to 23. While its application was pending before the Board, Emerald told Dr. Butt that it planned to build underneath his house:

Install new underpinning beneath the perimeter of the adjacent building. ... This underpinning will be left in place.@ (italics added.)

A. 311. It now claims that it need not do so, although it has not abandoned this plan. Tr. IV-57. However, its workers have already trespassed upon Dr. Butt's property for the purpose of site preparation. A. 312-318; Tr. III-64-65.

The Board=s Decision

The Board held a public hearing on Emerald=s application for a Special Permit on April 10 and June 12, 2000. A. 408. On June 26, 2002, it voted to approve the requested Special Permit/Finding with conditions, including Condition #1, stating that Athe Applicant shall attempt to increase the building setback from the lot line on the east side where possible.@ ("Condition 1") A. 25, 53. On July 9, 2002, the Board filed the Decision with the Somerville City Clerk. A. 21.

SUMMARY OF ARGUMENT

The plaintiff has standing as a party aggrieved by the Decision in that he would be significantly and adversely affected by the proposed project in a way not shared by the general public. The specific impacts upon the plaintiff and his property include the following: the Project's site development has already used his property without permission; the proposed building will be only 0.55 feet from his property line in some places; it will be 11.24 feet in others; the proposed building will block his view to the west and to the south, from the rear of Dr. Butt's property; the proposed building will cast shadows upon his property and building in the afternoon or evening at all times of the year; the existence of windows in the proposed building will result in a loss of privacy for Dr. Butt and his patients; and construction of the proposed building will cause vibrations at plaintiff's property, and at his building, creating a risk of foundation damage.

The Board can not lawfully approve a site plan when a building setback must be changed prior to construction. Such action violates Section 5.2.3.3 (requiring site plans showing proposed setbacks) and

Section 5.6 of the Ordinance, which requires ZBA approval of all plans for the project as the Developer proposes to construct it.

Although it is plainly Apossible@ to increase the building setback from the lot line on the east side, the Decision unlawfully defers and delegates the resolution of that issue by leaving it to the applicant to determine what is Apossible@, ostensibly with review only by the Building Inspector. The Board=s failure to require the applicant to explore the feasibility and impact of increasing the building setback to the easterly lot line, and to present a proposal for addressing the problem, subject to Board approval, was unlawful, arbitrary and capricious.

Apart from Condition 1, which at least implicitly finds a need for the minimization of impacts, neither the ZBA nor the Planning Board made required findings on the crucial issues of loss of view, light and shadow impacts, proximity to his home, incompatibility with the size and nature of existing buildings surrounding the property. The Ordinance requires findings that each of these impacts is minimized.

ARGUMENT

I. THE PLAINTIFF HAS STANDING WHERE HIS CLAIMS COME

WITHIN THE SCOPE OF CHAPTER 40A AND THE ZONING
ORDINANCE.

A. The Standard for Aggrievement Includes
Injury to the Interests Asserted Here

A person "aggrieved" by a zoning decision has standing to appeal. G.L.c. 40A, § 17. Butler v. City of Waltham, 63 Mass. App. Ct. 435 (2005). As a direct abutter, Dr. Butt enjoys a presumption of standing to challenge zoning decisions affecting the Site.

Marashlian v. Zoning Board of Appeals of Newburyport, 421 Mass. 719, 721 (1996). That presumption recedes only when the defendant offers evidence supporting his or her challenge to the plaintiff's standing. Watros v. Greater Lynn Mental Health & Retardation Ass'n., Inc., 421 Mass. 106, 111 (1996). The challenge must be supported by evidence. Valcourt v. Zoning Board of Appeals of Swansea, 48 Mass. App. Ct. 124, 128 (1999), review denied, 430 Mass. 1114 (2000).

In Marashlian, 421 Mass. at 721, the Supreme Judicial Court addressed and clarified the test for standing in the context of a challenge based upon traffic and parking. In that case, abutters challenged a special permit and variances for a hotel that would cause a minimal increase in traffic and a decrease in parking spaces. Id. at 722; see id. at

729-730 (dissenting opinion) (the impacts were quite minimal). The Court held that the Aggrievement@ standard should not be read narrowly. Id. at 721, 722. Plaintiffs must merely offer Acredible evidence@ to support their claims, not win them. Id. at 721. In that case, the plaintiffs' fears of increased traffic and decreased parking availability were neither speculative nor too remote for standing. Id. at 723.¹ Therefore, Marashlian concluded, the plaintiffs substantiated their claims that the hotel would cause increased traffic and decreased parking. By contrast, "uncorroborated speculation" that headlights would shine in a plaintiff's window is insufficient. Id. at 723 & n.5, quoting Riley v. Janco Central, Inc., 38 Mass. App. Ct. 984 (1995) (rescript), review denied, 421 Mass. 1108 (1996).

Intangible injuries can support standing, as long as they are not speculative or remote. In Tsagronis v. Board of Appeals of Wareham, 415 Mass. 329 (1993), the Court held summarily that the abutters had standing to challenge a variance for a house. One plaintiff=s Aview of Buzzards Bay would be partially obstructed by construction on the locus and ... the value of his property would be diminished@. The Court

held that the plaintiffs' status as aggrieved parties probably is compelled as a matter of law. Id. at 330 n.4. See also McGee v. Board of Appeal of Boston, 62 Mass. App. Ct. 930 (2004).

In addition to c. 40A itself, a zoning bylaw can expand the class of aggrieved persons. Martin v. Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-day Saints, 434 Mass. 141, 146-147 (2001). In that case, Belmont's zoning bylaw itself provides that the board should take into consideration the >visual consequences= of any proposed structure. Id. Because the Trial Judge found that a proposed church steeple would be visible to the plaintiff from most, if not all, of her property, the plaintiff had demonstrated that she came within the scope of Belmont's bylaw protection sufficiently to confer standing on her. Id. at 147.

