

#19 Consent Agenda

City of Cambridge

C. Wolf m.

MASSACHUSETTS

That C.M. be requested
to look into w/ Land Dept (+ Foley Hoag & Elmer
In City Council of Cambridge) 12/14 1992
whether P.B. can be

required that P.B. issue special permit before
certif. of occupancy is allowed

YEA	NAY	ABSENT	PRESENT	
				Mr. Ed Cyr
✓				Mr. Francis H. Duehay
✓				Mr. Jonathan S. Myers
✓ (2)			① ✓	Mrs. Sheila T. Russell
			✓	Mr. Walter J. Sullivan
			✓	Mr. Timothy J. Toomey, Jr.
			✓	Mr. William H. Walsh
✓				Ms. Alice K. Wolf
✓				Mayor Kenneth E. Reeves

5 0 0 4
6 0 0 3
C. Russell requests unanimous consent to change her vote to yes



City of Cambridge

Agenda # 20

IN CITY COUNCIL

December 14, 1992

COUNCILLOR WOLF

ORDERED: That the City Manager be and hereby is requested to confer with the City Solicitor and if necessary the Law Firm of Foley, Hoag and Eliot with a view in mind of issuing a report whether or not the Planning Board be required to have before it a Special Permit Application prior to the issuance of an occupancy permit.

In City Council December 14, 1992.

Adopted by a yea and nay vote:-

Yeas 6; Nays 0; Absent 0; Present 3.

Attest:- D. Margaret Drury, City Clerk.

A true copy; *D. Margaret Drury*

ATTEST:-

D. Margaret Drury
City Clerk



CITY OF CAMBRIDGE

Office of the City Solicitor
City Hall

795 Massachusetts Avenue
Cambridge, Massachusetts 02139

Tel. (617) 349-4121

Fax. (617) 349-4307 4134

Russell B. Higley
City Solicitor

Donald A. Drisdell
Deputy City Solicitor

Michael C. Costello
Assistant City Solicitor

Birge Albright
Legal Counsel

Gail S. Gabriel
Legal Counsel

Diane Wynshaw-Boris
Legal Counsel

Laura H. Yager
Legal Counsel

Linda A. Stamper
Legal Counsel

Arthur J. Goldberg
Legal Counsel

December 10, 1992

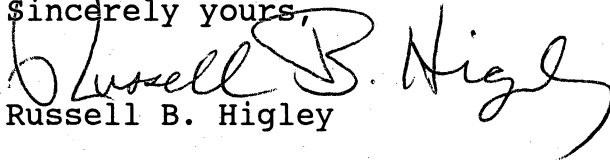
Robert W. Healy, City Manager
City of Cambridge
795 Massachusetts Avenue
Cambridge, MA 02139

RE: 11/23/92 Calendar Item No. 4
9/15/92 Communication No. 42 dated 9/14/92

Dear Mr. Healy,

Enclosed please find the Law Department's response to the above-captioned matters.

Sincerely yours,


Russell B. Higley

RBH/dwb

Encl.: as stated

CHRONOLOGY OF EVENTS RELATED TO MIDAS MUFFLER

January 19, 1989

Yoffa Co., Inc. d/b/a Midas Muffler applied to the BZA for a special permit and a variance to construct a two-story building with three garage bays at 10 Clarendon Ave. as an addition to the existing building. EXHIBIT 1.

February 8, 1989

Planning Board sent memo to the BZA regarding BZA case no. 5819-5825 making a comment with regard to the variance sought. It stated that it is the "Planning Board's position to discourage automobile oriented uses on Mass. Ave. and the policy of the Board is not to grant non-residential uses in the residential zones. The rest of the cases are left to the BZA without comment." EXHIBIT 2.

July 12, 1989

Richard Clarey and Michael Brandon sent a letter to Melvin Gadd pointing out zoning violations stemming from the plan conditionally approved by the BZA on June 22, 1989. EXHIBIT 3.

August 10, 1989

BZA rendered a decision with regard to case no. 5819. EXHIBIT 4.

August 14, 1989

Melvin Gadd, Chair of the BZA sent a letter to Michael Brandon regarding request of an opinion from the City Solicitor. EXHIBIT 5.

August 18, 1989

Michael Brandon sent a letter to Joseph Cellucci making various demands. EXHIBIT 6.

August 28, 1989

Richard Clarey filed a complaint appealing the decision of the BZA naming as plaintiffs: Esther Gibson (owner of 18 Clarendon), Jayanti Dixit (owner of 32 Clarendon), Amesuya Dixit (32 Clarendon), Alan and Sooja C. Bell (owners of 40 Clarendon), Patricia Rauch (tenants of 40 Clarendon), Barbara Hunt (tenants of 40 Clarendon), Avner Segall and Ricki Goldman (tenants of 40 Clarendon). EXHIBIT 7.

September 8, 1989

Joseph Cellucci sent a letter to Michael Brandon in response to Mr. Brandon's letter of August 18, 1989. EXHIBIT 8.

September 13, 1989

BZA noticed 5 plaintiffs for deposition for September 25, 1989: Esther Gibson, Jayanti Dixit, Amesuya Dixit, Alan and Sooja C. Bell. EXHIBIT 9.

September 22, 1989

Pursuant to Richard Clarey's request for a rescheduling of the depositions, a new date was set for October 10th. EXHIBIT 10.

September 27, 1989

John J. Campbell entered an appearance on behalf of Yoffa. EXHIBIT 11.

October 19, 1989

Richard Clarey sent letter to neighbors of Midas Muffler. EXHIBIT 12.

November 6, 1989

Attorney Anthony Pelusi, Jr. sent a letter to the Office of the Bar Counsel responding to a complaint filed by Attorney Richard Clarey against him. EXHIBIT 13.

December 6, 1989

Michael Brandon sent a letter to Frank Duehay suggesting that "the developer's attorneys, the BZA, the ISD, the Building Commissioner, the City Solicitor and the Law Department "and possibly the City Manager are working in collusion with each other not only to circumvent the city and state zoning laws, but also to disregard or selectively enforce departmental policies and procedures in order to limit public involvement, avoid an open assessment of the legal issues entailed, and justify or conceal blatant improprieties." EXHIBIT 14.

October 19, 1990

Richard Clarey moves to add plaintiffs. EXHIBIT 15.

November 2, 1990

Richard Clarey files a Motion of Plaintiffs Alan Bell and Sooja Bell to Withdraw as Plaintiffs from this Action.

EXHIBIT 16.

December 6, 1990

Plaintiff Ricki Goldman and Avner Segal sign request to have their names removed as plaintiffs from the action as they were no longer interested in pursuing the appeal. EXHIBIT 17.

December 19, 1990

Kenneth May files a Motion to Dismiss on behalf of all the plaintiffs. EXHIBIT 18.

December 24, 1990

Richard Clarey files Opposition to Motion to Dismiss Complaint on behalf of Ricki Goldman Segall, Rhodes Williams, Jill Larcomb, John F. Splaine, Esther Splaine, Richard Ploss, Susan Rich, Paula M. Wooley and Anna A. Ippolito. EXHIBIT 19.

December 26, 1990

Richard Clarey files with the Court an affidavit and supporting exhibits. EXHIBIT 20.

January 8, 1991

Planning Board voted unanimously to investigate the Midas Muffler case. See EXHIBIT 34.