Martin cited Monks v. Zoning Board of Appeals of Plymouth, 37 Mass. App. Ct. 685, 686-687 (1994), review denied, 419 Mass. 1106 (1995) (zoning bylaw limited height to protect the "visual character or quality of the adjacent buildings, the neighborhood or the town as a whole."). In Monks, the plaintiffs' evidence that the tower would be visible from their

house and neighborhood "sufficiently particularizes their general contention of visual impact to remove it from the realm of speculative and generalized aesthetic concern". Id. at 688-689. See also Sheehan v. Zoning Board of Appeals of Plymouth, 65 Mass. App. Ct. 52, 54-55 (2005)(upholding finding of standing based upon provisions of the town bylaw).

The purposes of Somerville=s Zoning Ordinance, as reflected in Section 5.2.5(j), requires Aminimizing the intrusion on views from other buildings.@ A. 119. Section 5.2.5(d) concerns the Ascale, massing and detailing of buildings." A. 118. Section 5.2.5(r) addresses prevention of "adverse impacts to light [and] air." A. 120. Section 1.2 makes "prevent[ing] of the overcrowding of land" a city zoning purpose. A. 89.1. Setback requirements are core concerns of the zoning laws and the Somerville Ordinance (Section 8.5).

Dr. Butt=s claims lie squarely within the concern of the Ordinance. A.162. As shown below, he focuses on views from his building and property, blockage of sunlight, insufficient setbacks, the size of adjacent buildings, visual impact, overcrowding and the like. He therefore has standing under Martin, Sheehan, McGee

and Monks.⁴

B. The Plaintiff Has Standing as an Aggrieved Person Under c.40A and the Ordinance.

Dr. Butt has standing here, with or without the presumption, based upon the impacts found below and, where no findings or contrary evidence exist (as on the trespass and vibration issues), based upon uncontroverted evidence and the presumption. This is a case where, "whether characterized as a misapplication of the law, or as a 'clearly erroneous' finding of fact, the judge's decision [denying standing] cannot stand". Bertrand v. Board of Appeals of Bourne, 58 Mass. App. Ct. 912 (2003)(rescript) and cases cited. "Especially given the close quarters involved here, the plaintiff['s] concerns cannot reasonably be characterized as ill-founded or speculative." Bertrand, 58 Mass. App. Ct. at 912.

In this case, the extreme proximity of the proposed construction to Dr. Butt's property has already resulted in site development activities on Dr. Butt's property, without permission. A. 312-318; Tr. III-64-65. A trespass upon the plaintiff's property,

⁴ See also Standerwick v. Zoning Board of Appeals of Andover, 64 Mass. App. Ct. 337, Further Appellate Review Granted, 445 Mass. 1105 (2005).

which occurred while this case was pending, creates an impact upon "legal rights" if there ever was one. See, e.g. Southwick v. Planning Board of Plymouth, 65 Mass. App. Ct. 315 (2005) (subdivision case), citing Rattner v. Planning Bd. of West Tisbury, 45 Mass.App.Ct. 8, 10 (1998) (same). The Judge also ignored the Project's construction impacts on the Plaintiff's property. These include vibration that even Emerald acknowledged has the potential to damage the plaintiff's property. Tr. IV-22 to 23. Emerald also proposed measures along Dr. Butt's lot line to, at least, physically provide "temporary support" within 1 foot of Dr. Butt's land and foundation. Tr. IV-114.⁵ The Court's findings ignore these undisputed facts concerning physical impacts on, or use of, Dr. Butt's property.

The Court did acknowledge injury to Dr. Butt's view, and the reduction in light to his property. It found that the Project "would block the view to the west" would "somewhat reduce[]" the view and light to Dr. Butt's second floor, affect views from the first floor and, "at certain times during the day and during

⁵ Earlier, Emerald proposed to place sheathing under Dr. Butt's building. A. 311; Tr. Xxx. It has not abandoned its sheathing plans. Tr. IV-57.

certain seasons [sic], the Project will cast some shadows on Dr. Butt's building." A. 54. In fact, the shadow studies credited by the Court showed that shadowing will occur during the afternoon or evening in all four seasons, or in the Court's words, "throughout the year." A. 57, 298-310. Dr. Butt testified to the crowding, with associated loss of privacy, that would affect his building and property. Tr. III-50 to 65. Indeed, as argued below, Condition 1, grounded in the SPGA's authority to achieve the Ordinance's purposes, confirms the Board's own concerns regarding the impacts of the minimal proposed setback. This testimony and the Court's findings suffice to show standing. See, e.g. Marashlian; Tsagronis; Martin.

In McGee, 62 Mass. App. Ct. at 930-931, the Court reversed the Trial Court's dismissal, after trial, of the plaintiffs' zoning appeal on standing grounds because:

The impact of [defendant's] proposed construction on McGee and Schivoni's building, rendering the fourth floor a significantly less attractive place to live, is a sufficiently perceptible harm, personal to McGee and Schiavoni, to qualify them as aggrieved persons who may maintain an action for judicial review of the variances.

* * *

Diminishment of light and air and obstruction of view may be bases for aggrieved person status.
[emphasis added].

The Supreme Judicial Court cited McGee's holding with approval in Goldberg v. Board of Health of Granby, 444 Mass. 627, 631-632, n.8 (2005). Here, the plaintiff proved diminishment of light, air and privacy and obstruction of view, not to mention actual use of his property and vibrations extending onto his property.

C. The Trial Court's Rationale Was Legally Erroneous

The Trial Court's rejection of standing, despite the impacts it found, depended upon comparison with a supposed permitted use, namely a "four story office building of 32,000 square feet." A. 57, 59; see also Tr. III-111. This was legal error for several reasons.

First, the impact of an alleged as-of-right project is not legally sufficient ground for rejecting standing. Marashlian 421 Mass. 724, overruled this approach, previously stated in a case repeatedly cited below, Barvenik v. Board of Aldermen of Newton, 33 Mass. App. Ct. 129 (1992). Barvenik and other cases had required a plaintiff to show "a substantial likelihood of harm greater than that which could

result from a use of the property permissible as of right".⁶ The Supreme Judicial Court declined to adopt such a rule, except to the extent that it requires "specific facts to establish perceptible harm". Marashlian 421 Mass. at 724. The magnitude of the threat of harm in relation to that from a permitted use is "a factor that may be considered", but it is not dispositive. Id. 421 Mass. at 724. In this case, there were no other factors to rebut the light, air, view and other impacts.

Third, the Court's supposed as-of-right use is extremely speculative and of questionable legality. A 32,000 square foot building used straightforwardly for office purposes would require a special permit, because Section 7.11 of the Ordinance mandates a special permit for any office use that exceeds 5,000 square feet. A. 139.⁷ The Court's supposed 32,000 square foot "permitted use" would have to divide the

⁶ Even under Barvenik, a plaintiff did not need to incur lost property value or other concrete, quantifiable injury to have standing. 33 Mass. App. Ct. at 133.

⁷ Even on the Court's theory, an office building could only account for 10,000 square feet of as-of-right space, because there are only two types of office uses - medical and non-medical, each requiring a special permit if in excess of 5,000 square feet. A. 139, subsection 7; Tr. 4-37 to 4-38.

office building into 7 distinct uses permitted in the CBD District, each falling into a separate use category under the Ordinance, and each taking up less than 5,000 square feet. This division and size limitation would have to continue for the life of the building, lest the as-of-right status expire.

Emerald submitted no evidence that such a configuration of uses, and perpetual limitations thereon, is or would ever be commercially viable, realistic or even plausible as a potential development. Moreover, the Ordinance is silent on whether that type of mixed-use approach to a single building, would, in fact, avoid special permit requirements. To allow a 32,000 square foot commercial building without a special permit would undermine the apparent intention of the City to regulate the impact of such large buildings. Neither the City, the Board nor the City's Commissioner of Inspectional services ever adopted this position (as opposed to a subordinate employee, who was willing to testify over objection, for Emerald, Tr. IV- 96-97, 107.

In any event, nothing in Marashlian suggests that, merely to identify a non-dispositive "factor",

the Courts should decide whether hypothetical projects, with extreme or even bizarre use configurations not specifically addressed in the Ordinance, qualify as "permitted" uses. Even if Emerald's square footage qualifies for consideration as a "factor", its unusual, unlikely and speculative nature makes it a decidedly insignificant factor - particularly where Marashlian squarely holds that the "permitted use" comparison cannot be dispositive.

To be sure, the Superior Court also adopted as findings certain other propositions advanced by Emerald. It faulted Dr. Butt for failure to submit expert opinion of increased shadows, when, in fact, Dr. Butt relied upon the **same** "professionally developed shadow study" as Emerald, which was conducted **jointly** by both sides to this case. Tr. IV-18. This study demonstrated that "at limited times [i.e. in the afternoon or evening⁸] throughout the year, the Project will cause a shadow on a portion of Dr. Butt's property" A. 57, Ex. 17, 297-310; Tr. III-56; IV-18 to 22. The Court also stated that

⁸ The computer-generated shadow studies credited by the Court reflected shadows from the Project in late afternoon and/or evening at representative times throughout the year: on May 21, June 21, January 21, March 21, September 21 and September 30. A. 298-310.

"Dr. Butt submitted photographs, demonstrating that at present some rooms in his building were encompassed by shadows during the time these photographs were taken - even though the Site is a vacant lot." A. 58, 372-378; Tr. III-87.⁹ The photographs, of course, also showed unobstructed sunlight coming into the rooms from the west. Id. The Court's observation reflected nothing more than the universal fact that any room with sun shining in the windows will also have shadows where the room's own walls block the sun. It does not negate the Court's findings (quoted above) regarding the blockage of afternoon sun and light (and daytime view) that will result from placing a four story building to the west, within inches or feet, of a plaintiff's building. A. 54. If the Court's approach¹⁰ is enough to defeat standing based upon loss of view, light and sun, then virtually no plaintiff will have such standing, but the law is to the contrary. See, e.g. Tsagronis; Martin, 434 Mass. at

⁹ Despite the Court's statement that the Plaintiff did not state when these photographs were taken, he stated that Exhibit 14A was taken on June 2 or 2, 2003 at 6 PM, and the others were taken in May or June in the evening between 2 and 6 PM. Tr. III- 86, 87.

¹⁰ The court also incorporated consideration of the merits into its discussion of standing (A. 59), but the two questions are separate and distinct. Marashlian, 421 Mass. at 721.

146, McGee.

D. The Effect of the Project on Dr. Butt
Would be Special and Different from the
Concerns of the Rest of the Community.

A zoning plaintiff=s rights must be injured in a way that is Aspecial or different from the concerns of the rest of the community.@ Bell, 429 Mass. at 554. However, the plaintiff merely must have "more than a general civic interest" in zoning enforcement. Murray v. Board of Appeals of Barnstable, 22 Mass. App. Ct. 473, 476 (1986); Cohen v. Board of Appeals of Plymouth, 35 Mass. App. Ct. 619, 624 (1993), review denied, 417 Mass. 1102 (1994). Compare Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge, 27 Mass. App. Ct. 491, 496, review denied, 405 Mass. 1204 (1989). (a statement of corporate purpose expressing "a general civic interest" in the enforcement of zoning laws or the preservation of Harvard Square is insufficient).