March 6, 1991

The BZA filed a Brief in Opposition to Motion to Add Plaintiffs. EXHIBIT 21.

March 8, 1991

Planning Board files Motion to Intervene as Plaintiffs. EXHIBIT 22.

March 14, 1991

Amesuya Dixit signed an affidavit stating that on November 23, 1990, she discharged Richard Clarey from representing her and requesting that the Court dismiss the action. EXHIBIT 23.

Jayanti Dixit signed an affidavit stating that on November 23, 1990, she discharged Richard Clarey from representing her and requesting that the Court dismiss the action. EXHIBIT 24.

Esther Gibson signed an affidavit stating that on November 23, 1990, she discharged Richard Clarey from representing her and requesting that the Court dismiss the action. EXHIBIT 25.

All the above affiants instructed Clarey to dismiss the complaint. He failed to do so. They subsequently fired him.

March 26, 1991

Patricia Rauch signed an affidavit stating that on November 23, 1990, she discharged Richard Clarey from representing her and requesting that the Court dismiss the action. EXHIBIT 26.

Barbara Hunt signed an affidavit stating that on November 23, 1990, she discharged Richard Clarey from representing her and requesting that the Court dismiss the action. EXHIBIT 27.

Alan Bell signed an affidavit stating that on November 23, 1990, she discharged Richard Clarey from representing her and requesting that the Court dismiss the action. EXHIBIT 28.

Sooja C. Bell signed an affidavit stating that on November 23, 1990, she discharged Richard Clarey from representing her and requesting that the Court dismiss the action. EXHIBIT 29.

March 28, 1991

FOLEY, HOAG & ELIOT are retained to represent the Planning Board. EXHIBIT 30.

April 1, 1991

BZA files Brief in Opposition to Motion to Intervene. EXHIBIT 31.

April 4, 1991

Planning Board files Reply Memorandum in Support of Motion to Intervene. EXHIBIT 32.

Richard Clarey filed a Memorandum of Additional Plaintiffs in Support of Their Motion to be Added naming Rhodes Williams, Jill Larcombe, John F. Splaine, Esther Splaine, Richard Ploss, Susan Rich, Paula M. Wooley and Anna A. Ippolito. EXHIBIT 33.

Hearing before Land Court Judge Marilyn M. Sullivan on the Motions.

Date Unknown

Yoffa files Opposition to Motion to Add Plaintiffs and Motion

to Intervene as Plaintiffs. EXHIBIT 34.

April 12, 1991

Planning Board files a supplemental brief. EXHIBIT 35.

April 16, 1991

Yoffa files Response to the Planning Board's Supplemental Memorandum in Support of its Motion to Intervene. EXHIBIT .

April 19, 1991

Yoffa files an additional affidavit supporting its Response. EXHIBIT 36.

April 22, 1991

Judge Sullivan rendered a decision dismissing the Complaint, denying the Planning Board's Motion to Intervene, and in effect denying Clarey's Motion to Add Plaintiffs. EXHIBIT 37.

May 30, 1991

The Planning Board sent a letter to Building Commissioner requesting that before Midas be issued a permit, it be required to seek a permit from the Planning Board. EXHIBIT 38.

December 20, 1991

Law Department sent a Memorandum to Ranjit Singanayagam stating the Law Department's position that since no appeal was taken from the dismissal of the appeal or denial of the motion and no further avenue for appeal existed, "the landowner is entitled to rely upon the special permit in seeking a building permit which conforms to the plans approved by and as set forth in the decision of the BZA." EXHIBIT 39.

February 18, 1992

Michael Brandon sent a letter to Building Commissioner requesting an immediate enforcement of the Zoning Ordinance. EXHIBIT 40.

June 12, 1992

Michael Brandon sent a letter to the Building Commissioner requesting an immediate enforcement of the Zoning Ordinance. EXHIBIT 41.

June 18, 1992

Michael Brandon sent a communication to the City Council.
EXHIBIT 42.

June 29, 1992

Michael Brandon sent a letter to Building Commissioner renewing his demand for enforcement of the building, sanitary and zoning laws. EXHIBIT 43.

July 21, 1992

Les Barber responded to Michael Brandon's letter. EXHIBIT 44.

August 3, 1992

Ranjit Singanayagam sent the Law Department a memorandum which responded to the issues contained in Michael Brandon's letter. EXHIBIT 45.

December 5, 1992

The Law Department sent a memorandum to the Building Commissioner asking that no occupancy permit be issued unless and until the property owner complied with the plans it submitted to the BZA.

December 8, 1992

At the request of the Law Department, Edward O'Connell, for Legal Counsel for the City sent a letter to the Law Department in which he stated the events he recollected with regard to the Midas Muffler litigation. EXHIBIT 46.

CITY OF CAMBRIDGE
BOARD OF ZONING APPEALRECEIVED BY
OFFICE OF CITY CLERK
1989 JAN 19 PM 1:10

The undersigned hereby petitions the board of zoning appeal for the following;

Special Permit XVariance X

CAMBRIDGE MA Appeal

PETITIONER YOFFA CO., INC. d/b/a MIDAS MUFFLERLOCATION 10 CLARENDON AVE., and 2501 MASS. AVE.TYPE OF OCCUPANCY EXTENSION OF MIDAS MUFFLER SHOPZONING DISTRICT RES. B and BA2

REASON FOR PETITION:

X New structureX ParkingX Additions Subdivision Dormer Conversion to Add'l Dwelling Units SignX Use/Occupancy OtherDESCRIPTION TO CONSTRUCT A TWO STORY BUILDING WITH THREE GARAGE BAYS AT
10 CLARENDON AVE. AS AN ADDITION TO THE EXISTING BUILDING.

Sections of Ordinance Cited:

Article 4 Section 4.37H USE VARIANCEArticle 5 Section 5.1, 5.33 SETBACK AND DIMENSIONAL REQUIREMENTSArticle 6 Section 6.435 TANDEM PARKING, 6.441 PARKING SETBACK FROM PROPERTY
LINE.

Applicants for a Variance must complete Page 2

Applicants for a Special Permit must complete Page 3

Applicants for an Appeal must attach a supporting statement

YOFFA CO., INC., d/b/a MIDAS MUFFLER

Signature: By: John J. Campbell

JOHN J. CAMPBELL, ATTORNEY

Address: 90 ELLERY STREET, SUITE 23

CAMBRIDGE, MA 02138

Tel. No. 868-6700Date 1/9/89

000001

REFERENCE TO THE FOLLOWING REQUIREMENTS FOR A VARIANCE MUST BE CITED:

a) A literal enforcement of the provisions of this Ordinance would involve a substantial hardship, financial or otherwise, to the petitioner or appellant:

SEE STATEMENT ATTACHED

b) The hardship is owing to circumstances relating to the soil conditions, shape or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located:

THE EXTENSION WILL NOT AFFECT GENERALLY THE ZONING DISTRICT IN WHICH IT IS LOCATED SINCE THE PROPERTY ABUTTING THE PREMISES OF YOUR PETITIONERS AT 10 CLARENDON AVE. UP TO 28 CLARENDON AVE. ARE PRESENTLY USED FOR COMMERCIAL PURPOSES.

c) Desirable relief may be granted without either:

- 1) substantial detriment to the public good: SINCE THE BUILDING WILL EXTEND INTO THE RESIDENTIAL DISTRICT A DISTANCE OF ONLY 23 FEET
- 2) nullifying or substantially derogating from the intent or purpose of this Ordinance: THE AREA ALONG MASS. AVE. IS NEARLY COMPLETELY USED FOR COMMERCIAL PURPOSES AND THE SMALL ADDITION THAT IS PROPOSED IS IN KEEPING WITH THE COMMERCIAL USE OF THE PRESENT EXISTING BUILDING OF YOUR PETITIONER.

Variance

- A) A LITERAL ENFORCEMENT OF THE PROVISIONS OF THIS ORDINANCE WOULD INVOLVE A SUBSTANTIAL HARDSHIP, FINANCIAL OR OTHERWISE, TO THE PETITIONER FOR THE FOLLOWING REASONS:

IN THE MID-50's WHEN MIDAS WAS FIRST FRANCHISED, THE CONCEPT WAS TO HAVE A SPECIALIZED OUTLET FOR CONSUMERS TO HAVE THEIR EXHAUST SYSTEMS REPLACED. MIDAS REPLACED EXHAUST SYSTEMS EXCLUSIVELY AND NOTHING ELSE.

IN JULY, 1964 WHEN THE CAMBRIDGE STORE OPENED THAT SPECIALIZATION CONCEPT WAS STILL OF PRIMARY FOCUS BY MIDAS. THEREFORE, A FOUR BAY FACILITY WAS SUITABLE FOR SERVICING AUTOS QUICKLY BECAUSE EXHAUST SYSTEMS CAN GENERALLY BE REPLACED WITHIN AN HOUR AND WE WERE ABLE TO STOCK THE PARTS TO SATISFY A LARGE SEGMENT OF THE MARKET. HOWEVER, GRADUALLY THE IMPORT OF FOREIGN CARS CHANGED THE EXHAUST SYSTEM MARKET. NO LONGER WERE WE JUST SERVICING GENERAL MOTORS, FORD, CHRYSLER AND AMERICAN MOTORS. THE INFLUX OF IMPORTED CARS AND THE PROLIFERATION OF MANY DIFFERENT MODELS BY DOMESTIC MANUFACTURERS FORCED US TO INVENTORY MANY MORE PARTS THAN THE BUILDING WAS DESIGNED TO HOLD.

THE NEED TO STOCK MANY MORE PARTS HAS INCREASED EVERY YEAR BUT THE MARKET FOR EXHAUST IS THOUGHT TO BE MATURE WITH LITTLE GROWTH. MIDAS REALIZED THE INEVITABLE AND DECIDED TO VENTURE INTO OTHER AREAS SUCH AS BRAKES. A FOUR BAY FACILITY IS NOT SUITABLE FOR THE INSTALLATION OF BRAKES BECAUSE NO LONGER CAN A CAR BE REPAIRED IN ABOUT ONE HOUR. A BRAKE JOB MAY TAKE 2, 3, OR 4 HOURS DEPENDING ON THE COMPLEXITY OF THE PROBLEM. WE ARE COMPELLED TO TURN AWAY SOME BRAKE BUSINESS BECAUSE WE SIMPLY CAN NOT AFFORD TO TIE UP A BAY.

MIDAS HAS AGAIN DECIDED TO COUNTER THE SHRINKING EXHAUST MARKET BY OFFERING ALIGNMENT AND SUSPENSION SERVICES. THIS REQUIRES AT LEAST ONE BAY FOR THE EXCLUSIVE USE OF AN ALIGNMENT RACK AND COMPUTER. WE CAN NOT INSTALL THE RACK IN THE EXISTING BUILDING BECAUSE WE JUST DO NOT HAVE THE ROOM.

WE WANT TO REMAIN A VIABLE CONCERN BUT WE JUST DO NOT HAVE THE ROOM FOR BAYS, EQUIPMENT AND INVENTORY TO OFFER THE SERVICES THAT THE MARKETPLACE PRESENTLY DEMANDS.

OUR PARENT COMPANY, MIDAS INTERNATIONAL, WANTS ITS FRANCHISES TO PARTICIPATE IN ALL APPROVED SERVICES, BUT WE ARE FORCED TO LIMIT OURSELVES BECAUSE OF OUR SPACE LIMITATIONS. WE CAN NOT EFFICIENTLY AND PROPERLY SERVICE AUTOMOBILES IN 1990 IN THE SAME FACILITIES WHICH WE USED IN 1964.

REFERENCE TO EACH OF THE FOLLOWING STATEMENTS MUST BE CITED.

THIS STATEMENT PERTAINS TO AN ALREADY EXISTING USE AND BUILDING AND IS REQUIRED BECAUSE AN ADDITION TO THE PREMISES IS PROPOSED.

a) It appears that requirements of the Ordinance can or will be met because:
THE EXISTING BUILDING CONFORMS TO THE ZONING ORDINANCE.

b) traffic generated or patterns of access or egress would not cause competing hazard, or substantial change in established neighborhood character:

NO ADDITIONAL TRAFFIC WILL BE GENERATED THAT WOULD CONSTITUTE A HAZARD OR SUBSTANTIAL CHANGE IN ESTABLISHED NEIGHBORHOOD CHARACTER

c) the continued operation of or the development of adjacent uses as permitted in the Zoning Ordinance would not be adversely affected by the nature of the proposed use:

THE PROPOSED USE OF EXISTING PREMISES WILL NOT CHANGE USES PERMITTED IN THE ZONING ORDINANCE, NOR WILL THE USES PERMITTED IN THE ZONING ORDINANCE BE ADVERSELY AFFECTED BY THE NATURE OF THE PROPOSED USE.

d) nuisance or hazard would not be created to the detriment of the health, safety and/or welfare of the occupants of the proposed use:

ALL EQUIPMENT AND METHODS OF INSTALLATION ARE MODERN AND MEET HIGHEST STANDARD OF SAFETY AND HEALTH OF THE OCCUPANTS OF THE BUILDING.

e) for other reasons, the proposed use would not impair the integrity of the district or adjoining district or otherwise derogate from the Ordinance:

THE PRESENT BUILDING IS SAFE AND PROVIDES SUFFICIENT PARKING FOR ALL CUSTOMERS AND EMPLOYEES.

To be completed by OWNER, signed and returned to Secretary of Board of Appeal.

(owner or petitioner)

Location of Premises 10 CLARENDON AVE., CAMBRIDGE, MA

the record title standing in the name of F. STANLEY LITCHMAN

whose address is: 340 RUSSETT ROAD, CHESTNUT HILL, MA
(Street) (City or Town) (State & Zip Code)

by a deed duly recorded in the MIDDLESEX SOUTH County Registry of Deeds in
INSTRUMENT NO. 494, FEBRUARY 17, 1988

Book _____ Page _____ or _____ Registry _____

~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~

J. L. Hawley Letchman
(Signature by Land Owner)

Commonwealth of Massachusetts County of MIDDLESEX

Then Personally appeared the above-name FR STANLEY LITCHMAN

and made oath that the above statement is true.

Бсјоре ме

Before me

John J. Campbell Notary

JOHN J. CAMPBELL

My commission expires January 30, 1992



CITY OF CAMBRIDGE, MASSACHUSETTS

PLANNING BOARD

HALL ANNEX, 57 INMAN STREET, CAMBRIDGE 02139

February 8, 1989

To: The Board of Zoning Appeal

From: The Planning Board

Re: BZA cases 5819 - 5825

The Planning Board has a comment on the variance request from the Midas Muffler Shop, Case #5819. The Planning Board's position is to discourage automobile oriented uses on Massachusetts Avenue and the policy of the Board is not to grant non-residential uses in the residential zones.