Here, Dr. Butt=s unique interests derive from the fact that he is a direct abutter and would directly view the proposed development and suffer the impact of reduced setbacks to his own property. Among the purposes of the Zoning Act are securing safety from fire, panic and other dangers and preventing

overcrowding of land. See Cross v. Planning Board of Chelmsford, 345 Mass. 618 (1963). Setback requirements serve these purposes. Brett v. Building Commissioner of Brookline, 250 Mass. 73, 78 (1924). These are the very reasons that courts have long upheld zoning regulations prescribing setbacks in the front, sides and rear of a dwelling. Id.; Wood v. Building Commissioner of Boston, 256 Mass. 238 (1926); Siegemund v. Building Commissioner of Boston, 259 Mass. 329 (1927); Slack v. Inspector of Buildings of Wellesley, 262 Mass. 404 (1928). See Gorieb v. Fox, 274 U.S. 603 (1927).

The general public does not abut the development and would not be affected by the proposed minimal setbacks, or by the Board's failure to require Emerald to submit a plan with greater setbacks. As shown in each of the preceding sections of this memorandum, Dr. Butt, as abutter, would be injured by the project differently than the rest of the community.

II. THE BOARD'S DECISION WAS UNLAWFUL

A. The Board Unlawfully Deferred and Delegated its Decision-Making Duties.

1. Condition #1 Unlawfully Defers and Delegates an Issue of Substance.

In Condition 1, the Decision unlawfully deferred

and delegated to other City officials the resolution of the Project's setback to Dr. Butt's property. See Chambers v. Building Inspector of Peabody, 40 Mass. App. Ct. 762, 766-767, rev. den. 423 Mass. 1107 (1996) and cases cited.

The Ordinance places responsibility upon the Board to ensure that the Project prevents or minimizes certain specific impacts. For example, Section 5.2.5 of the Ordinance requires the Board to make findings, among other things, that "Buildings are . . . advantageously located for views from the building while **minimizing** the intrusion on **views from other buildings** [subparagraph (j)]" and that the design will "**prevent or minimize** any detrimental effect **on adjoining premises** . . . including, . . . (2) preventing adverse impacts to light, air and noise, wind and temperature levels **in the immediate vicinity** of the proposed development [subparagraph (r)]." [Emphasis added]. Imposition of setback requirements to achieve these goals can only reflect the Board's power under Ordinance Section 5.2.6 (A. 117.1, 119) to require the Project to minimize the listed impacts and

accomplish the purposes of the Ordinance.¹¹

To that end, Condition #1 states that the Applicant shall attempt to increase the building setback from the lot line on the east side where possible. @ A. 176. (Emphasis added). The Board's concern with setback issues in the CBD district is no surprise. Emerald acknowledged that the imposition of setback requirements in a special permit to achieve the purposes of the zoning Ordinance is "a common expectation" and a "distinct possibility", even where the Zoning Ordinance does not specifically provide for a setback. Tr. III-140 to 142. See also A. 324, item 4. (According to Emerald, "the Planning and zoning boards are virtually certain to require side yard setbacks (even though none is required for commercial use)" in the CBD District).

The Condition 1's operate phrase as shall attempt

¹¹ The ZBA's authority to impose conditions and limitations upon a special permit derives from Section 5.2.6 of the Somerville Zoning Ordinance, which provides, in relevant part:

the SPGA may attach conditions and safeguards as it deems necessary to ensure that the findings and determinations it must make are complied with, including, but not limited to: [two types of conditions] . . .

to increase the building's setback" is mandatory. See, e.g. Ordinance, Section 2.1 (The word "shall" is always mandatory and not merely directory). To be sure, the Board tempered this mandate with concern over feasibility ("if possible"). Given a feasible plan, however, the mandatory "attempt" -- or, in the Court's words, the "good faith effort" (A. 59) -- to reduce setbacks will be successful.

Feasibility of at least some increased setback is conceded. Emerald admits that "[i]t is always possible to increase a setback". A. 69. (emphasis added). See Tr. IV-63. It is possible as an architectural and engineering matter, to design and construct a building that is set back 15 feet or more from the plaintiff's building.¹² Tr. III-124 to 125; V-18. After the

¹² Emerald never proposed to increase the setback beyond 3 feet, citing financial concerns - including the loss of units. Tr. III-125, 130 to 131; Tr. IV-63, 81-82. Yet, Emerald's financial concerns about the size of the building are not fixed, and have shifted over time. Emerald originally proposed a smaller building to the MBTA as being what we would like to erect on the site. Ex. 38; Tr. III- 137 to 138. As shown in that exhibit, Emerald wanted to build a building with approximately the same setbacks as it now proposed, but with a full 15' setback from the MBTA's vent shaft. Id.; Tr. III-135. By decreasing the setback to the vent shaft, Emerald has expanded the square footage of its originally proposed building by placing the following within 15' of the vent shaft: 6 parking spaces, an elevator lobby, a sprinkler, handicapped

Board's Decision, Emerald actually proposed and submitted a plan with an additional 3 feet of setback. Ex. 25. Because an increased setback is admittedly feasible, an "attempt" to increase setbacks would succeed in creating a greater separation between the Project and Dr. Butt's property. The Board did not decide what setbacks sufficed under the Ordinance, however. Presumably Emerald (or possibly the Building Inspector) would decide how much to increase the setbacks, instead of the Board.

It is unlawful for the Board to delegate to others or to defer until a later date, those matters that bear upon whether or not the special permit should issue. Weld v. Zoning Board of Appeals of the City of Gloucester, 345 Mass. 376 (1963); Chambers, 40 Mass. App. Ct. at 766-767; Tebo v. Board of Appeals of Shrewsbury, 22 Mass. App. Ct. 618, 624 (1986). The key is whether the deferred question is an "issue of substance." Chambers, 40 Mass. App. Ct. at 767, quoting Tebo, 22 Mass. App. Ct. at 624 and distinguishing Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147, 158-159 (1976) (no delegation by the

ramp and a lobby area and some portion of one of the units. Tr. IV-11 to 13.

board).

The determination of setbacks is an Aissue of substance,@ which bears directly upon the Project's compliance with the zoning regulations that protect abutters' interests. In Chambers, 40 Mass. App. Ct. at 766-67, for instance, the board unlawfully deferred the issue of the size and location of the proposed building, which bore upon the impact of the project on the plaintiffs-abutters. The Ordinance recognizes the setbacks are a key issue. See Section 5.2.3.3 (requiring site plans showing proposed setbacks) and Section 5.6 of the Ordinance, which requires ZBA approval of all plans for the Project as Emerald proposes to construct it. The Board's power to impose this condition under Section 5.2.6 derives from the key issue of mitigation or prevention of cognizable impacts under the Ordinance.

Because Condition #1 contains no standards, it not only delegates decisions regarding setbacks, but also allows consideration of matters that are unlawful factors under zoning. Emerald correctly acknowledged that the profitability of a project is not a lawful consideration in a special permit proceeding under Article V of the Ordinance. A. 325; Tr. III-129.

(Stating that the special permit provisions of the Ordinance do not concern "profitability" or the "economics of the project.").¹³ During the Board's hearing, Emerald declined to provide financial information regarding the profitability of the Project. A. 174; Tr. III-127 to 128. Yet, Emerald has relied upon just such financial considerations to avoid increasing the setback. Tr. III-125, IV-63, 81 to 82.

The problems with Condition #1 became evident after the Court allowed Emerald's motion for a limited remand - a motion that tacitly conceded Condition #1's lack of any benchmark for approving the increased setbacks. Emerald claimed that a three foot setback would meet Condition 1. Dr. Butt disagreed. Nothing in the Decision determines whose position is correct. Instead of resolving the issue, the Planning Board declined once again to take a position on this issue,

¹³ Emerald's Vice President stated that A[i]t has been my experience . . . that the profitability or lack thereof of a project has not been of concern to the SPGA. Indeed Article 5 of the Somerville Zoning Ordinance contains no such explicit requirement. . . . According to the Ordinance, the Board is being asked to make positive findings to further the purposes in Article 1, none of which concerns the economics of the project. @ Ex. 23 (pars. 2 and 4); Tr. III-127. The same rule applies as well to Emerald's attempt to invoke economics to justify minimal setbacks.

and the Zoning Board of Appeals (which had the duty to resolve the question in the first instance, if not on remand) accepted Emerald's request to withdraw its application for "clarification." Tr. III-132. The resulting lack of resolution over whether a three foot setback, or a greater one, meets the terms and purposes of the Ordinance highlighted the Board's failure to decide the setback issue in the first instance.

Having identified the adverse impact from the proposed minimal setbacks to Dr. Butt's property, it was the Board's responsibility to require Emerald to determine what increases in building setback were needed to meet the Ordinance's purposes that led to Condition #1 in the first place. Because the Board failed to fulfill that responsibility, the Decision must be vacated.

1. To the Extend that the Superior Court Found That an Increased Setback Was Impossible, its Finding Was Clearly Erroneous

At one point in its Memorandum and Order, the Superior Court stated that "Emerald, in accordance with the ZBA's request, attempted to increase the setback, **but could not do it.**" A. 53 (Emphasis added).

To the extent that the bolded language may be deemed a finding of material fact,¹⁴ it is clearly erroneous. See Ball v. Planning Board of Leverett, 58 Mass. App. Ct. 513, 518 (2003)(setting "aside a trial judge's findings of fact as unsupported by the evidence"); Bertrand, 58 Mass. App. Ct. at 912. In fact, this finding conflicts with the Court's own evident finding, a few lines later (A. 53) that Emerald did present a plan with an "increased setback" on remand (which Emerald later withdrew prior to decision). Emerald drew up a plan showing an increased, 3 foot setback, admitted that increasing a setback is "always possible"; and acknowledged there is no engineering or architectural impediment to an increased setback. A.69; Tr. III-124 to 125; V-18. Emerald (to its credit) never claimed, or asked the Court to find, impossibility. A. 43-48. There was no evidence at all of impossibility to support the Court's finding, so there is no question of credibility of the

¹⁴ It is possible that the Court meant that successful compliance with Condition #1 implicitly required Dr. Butt to agree to Emerald's increased setback, but nothing in the Decision contemplates consent of any abutter. If that is what the Court meant, then its reading of Condition #1 was legally erroneous, as it lacks a basis in the Board's Decision.

witnesses. All of this creates a firm conviction that a mistake was committed.

B. The Decision Approves A Violation of Rear Setback Requirements.

Emerald acknowledged that it did not propose a 18 foot setback at the Site's southerly boundary with Dr. Butt's property (i.e. the back of 343 Summer Street), but instead contemplated a 9 to 10 foot setback. Tr. III-117. Nevertheless, the Court ruled (A. 60) that Emerald's project would not violate Section 8.5 of the Ordinance, which requires a rear yard setback of 10 feet plus two feet for each above-ground story of the proposed building in the CBD District. In doing so, it applied the wrong legal standard.

The lot line running parallel to the street along Dr. Butt's property meets the definition of a Rear lot line in the Somerville Zoning Ordinance, because Section 2.2.94 of the Ordinance (A.104) defines a rear lot line, in two sentences, as follows:

2.2.94. LOT LINE, REAR . Any lot line which is parallel to or within forty five (45) degrees of being parallel to a front lot line, except for a lot line that is itself a front lot line. In the case of a lot having no street frontage or a lot of odd shape, only the one lot line furthest from any street shall be considered a rear lot line.
NOTE See Figure 2H. (Emphasis added).