The rest of the cases are left to the Board of Zoning Appeal without comment.

000002

July 12, 1989

Mel Gadd, Chairman
Cambridge Board of Zoning Appeals
831 Massachusetts Avenue
Cambridge, MA 02139

RE: Midas Muffler Petition (Yoffa Company)
10 Clarendon Avenue/2501 Massachusetts Avenue
Case No. 5819

Dear Mr. Gadd:

As requested, we write to point out the following zoning violations that stem from the plan conditionally approved by the BZA on June 22, 1989:

1. The plan acted on differs significantly from the original proposal in terms of its subject matter, the nature of the legal action, and the specific relief sought. This new plan was not properly submitted to the Board, nor was advance notice of the public hearing provided through publication, nor was the matter referred to the Planning Board for review. These procedural defects violate Massachusetts law (G.L. c.40A, Sections 9 and 11) as well as the Cambridge ordinance (Sections 10.16 and 10.42).
2. The proposed parking lot on Clarendon Avenue is not allowable by special permit because it creates an accessory use that is explicitly disallowed in the Residence B zone (Sec. 4.32b, note 18).
3. In addition, the proposed parking lot is not allowable by special permit because the ordinance expressly forbids the siting of accessory off-street parking in a more restrictive zone than the zone it serves (Sec. 6.221 and 6.222a).
4. The proposed enlargement of the auto repair garage and parts warehouse violates the Massachusetts Avenue Overlay zoning (Sec. 11.100). The planned annex does not meet the district's setback requirements (Sec. 11.105), it expands industrial uses that are no longer allowed (Sec. 11.106), and it does not conform to the mandatory design standards established to enhance the Avenue (Sec. 11.107.1). Moreover, only the Planning Board--not the BZA--is authorized to grant special permits that allow divergence from these Overlay requirements (Sec. 11.108).
5. The planned Mass. Ave. annex also violates the dimensional requirements of the base zoning in the Business A-2 district (Sec. 5.33).
6. The proposed expansion of the preexisting, nonconforming building and use is not allowable by special permit because it further violates the dimensional requirements and exceeds the limitations imposed by the ordinance on the extent of such increases (Sec. 8.22a).
7. Consequently, the permits granted in this case are improper in that they derogate from the intent and purpose of the ordinance and are in other ways detrimental to the public interest according to the specific criteria set forth in the zoning code (Sec. 10.43).

(more)

000003

Mel Gadd/BZA
Page 2
July 12, 1989

In addition, we note that the new parking spaces may violate the Cambridge parking freeze mandated by the Environmental Protection Agency.

Finally, it has been suggested that the nearby neighbors do not object to Midas's expansion plans. Actually, as the attached memorandum and petition indicate, the neighbors are opposed to the proposal that was publicized.

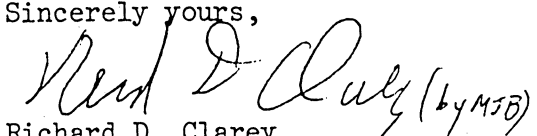
In closing, we ask the Board to reconsider several matters carefully:

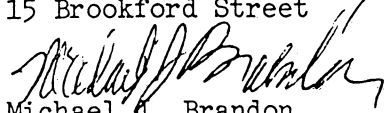
- * The probable negative impacts of the approved plan--
traffic congestion, pedestrian hazards, parking problems, noise, exhaust fumes, hazardous wastes, litter, commercial intrusions in residential areas and loss of potential housing, depressed property values, visual blight, and other public dangers, disruptions, and nuisances
- * The substantial community opposition that has been expressed--
by the immediate abutter, other parties in interest, Trolley Square neighbors, the North Cambridge Stabilization Committee, and the Cambridge Planning Board, among others
- * The highly dubious legality of the Board's approval and the likelihood that it will expose the city and its taxpayers to costly litigation

In view of the above, we urge the BZA to reopen this case, revise its findings, reverse its decision, revoke the special permits, and deny the petition.

We look forward to your timely response.

Sincerely yours,


Richard D. Clarey
15 Brookford Street


Michael G. Brandon
27 Seven Pines Avenue

cc: City Manager Robert Healy; Cambridge City Council; City Solicitor Russell Higley; Building Commissioner Joseph Cellucci & Zoning Specialist Ranjit Singanayagam; Chairman Paul Dietrich, Cambridge Planning Board; Asst. City Manager for Community Development Michael Rosenberg & Zoning Specialist Lester Barber; Chairman George McCray, North Cambridge Stabilization Committee; Traffic Commissioner George Teso; Atty John J. Campbell

Mel Gadd/BZA
Page 2
July 12, 1989

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In closing, we ask the Board to reconsider several matters carefully:

- * The probable negative impacts of the approved plan--
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- * The highly dubious legality of the Board's approval and the likelihood that it will expose the city and its taxpayers to costly litigation

In view of the above, we urge the BZA to reopen this case, revise its findings, reverse its decision, revoke the special permits, and deny the petition.

We look forward to your timely response.

Sincerely yours,

Richard D. Clarey (by MJB)
Richard D. Clarey
15 Brookford Street

Michael G. Brandon
Michael G. Brandon
27 Seven Pines Avenue

cc: City Manager Robert Healy; Cambridge City Council; City Solicitor Russell Higley; Building Commissioner Joseph Cellucci & Zoning Specialist Ranjit Singanayagam; Chairman Paul Dietrich, Cambridge Planning Board; Asst. City Manager for Community Development Michael Rosenberg & Zoning Specialist Lester Barber; Chairman George McCray, North Cambridge Stabilization Committee; Traffic Commissioner George Teso; Atty John J. Campbell



City of Cambridge

MASSACHUSETTS

BOARD OF ZONING APPEAL

1989 AUG 10 PM 2:41
CAMBRIDGE MA.

CASE NO: 5819

LOCATION: 10 Clarendon Avenue
Cambridge, Massachusetts

Residence B & BA2 Zone

PETITIONER: YOFFA Co. Inc d/b/a MIDAS MUFFLER

PETITION: Variance: To construct a two story building with three garage bays at 10 Clarendon Ave. And an addition to the existing building 2501 Mass Ave. The new building is to be used as an extension to the existing Midas Muffler shop.

VIOLATIONS: Article 4.000, Sec. 4.37H (Use) Art. 5.000, Sec. 5.31, 5.33 (Table of Dimensional Requirements). Art. 6.000, Sec. 6.435 Tandem Parking 6.441 Parking Setback from property line.

DATE OF PUBLIC NOTICE: January 30 & February 6, 1989

DATE OF PUBLIC HEARING: February 16, 1989

MEMBERS OF THE BOARD

Melvin Gadd, Chairperson
Edward R. Goode, Vice Chairman
Lisa DeLima
Susan Spurlock

____X____
____X____

____X____

ASSOCIATE MEMBERS

J.T. Rickard
Joshua T. Anderson
George Spartichino

____X____

____X____

Members of the Board of Zoning Appeal heard testimony and viewed materials submitted regarding the above request for relief from the requirements of the Cambridge Zoning Ordinance.

The Board is familiar with the location of the petitioner's property, the layout and other characteristics as well as the surrounding district.

000004

Page 2

The petitioner originally appeared before the Board seeking a variance to allow the construction of a two-story building with three garage bays as an addition to an existing commercial building. Public hearings on this matter were conducted on February 16, March 2, April 6, May 4, and June 22, 1989. According to the testimony presented, the petitioner desires to construct the proposed addition to accomodate its growing business and to better meet the needs of its customers. The petitioner's plans included the demolition of an abutting dwelling and the extension of the business use to the cleared land.

In response to opposition brought by neighbors to the subject property, the petitioner modified its plans so as to locate the proposed addition at the front of the property and to allow for the required parking at the adjacent site of the dwelling to be demolished.

Upon receipt of the above modifications, the Chairman determined that a special permit, rather than a variance, would be the most appropriate form of relief.

Following a discussion of the matter by the Board, the Chairman moved that a special permit be granted. Five members voted in favor of the motion to grant the special permit and found as follows: that the existing building is in conformance with current zoning; that no additional traffic will be generated; that no substantial change in established neighborhood character will be created; that no change of use is presented and that no adjacent uses will be adversely affected; that all equipment to be used in the proposed addition and the methods of installation will meet the highest standard, of safety and will ensure the health of the building occupants; and finally, that the proposed use will be served by sufficient parking for its employees and customers.

The above-relief is granted on the condition that the proposed construction be as per the plans submitted and that the subject property be landscaped as per the discussions held and the revised plans submitted.

The Board of Zoning Appeal is empowered to waive local zoning regulations only. This decision therefore does not relieve the petitioner in any way from the duty to comply with local ordinances and regulatio of other local agencies, including, but not limited to the Historical Commission, License Commission and the Rent Control Board and/or compliance with requirements pursuant to the Building Code and other applicable codes.


Melvin Gadd, Chairperson

Attest: A true and correct copy of decision filed with the offices of the City Clerk and Planning Board on 8/10/89 by Maria Garrow, Clerk.

Twenty days have elapsed since the filing of this decision

No appeal has been filed _____.

Appeal has been filed and dismissed or denied _____

Date _____ City Clerk.



CITY OF CAMBRIDGE

INSPECTIONAL SERVICES DEPARTMENT CITY HALL
CAMBRIDGE, MASSACHUSETTS 02139 (617) 498-9013

JOSEPH J. CELLUCCI
COMMISSIONER OF BUILDINGS
AND HOUSING

August 14, 1989

Michael J. Brandon
27 Seven Pines Avenue
Cambridge, MA

RE: 10 Clarendon Avenue

Dear: Mr. Brandon

At the meeting of the Board of Zoning Appeal on July 27, 1989, the issues in your letter dated July 12, 1989 were discussed. Motion to refer this issues to the City Solicitor for an opinion was presented to the Board, but failed on a vote of 4 to deny.

The members felt that the abutters with legal standing in the case still had their rights to appeal the case through the appropriate channels, and therefore felt their original decision to grant the permits should stand.

Sincerely yours,

Melvin Gadd,
Chairperson

MG/mp

c.c. Robert W. Healy - City Manager
Russell B. Higley - City Solicitor

000003

August 18, 1989

Mr. Joseph J. Cellucci
Commissioner of Buildings and Housing
c/o Cambridge City Hall
Cambridge, Massachusetts 02139

RE: Yoffa Company, Inc., d/b/a Midas Muffler
10 Clarendon Avenue/2501 Massachusetts Avenue
BZA Case No. 5819

Dear Commissioner Cellucci:

We write you pursuant to MGL 40A, section 7, to request prompt enforcement of the zoning ordinance as it pertains to Midas Muffler's planned expansion at 10 Clarendon Ave. and 2501 Massachusetts Ave.

As you know, the Board of Zoning Appeals on August 10, 1989, filed with the City Clerk a decision granting a "special permit"--but not a variance--in the above case. Previously, in our July 12 letter to the BZA (copy attached), we cited more than a dozen specific zoning violations inherent in the revised plan that was concocted by the petitioner and quickly sanctioned by the Board without fully reviewing its legal ramifications under the ordinance. On July 27, however, the Board formally declined to reconsider its decision or even to seek guidance from the city's Law Department unless a lawsuit is filed. In essence, the BZA's actions indicate that its members have no intention of carefully applying or abiding by the zoning laws you are charged with enforcing under MGL 40A and Section 9.11 of the ordinance.

We therefore urge you to initiate "appropriate action or proceedings in the name of the City of Cambridge to prevent, correct, restrain, or abate violations" of the ordinance, as required by Section 9.15. We request that you take the following enforcement actions without delay, as well as any others deemed appropriate:

1. Ask the City Manager to authorize an expedient legal opinion from the City Solicitor addressing (a) our specific allegations of zoning violations, (b) the propriety of the BZA's procedures, actions, and written decision in this case, (c) the legal effect of the apparently inadequate "special permit" that was granted, and (d) the steps that you might take to ensure enforcement of the ordinance in this matter.

2. If necessary, file an appeal of the BZA decision with an appropriate court within the statutory time limit--an appeal seeking to annul the Board's decision and asking for a court injunction compelling the BZA to comply with applicable zoning restrictions and not overstep its authority in conducting its business and making its future deliberations.

3. Notify all concerned parties that Section 9.12 and MGL 40A, sec. 7, prohibit you from granting building permits for this project until all proper variances and special permits have been legally obtained from the appropriate officials. Specifically, make it clear that even if there is no court challenge, the BZA special permit does not provide the petitioner with adequate relief from the zoning restrictions and does not give you the authority to allow this project to proceed in the absence of (a) a special permit properly issued by the Planning Board (not the BZA) pursuant to Section 11.108, or (b) specific variances (not a vague special permit) granted by the BZA following a properly advertised public hearing as required by law.

(MORE)

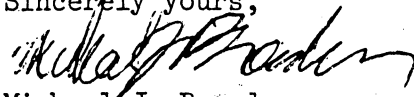
000003

Mr. Joseph J. Cellucci
Commissioner of Buildings and Housing
August 18, 1989
Page 2

4. Order the immediate removal of all temporary signs at 2501 Mass. Ave. that do not comply with Sections 7.11 and 7.125.D.--namely, the "Nobody Beats Midas" banners hanging from the building and attached to the pole of the permanent freestanding sign at the front of the lot, and the paper sign affixed to the window glass that exceeds the allowable 30% area and is also in violation of the 15-day restriction.

We would be happy to meet with you to discuss our concerns in more detail and look forward to receiving your response within fourteen days.