By the plain language of the rule contained in the first sentence of this definition, any line that is parallel to the Afront lot line@ is a rear lot line That part of the definition is met here by the 42' boundary running north-south between the Site and Dr. Butt=s property. For two reasons, the second sentence does not make that lot line a side lot line.

In the first place, there was no legal basis to call the Site a lot Aof odd shape@, which would exempt the Site from the general definition of rear lot line, quoted above. Words in zoning ordinances should be given their ordinary meaning. Needham Pastoral Counseling Center, Inc. v. Board of Appeals of Needham, 29 Mass. App. Ct. 31, 33, review denied, 408 Mass. 1103 (1990). See Murray v. Board of Appeals, 22 Mass. App. Ct. 473, 478 (The ordinance=s meaning Ais to be ascertained from all its terms and parts as well as the subject matter to which it relates.@); Kenney v. Building Commissioner of Melrose, 315 Mass. 291, 295 (1943).

AOdd@ means A[d]eviating from what is ordinary, usual, or expected; strange or peculiar.@ The American Heritage College Dictionary (3d Ed. 1993). The focus of the Aodd shape@ provision is to specify

that Aonly the one lot line furthest from any street shall be considered a rear lot line.@ Ordinance, Section 2.2.94.

The Site is not of odd shape, under any plausible understanding of the Ordinance's language. First, the Court found that Emerald=s lot is Aroughly rectangular in shape with the exception of the rear corner of Lot 343, which extends several feet beyond the adjacent rear property line. . .@ A. 51. The Court believed that this "several" foot extension "renders the 6-sided lot into 'a lot of odd shape'" under the Ordinance. Id. A roughly rectangular lot, with a small exception of "several feet", is not in any sense "odd" under standard definitions of that word. The undisputed evidence showed that six-sided lots (shaped like an "L") are not "unusual" or "unexpected" in Somerville; other six-sided lots abound in the vicinity of the Project. A. 191; Tr. IV-104 to 106.¹⁵

The Superior Court's approach equates a lot of "odd shape" with any lot having six sides. The Ordinance expressly took a different approach, relying not upon the number of sides, but upon whether the

¹⁵ This is true even without counting any lots shown as separate, adjacent lots on the Assessor=s Map, but held in common ownership as the Site is.

lot's shape is unusual or uncommon in Somerville. The Court never applied this test and therefore applied the wrong legal standard.¹⁶

Moreover, the Site's six-sided shape results from consolidating three rectangular lots. In fact, the MBTA took three separate, rectangular parcels by eminent domain, as set forth in the recorded documents and plans, and those three lots are still shown as such on the City Assessors' Plans. A. 191, 259-262; Tr. III-134. The Court seems to have agreed that at least rectangular lots are not "odd." See also Tr. IV-103 To accept Emerald's position would permit absurd results, by allowing manipulation of the rear yard setback protections through consolidation of lots to permit larger developments right up to the lot line with greater impacts upon adjoining properties than permitted for smaller developments on smaller lots. Tr. IV-74, 78-81. Such absurd results must be avoided. See Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255, 259-260 (2003)(rejecting an inequitable and irregular result where the Legislature had not clearly prescribed that result).

¹⁶ The Court made no findings that L-shaped lots are uncommon or unusual.

On this issue, the testimony of Paul Nonni, a senior building inspector (Tr. IV-85), is not relevant, because Mr. Nonni does not have the final word for the City on the issue (his determinations are subject to appeal to the Board), and because, if the Ordinance is ambiguous, the Board would have to rule on the issue before the matter could be decided in court under any deferential standard. See, e.g. Colangelo v. Board of Appeals of Lexington, 407 Mass. 242, 247 (1990); Clark & Clark Hotel Corp. v. Building Inspector of Falmouth, 20 Mass. App. Ct. 206, 213-14 (1985)(requiring exhaustion of administrative remedies). The Court should have sustained the plaintiff's objections to this line of testimony. (Tr. IV-87 to 95) and, in any event cannot rely upon this testimony -- showing a different lot configuration (Tr. IV-75 to 76).

The Court's reference to the diagram accompanying Section 2.2.94 of the Ordinance does not support the Court's result.¹⁷ On that diagram, the only lot line

¹⁷ Presumably, the Court is referring to a Aside@ lot line shown on that drawing that is parallel to a street, but is between the lot's rear line and not to the lot's front lot line. A. 104. The critical distinction between this case and the drawing is that, in the drawing, the Aside@ lot line is not parallel to

that is parallel to a front lot line is listed as a Rear lot line, except for a Side lot line that runs **between** the street and the lot's Rear lot line.

A. 104. The diagram does not show a lot, like the Site, where the contested lot line is the only line directly behind, and parallel to a segment of the lot's front lot line - a rear lot line under any common understanding and under the terms of the Ordinance.

A special permit should be vacated where necessary variances have not been obtained. Cox v. Board of Appeals of Carver, 42 Mass. App. Ct. 422, review denied, 425 Mass. 1102 (1997); Guiragossian v. Board of Appeals of Watertown, 21 Mass. App. Ct. 111 (1985), rev. denied, 396 Mass. 1105 (1986). See also Ordinance, §5.2.5(h)(requiring a finding of consistency with the purposes of the Ordinance),

A.118.

C. The Board Abused its Discretion and Failed To Make Findings Regarding the Impacts Upon Adjoining Buildings.

The same underlying discomfort with the minimal setback that lead to Condition #1 is also evident in

the lot's own Front lot line, but runs parallel to the front line **of a different lot.**

Board's Decision failure to make the necessary findings regarding impacts upon adjoining properties. Approving the Special Permit without the necessary findings - particularly in light of the findings implicit in Condition #1 -- was an error of law and abuse of discretion. The Board has a duty to make the mandatory findings under the Ordinance, which is not met by a mere repetition of the statutory words. See Wolfson v. Sun Oil Co., 357 Mass. 87, 89 (1970).