Sincerely yours,



Michael J. Brandon
27 Seven Pines Avenue



Richard D. Clarey
15 Brookford Street

encl.

cc: City Manager Robert Healy; City Solicitor Russell Higley; Chairman Paul Dietrich, Cambridge Planning Board; Asst. City Manager for Community Development Michael Rosenberg & Zoning Specialist Lester Barber; Chairman Mel Gadd, Cambridge Board of Zoning Appeals; Cambridge City Council; Chairman George McCray, North Cambridge Stabilization Committee; Traffic Commissioner George Teso

Berlin, Clarey, Deptula & Levee

ATTORNEYS AT LAW

50 STANIFORD STREET, BOSTON, MASSACHUSETTS 02114

GERALD A. BERLIN
RICHARD D. CLAREY
GEORGE C. DEPTULA
NEWTON H. LEVEE
KAREN D. HURVITZ
PHILLIPS AXTEN
BARBARA HAYDEN FITTS
JEANNE J. SPEIZER
LESLIE K. LOCKARD
KARIN A. GREGORY

TELEPHONE (617) 227-0720
TELECOPIER (617) 227-0243

ALVIN LEVIN
1924-1987
OF COUNSEL
LINDA G. LEFFERT

August 28, 1989

BY HAND

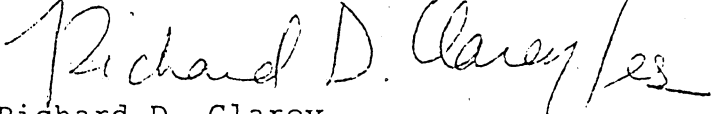
City Clerk
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, Massachusetts

RE: BZA Case No. 5819
10 Clarendon Avenue
Petition of Yoffa Co., Inc.

Dear Sir:

I hereby give notice that a Complaint was filed with the
Land Court today under G.L. c.40A, §17 in the above case. I
enclose a copy of the Complaint.

Sincerely yours,


Richard D. Clarey

RDC:es

Enclosure

4954S

000007

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT

NO. 136686

ESTHER GIBSON, JAYANTI DIXIT,
AMESUYA DIXIT, ALAN AND SOOJA C.
BELL, PATRICIA RAUCH, BARBARA HUNT,
AVNER SEGALL, and RICKI GOLDMAN,
Plaintiffs

V.

BOARD OF ZONING APPEALS OF THE
CITY OF CAMBRIDGE, MELVIN GADD,
EDWARD R. GOODE, LISA DELIMA,
SUSAN SPURLOCK, JACQUELINE T.
RICKARD, GEORGE SPARTICHINO,
JOSHUA T. ANDERSON, and YOFFA CO.,
INC. d/b/a MIDAS MUFFLER,
Defendants

CAMBRIDGE MA.
JUL 23 1989

COMPLAINT

INTRODUCTION

This is an appeal under G.L. c.40A, §17. This Complaint alleges that the Board of Zoning Appeals of the City of Cambridge ("BZA") violated substantive and procedural requirements of the Cambridge zoning ordinance and c.40A in granting a special permit to Yoffa Co., Inc. ("Yoffa") that authorizes the construction of a prohibited garage and warehouse in the Massachusetts Avenue Overlay District and that sanctions the commercial invasion of a residential zone by allowing a lot on which a residence now stands to be converted to a business parking lot. A certified copy of the BZA's decision appealed from, filed with the Cambridge City Clerk on August 10, 1989, is attached hereto as Exhibit "A".

PARTIES

1. Plaintiffs all are residents of homes at the following numbered addresses on Clarendon Avenue within a residence B zone and within 300 feet of the subject property: #18, Esther Gibson (owner); #28, Jayanti and Amesuya Dixit (owners); #32, Alan and Sooja C. Bell (owners); #40 (Apt.), Patricia Rauch and Barbara Hunt (tenants); #40 (Apt.), Avner Segall and Ricki Goldman (tenants).

2. The Defendants are the BZA, the individual members of the BZA who participated in the decision, and the owner of the subject property. The addresses of the BZA members are: Melvin Gadd, 43 Cottage Street; Edward R. Goode, 121 Walden Street; Lisa Delima, 28 Fairfield Street; Susan Spurlock, 330 Walden Street; Jacqueline Rickard, 122 Trowbridge Street; Joshua T. Anderson, 218 Harvard Street; and George Spartichino, 99 Normandy Avenue. The principal offices of Yoffa are located at 2501 Massachusetts Avenue, Cambridge, Massachusetts.

FACTS

3. The decision appealed from grants to Yoffa a special permit for the construction of a garage and warehouse at 2501 Massachusetts Avenue, within a Business A-2 zoning district but in violation of the Massachusetts Avenue Overlay District regulations that supersede the base zoning requirements.

4. Said decision also authorizes an encroachment into the Residence B zoning district adjacent to the aforementioned business property of Yoffa by permitting the use of the lot at

10 Clarendon Avenue, on which a residence now stands, to be used as an accessory business parking lot, in violation of the ordinance.

5. There is a substantial difference between the published relief requested and the relief granted. The petitioner sought a variance to construct a two-story building with three garage bays at 10 Clarendon Avenue as an addition to its existing garage at 2501 Massachusetts Avenue. This was the only petition that was given public notice. The BZA approved a significantly different project and granted substantially different relief: A special permit authorizing the petitioner to construct a new building at 2501 Massachusetts Avenue and to invade the adjacent residential district by using 10 Clarendon Avenue as an overflow business parking lot.

VIOLATIONS

6. Among the specific zoning law violations are the following:

a. The plan acted on differs significantly from the original proposal in terms of its subject matter, the nature of the legal action, and the specific relief sought. The new plan was not properly submitted to the Board, nor was advance notice of the public hearing provided through publication, nor was the matter referred to the Cambridge Planning Board for review. These procedural defects violate Massachusetts law (G.L. c.40A, §§9 and 11) as well as the Cambridge ordinance (Sections 10.16 and 10.42).

b. The proposed parking lot on Clarendon Avenue is not allowable by special permit because it creates an accessory use that is explicitly disallowed in the Residence B zone (Section 4.32b, note 18).

c. The proposed parking lot also is not allowable because the ordinance specifies that disallowed uses cannot be extended into a more restricted zone by special permit (Section 3.32).

201-200 4.11.11 6.30
d. In addition, the proposed parking lot is not allowable by special permit because the ordinance expressly forbids the siting of accessory off-street parking in a more restrictive zone than the zone it serves (Sections 6.221 and 6.222a).

e. The proposed enlargement of the auto repair garage and parts warehouse violates the Massachusetts Avenue Overlay zoning (Section 11.100). The planned annex does not meet the district's setback requirements (Section 11.105), it expands industrial uses that are no longer allowed (Section 11.106), and it does not conform to the mandatory design standards established to enhance the Avenue (Section 11.107.1). Moreover, only the Cambridge Planning Board--not the BZA--is authorized to grant special permits that allow divergence from these Overlay requirements (Section 11.108).

f. The planned Massachusetts Avenue annex also violates the dimensional requirements of the base zoning in the Business A-2 district (Section 5.33).

g. The proposed expansion of the pre-existing, nonconforming building and use is not allowable by special permit because it further violates the dimensional requirements and exceeds the limitations imposed by the ordinance on the extent of such increases (Section 8.22a).

7. Consequently, the permit granted in this case is improper in that it derogates from the intent and purpose of the ordinance and is in other ways detrimental to the public interest according to the specific criteria set forth in the zoning code (Section 10.43).

8. The findings in the written decision being appealed from were not findings specifically discussed and arrived at during the public hearing in this case and are not reflected in the transcript of the BZA's proceedings. Furthermore, the written findings are not supported by the public testimony or other facts available to the BZA. Faults in the findings include the following:

a. Contrary to the BZA findings, the existing building does not conform to current zoning but rather constitutes a pre-existing nonconforming use. It also does not conform to current dimensional requirements and other zoning restrictions.

b. Contrary to the BZA findings, significant additional traffic will necessarily be generated by the addition of three new garage bays and the construction of a parking lot on what is now a residential lot--as the written decision itself acknowledges in referring to the petitioner's desire "to accommodate [sic] its growing business."

c. Contrary to the BZA findings, the established neighborhood character will be changed substantially by the very act of converting a residentially used property to a commercial use and by expanding a relatively small muffler replacement shop into a large, generalized auto repair garage and warehouse facility--especially given the sensitive location of the subject properties in an already congested area immediately adjacent to a city park, a playground, a tot lot, private homes, and an apartment house for the elderly.

d. Contrary to the BZA findings, several use changes are clearly involved: from residential housing to business parking, and from a mere muffler shop to a full-scale auto repair center offering brake, suspension, and alignment services, as well as exhaust system repairs and parts replacement.

e. Contrary to the BZA findings, testimony and other evidence provided by nearby residents, neighborhood improvement groups, traffic engineers, city planners, and the Cambridge Planning Board indicate that adjacent uses--both residential and commercial ones--will be adversely affected by increased traffic congestion, pedestrian hazards, parking problems, noise, exhaust fumes, hazardous wastes, litter, commercial disruption of the residential neighborhood, loss of potential housing, depressed property values, visual blight, and other public dangers, disruptions, and nuisances.

9. The broadness, vagueness, internal contradictions, and other flaws in the BZA's written decision render it invalid and meaningless. Although labeled as a petition for a variance to build at 10 Clarendon Avenue, the decision instead grants a special permit to build at 2501 Massachusetts Avenue. Although

the zoning ordinance empowers the BZA to grant special permits in certain circumstances when specific criteria are met, no pertinent specific sections of the ordinance are cited in the decision and the appropriate criteria do not appear to have been applied or satisfied in any instance. Many applicable zoning requirements seem to have been totally overlooked and are neither cited nor specifically waived in the decision. The conditions imposed by the BZA in the decision refer ambiguously to "plans submitted" and "discussions held" without specifying dates or providing other information necessary to identify the particular plans the BZA intended to approve. Moreover, there is no explanation whatsoever of how or why the BZA Chairman, despite the violations cited in Paragraph 7 above, "determined that a special permit, rather than a variance, would be the most appropriate form of relief."

10. The decision granting the permit was arbitrary, capricious, an abuse of discretion, in excess of the authority of the BZA, and otherwise not in accordance with the law.

WHEREFORE, Plaintiffs respectfully request this Court to enter an order:

A. Declaring that the decision of the BZA filed August 10, 1989, granting a special permit to Yoffa is in excess of the Board's authority and is null and void and of no force and effect;

B. Annuling said decision and the special permit granted thereunder;

C. Awarding Plaintiffs their costs, including reasonable attorneys' fees; and

D. Awarding Plaintiffs such other and further relief as the Court may deem just and proper.

ESTHER GIBSON, JAYANTI DIXIT,
AMESUYA DIXIT, ALAN AND SOOJA C.
BELL, PATRICIA RAUCH, BARBARA HUNT,
AVNER SEGALL, and RICKI GOLDMAN,
By their attorneys,

Richard D. Clarey
Berlin, Clarey, Deptula & Levee
50 Staniford Street
Boston, MA 02114
(617) 227-0720

Dated: August 28, 1989

4897S



CITY OF CAMBRIDGE

INSPECTIONAL SERVICES DEPARTMENT CITY HALL
CAMBRIDGE, MASSACHUSETTS 02139 (617) 498-9013

JOSEPH J. CELLUCCI
COMMISSIONER OF BUILDINGS
AND HOUSING

September 8, 1989

Mr. Michael J. Brandon
27 Seven Pines Avenue
Cambridge, MA 02140

RE: Board of Zoning Appeal - Case No. 5819

Dear Sirs:

In response to your letter of August 18, 1989 I state as follows:

1. I have asked the City Manager to authorize the City Solicitor to advise me relative to the above-referenced matter and I have had contact with the City Solicitor's staff in this regard.
2. As Mr. Clarey has brought on appeal of the above referenced case, I see no reason to do so myself.
3. Mr. Clarey's lawsuit, if brought in accordance with M.G.C. Chapter 40A, Section 17, renders your third request moot.
4. Finally, it is my understanding that all signs found to be in violation of Article 7 of the Cambridge Zoning Ordinance have been removed.

I trust you will find the above to be responsive to your recent letter. As always thank you for your interest in this matter.

Sincerely yours,

Joseph J. Cellucci
Joseph J. Cellucci
Building Commissioner

JJC/mp

002018



CITY OF CAMBRIDGE

Russell B. Higley
City Solicitor

Donald A. Drisdell
Deputy City Solicitor

Michael C. Costello
Assistant City Solicitor

Office of the City Solicitor
City Hall
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

(617) 498-9020

Birge Albright
Legal Counsel

Gail S. Gabriel
Legal Counsel

Joseph M. Kaigler
Legal Counsel

Diane Wynshaw-Boris
Legal Counsel

*POSTPONED
until Oct. 16*

September 13, 1989

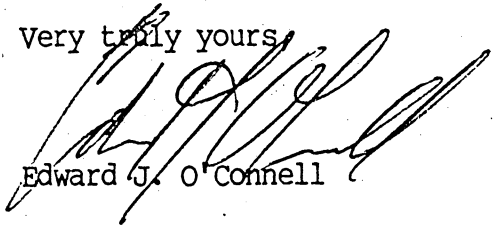
Richard D. Clarey, Esq.
Berlin, Clarey, Deptula and Levee
50 Staniford Street
Boston, MA 02114

Re: Esther Gibson, et al. v. Board of Zoning Appeal of
the City of Cambridge, et al.

Dear Mr. Clarey:

Enclosed please find 5 notices of deposition with regard to the above
entitled matter.

Very truly yours,


Edward J. O'Connell

EJO/jab
Enclosures

cc: John J. Campbell, Esq.

000009

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

LAND COURT
NO. 136686

ESTHER GIBSON, ET AL.,
Plaintiff

V.

BOARD OF ZONING APPEAL OF
THE CITY OF CAMBRIDGE, ET AL.,
Defendants

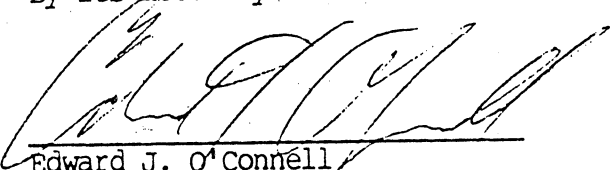
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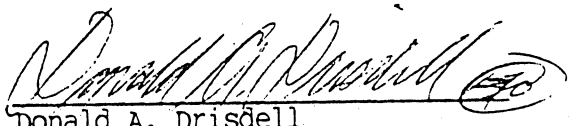
TO: Richard D. Clarey, Esq.
50 Staniford Street
Boston, MA 02114

Please take notice that on Tuesday, October 10, 1989 at 9:00 a.m. in the Office of the City Solicitor, 3rd Floor, City Hall, 795 Massachusetts Avenue, Cambridge, MA 02139 the defendant, City of Cambridge, in this action, by its attorney, will take the deposition upon oral examination of the plaintiff, Esther Gibson, pursuant to the applicable provisions of the Massachusetts Rules of Civil Procedure, before Doris Wong, Notary Public, in and for the Commonwealth of Massachusetts, or some other officer duly authorized by law to administer oaths. The oral examination will continue from day to day until completed.