The Ordinance requires the Board to make findings on 21 specific issues relating to the impact of the proposal on the neighborhood, the site and the City before issuing a special permit with site plan review. See Section 5.2.5 ("Prior to granting a special permit with site plan review, the SPGA **shall** make findings and determinations that the development of the site . . .") A. 118-120 (Emphasis added). Dr. Butt argued that the project's impacts on his property would violate Section 5.2.5 (j)(4) (Minimizing the intrusion on views from other buildings), Section 5.2.5 (r)(2) (Preventing adverse impacts to light, air and noise, wind and temperature levels in the immediate vicinity of the proposed development. . .) and Section 5.25(r) (Prevent or minimize any

detrimental effect on adjoining premises. @). A. 119-120. He also pointed out that the proposed building, at 4+ stories high, is more massive than the existing, neighboring 2 2 story residences, despite the Ordinance=s requirement that the building be Acompatible in scale@ with surrounding buildings (Section 5.2.5 (r)) and that the Ascale, massing and detailing of buildings are compatible with those prevalent in the surrounding area.@ (section 5.2.5(d)) A. 118, 120.

The only indication of the Board=s views on the impact upon Dr. Butt=s adjoining property appears in Condition #1, which reflects, at the very least, a reluctance to condone the Project=s impacts upon Dr. Butt=s abutting property. In some circumstances, of which this is one, a condition such as Condition #1 functions as a finding. See Tebo, 22 Mass. App. Ct. at 621(ABy their nature, the detailed conditions imposed by the zoning board do double duty as findings@). If condition #1 means anything, it reflects a finding that a revised project design with increased setbacks would reduce the Project=s adverse impacts upon the Plaintiff=s property. The Project therefore fails to "prevent[]" and "minimiz[e]" the

impacts upon the abutting property.

Nothing in the Decision finds to the contrary.

For instance, Section 5.2.5(r) (A.120) provides:

Prevention of adverse impacts. Provisions have been made to *prevent or minimize any detrimental effect on adjoining premises*, and the general neighborhood, including . . . (2) *preventing adverse impacts to light, air and noise, wind and temperature levels in the immediate vicinity of the proposed development.* (emphasis added).

The Board's findings say nothing about minimizing adverse impact to light and air upon the property of Dr. Butt and other "adjoining properties." The same is true of adverse impacts "in the immediate vicinity." The findings regarding traffic, parking, landscaping and the general "*neighborhood*"¹⁸ fail to address impacts upon abutting properties, adjoining buildings and the immediate vicinity of the Project. A. 184, paragraph 24. They thus fail to address the Project's principal vices, namely the impact on views,

¹⁸ The Board found: "Impacts on the Neighborhood: The proposed project is expected to have minimal parking impacts on the neighborhood, especially on-street parking, as at least one and possibly two parking spaces per unit is proposed underground. In addition, the Traffic and Parking Department has determined that the traffic impacts on the neighborhood would be minimal from the traffic study that the developer provided. Finally, the Applicant has designed an attractive residential building with substantial landscaping that would produce minimal aesthetic impacts on the neighborhood." A.184.

light, air, privacy, massing and other consequences of a minimal setback. Nor did the Board make any general finding that detrimental impacts on adjoining properties were minimized or prevented.

In addition, the Ordinance requires the following findings regarding "site and area compatibility" and relationship of the building to the environment:

[The Project] Is designed in a manner that is compatible with the existing natural features of the site and is compatible with the characteristics of the surrounding area, and that the *scale, massing and detailing of buildings are compatible with those prevalent in the surrounding area.* Section 5.2.5(d) [Emphasis added].

Relation of buildings to environment. Buildings are: . . . 4) advantageously located for views from the building *while minimizing the intrusion on views from other buildings.* Section 5.2.5(j) (emphasis added)

The Board's most relevant finding, entitled "Relationship of buildings to the environment",¹⁹ does

¹⁹ This finding reads: "Relationship of buildings to the environment: The building is located harmoniously within the land form, it is located around the existing shaft site and provides for open space both along the street and as a buffer in the rear of the site. The building is compatible in scale and design with those buildings that are visually related to the development site. *The Applicant has done a visual photographic survey of the buildings that anchor the Davis Square Central Business District and has shown that those buildings are typically four story structures. This building is compatible in use with*

not discuss "intrusion on views from other buildings" or the Project's out-of-scale massing. It errs by discussing only the "use" of surrounding buildings, but not the intrusion. The Board's only reference to compatibility with surrounding 2 ½ story homes is to the fact they are "residential in nature" not their scale, and massing. Moreover, it equates the "buildings that are visually related to the development site" with "the buildings that anchor the Davis Square Central Business District", which are located much farther away. A. 183;²⁰ Tr. IV-42 to 44, 71-72.

D. The Alleged Violations Inside Plaintiff=s Building are Neither Relevant nor Supported.

The Court also accused the plaintiff of having zoning violations inside his building.²¹ The Plaintiff

the surrounding buildings as it is residential in nature. The building has been located as advantageously as possible for view and orientation." (Emphasis added). A.183.

²⁰ The difference is crucial, as Emerald's own evidence showed that the neighborhood consists of 2 1/2 story residential buildings and that the larger buildings cannot be seen from the Site.

²¹ It is true that there was an encroachment of long standing (a small roof overhang) onto Emerald's property (A. 51), but nothing turns on that fact. Dr. Butt has standing with and without that overhang, and does not rely upon injury to the encroaching item as part of his case on standing. Moreover, he does not

objected to the relevance of this line of exhibits and testimony on this collateral point not raised by the pleadings or the Board's decision. A.75-76; Tr. III-74, 82.

Neither the Court nor Emerald ever cited a case tying this evidence to a relevant aspect of standing or the merits. The Board's compliance with the Ordinance with regard to Emerald's project at the Site depends upon the criteria discussed above, none of which turns upon alleged violations inside Dr. Butt's building. Nor does Dr. Butt's standing turn on these issues, as there was no contention that his residential and dental office uses were themselves unlawful.

Dr. Butt's property received a Certificate of Occupancy dated April 20, 1990, authorizing A2 & 2 family with general contractor rear@. Ex. 41; Tr. IV-99 to 100. Dr. Butt's property also received a certificate of occupancy dated December 21, 2001 for an Aorthodontics office@, which also reflected the ISD's determination of compliance with building and

rely upon any issue of access across the Site; he testified that his tenants can leave from the rear of his property in the event of an emergency. Tr. III-87.

zoning codes for that use. A. 397; Tr. III-33, Tr. IV-98. See Ordinance, Section 3.1.4.²²

The entire record on the supposed violations rested upon the City's accusations of violations, which were made without taking account of the certificate of occupancy for the A2 & 2 family with general contractor rear.@ A. 411; Tr. IV-26, 99-100.²³ They were also based upon issues raised by a now-abandoned proposal to place Dr. Butt's "dental office" in the rear of the house. A. 391. Tr. III-103. Moreover, Exhibit 37 refers to alleged violations outlined in a letter dated September 18, 2000, which is not part of the record. A. 398. Because that letter was not before the Court, it was therefore impossible to determine what the alleged violations were or whether they presently exist, let alone whether they have any bearing upon this case. As a result, none of these accusations regarding the

²² A Certificate of Occupancy reflects the City Building Inspection Services Division's (AISD's) determination of compliance with building and zoning codes for those uses at that time.

²³ Exhibit 37 itself surfaced only after Dr. Butt filed a separate lawsuit in March, 2004, although Mr. Morris had been trying since May, 2003 to have ISD send such a letter. Tr. III-104.

interior of Dr. Butt's building was shown to have any substance, let alone relevance to the zoning permits for the Site.

CONCLUSION

The Superior Court Judgment should be vacated, with instructions to vacate the Decision or, in the alternative, to remand the case to the Board with instructions to follow the Court's opinion.

M. HANIF BUTT,

By his attorneys,

Arthur P. Kreiger, BBO #279870
Douglas H. Wilkins, BBO #528000
ANDERSON & KREIGER LLP
43 Thorndike Street
Cambridge, MA 02141
(617) 252-6575

Dated: February 12, 2006

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ADDENDUM

ORDINANCE, Section 5.2.5

Prior to granting a special permit with site plan review, the SPGA shall make findings and determinations that the development of the site:

(d) Site and area compatibility. Is designed in a manner that is compatible with the existing natural features of the site and is compatible with the characteristics of the surrounding area, and that the scale, massing and detailing of buildings are compatible with those prevalent in the surrounding area;

* * *

(g) Environmental impacts. Will not create adverse environmental impacts, including those that may occur off the site, or such potential adverse impacts will be mitigated in connection with the proposed development, so that the development will be compatible with the surrounding area; and

(h) Consistency with purposes. Is consistent with: 1) the purposes of this Ordinance, particularly those set forth in Article 1 and Article 5;1/ and 2) the purposes, provisions, and specific objectives applicable to the requested special permit with site plan review which may be set forth elsewhere in this Ordinance, such as, but not limited to, those at the beginning of the various sections.

Where the SPGA determines that one or more of the following objectives is applicable to the particular application for a special permit with site plan review, the SPGA shall also make findings and determinations that the following objectives will be met:

24/ Some of these purposes are quoted below, p. 11

* * *

(j) Relation of buildings to environment. Buildings are: 1) located harmoniously with the land form, vegetation and other natural features of the site; 2) compatible in scale, design and use with those buildings and designs which are visually related to the development site; 3) effectively located for solar and wind orientation for energy conservation; and 4) advantageously located for views from the building while minimizing the intrusion on views from other buildings;

* * *

(m) Enhancement of appearance. The natural character and appearance of the City is enhanced. Awareness of the existence of a development, particularly a non-residential development or a higher density residential development, should be minimized by screening views of the development from nearby streets, residential neighborhoods of City property by the effective use of existing land forms, or alteration thereto, such as berms, and by existing vegetation or supplemental planting;

* * *

(o) Emergency access. There is easy access to buildings, and the grounds adjoining them, for operations by fire, police, medical and other emergency personnel and equipment;

* * *

(r) Prevention of adverse impacts. Provisions have been made to prevent or minimize any detrimental effect on adjoining premises, and the general neighborhood, including, (1) minimizing any adverse impact from new hard surface ground cover, or machinery which emits heat, vapor, light or fumes; and (2) preventing adverse impacts to light, air and noise, wind and temperature levels in the immediate vicinity of the proposed development;

* * *

(t) Screening of service facilities. Exposed transformers and other machinery, storage, service and truck loading areas, dumpsters, utility buildings, and similar structures shall be effectively screened by plantings or other screening methods so that they are not directly visible from either the proposed development or the surrounding properties;

* * *

Ordinance, ' 5.2.5 (emphasis added).

CERTIFICATE OF SERVICE

I, Douglas H. Wilkins hereby certify that I served Plaintiff-Appellant's Brief by causing a copy to be mailed to counsel listed below by first-class mail on this 19th day of January, 2006.

Mark A. White, Esq.
O'Brien & White, P.C.
50 Congress Street, Suite 936
Boston, MA 02109

David Shapiro, Esq.
Assistant City Solicitor
City Hall, Law Department
93 Highland Avenue
Somerville, MA 02143

Douglas H. Wilkins