You are invited to attend and cross-examine.

CITY OF CAMBRIDGE,
By its attorneys


Edward J. O'Connell
Student Attorney


Donald A. Drisdell
Supervising Attorney
Law Department
City Hall - Room 105
795 Massachusetts Avenue
Cambridge, MA 02139
(617) 498-9020

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

LAND COURT
NO. 136686

ESTHER GIBSON, ET AL.,
Plaintiff
V.
BOARD OF ZONING APPEAL OF
THE CITY OF CAMBRIDGE, ET AL.,
Defendants

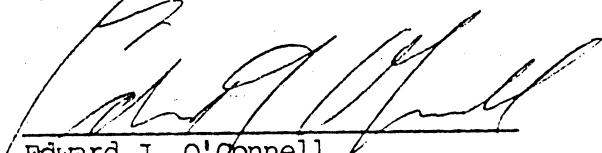
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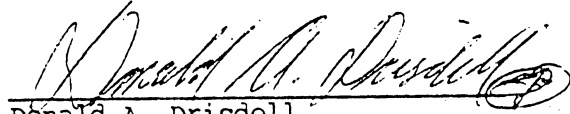
TO: Richard D. Clarey, Esq.
50 Staniford Street
Boston, MA 02114

Please take notice that on Tuesday, October 10, 1989 at 9:30 a.m. in the Office of the City Solicitor, 3rd Floor, City Hall, 795 Massachusetts Avenue, Cambridge, MA 02139 the defendant, City of Cambridge, in this action, by its attorney, will take the deposition upon oral examination of the plaintiff, Jayanti Dixit, pursuant to the applicable provisions of the Massachusetts Rules of Civil Procedure, before Doris Wong, Notary Public, in and for the Commonwealth of Massachusetts, or some other officer duly authorized by law to administer oaths. The oral examination will continue from day to day until completed.

You are invited to attend and cross-examine.

CITY OF CAMBRIDGE,
By its attorneys


Edward J. O'Connell
Student Attorney


Donald A. Drisdell
Supervising Attorney
Law Department
City Hall - Room 105
795 Massachusetts Avenue
Cambridge, MA 02139
(617) 498-9020

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

LAND COURT
NO. 136686

* * * * *
ESTHER GIBSON, ET AL.,
Plaintiff

V.

BOARD OF ZONING APPEAL OF
THE CITY OF CAMBRIDGE, ET AL.,
Defendants
* * * * *

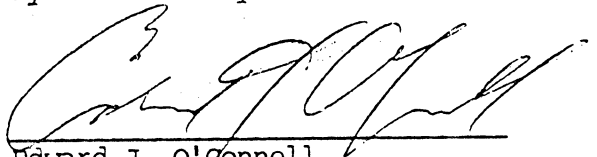
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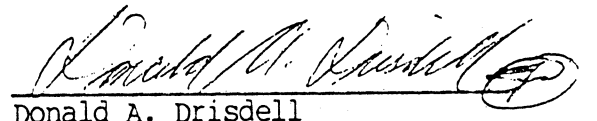
TO: Richard D. Clarey, Esq.
50 Staniford Street
Boston, MA 02114

Please take notice that on Tuesday, October 10, 1989 at 10:00 a.m. in the Office of the City Solicitor, 3rd Floor, City Hall, 795 Massachusetts Avenue, Cambridge, MA 02139 the defendant, City of Cambridge, in this action, by its attorney, will take the deposition upon oral examination of the plaintiff, Amesuya Dixit, pursuant to the applicable provisions of the Massachusetts Rules of Civil Procedure, before Doris Wong, Notary Public, in and for the Commonwealth of Massachusetts, or some other officer duly authorized by law to administer oaths. The oral examination will continue from day to day until completed.

You are invited to attend and cross-examine.

CITY OF CAMBRIDGE,
By its attorneys


Edward J. O'Connell
Student Attorney


Donald A. Drisdell
Supervising Attorney
Law Department
City Hall - Room 105
795 Massachusetts Avenue
Cambridge, MA 02139
(617) 498-9020

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

LAND COURT
NO. 136686

ESTHER GIBSON, ET AL.,
Plaintiff

V.

BOARD OF ZONING APPEAL OF
THE CITY OF CAMBRIDGE, ET AL.,
Defendants

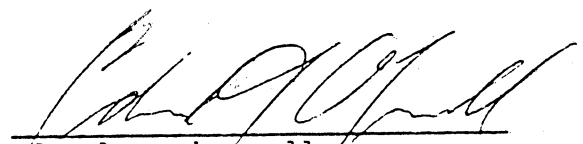
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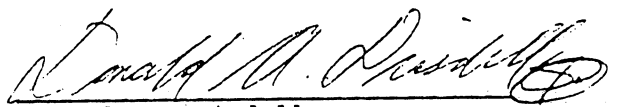
TO: Richard D. Clarey, Esq.
50 Staniford Street
Boston, MA 02114

Please take notice that on Tuesday, October 10, 1989 at 10:30 a.m. in the Office of the City Solicitor, 3rd Floor, City Hall, 795 Massachusetts Avenue, Cambridge, MA 02139 the defendant, City of Cambridge, in this action, by its attorney, will take the deposition upon oral examination of the plaintiff, Sooja Bell, pursuant to the applicable provisions of the Massachusetts Rules of Civil Procedure, before Doris Wong, Notary Public, in and for the Commonwealth of Massachusetts, or some other officer duly authorized by law to administer oaths. The oral examination will continue from day to day until completed.

You are invited to attend and cross-examine.

CITY OF CAMBRIDGE,
By its attorneys


Edward J. O'Connell
Student Attorney


Donald A. Drisdell
Supervising Attorney
Law Department
City Hall - Room 105
795 Massachusetts Avenue
Cambridge, MA 02139
(617) 498-9020

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

LAND COURT
NO. 136686

* * * * *
ESTHER GIBSON, ET AL., *
Plaintiff *
*
V. *
*
BOARD OF ZONING APPEAL OF *
THE CITY OF CAMBRIDGE, ET AL., *
Defendants *
* * * * *

NOTICE OF TAKING DEPOSITION

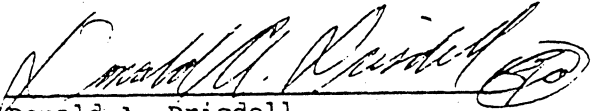
TO: Richard D. Clarey, Esq.
50 Staniford Street
Boston, MA 02114

Please take notice that on Tuesday, October 10, 1989 at 11:00 a.m. in the Office of the City Solicitor, 3rd Floor, City Hall, 795 Massachusetts Avenue, Cambridge, MA 02139 the defendant, City of Cambridge, in this action, by its attorney, will take the deposition upon oral examination of the plaintiff, Alan Bell, pursuant to the applicable provisions of the Massachusetts Rules of Civil Procedure, before Doris Wong, Notary Public, in and for the Commonwealth of Massachusetts, or some other officer duly authorized by law to administer oaths. The oral examination will continue from day to day until completed.

You are invited to attend and cross-examine.

CITY OF CAMBRIDGE,
By its attorneys


Edward J. O'Connell
Student Attorney


Donald A. Drisdell
Supervising Attorney
Law Department
City Hall - Room 105
795 Massachusetts Avenue
Cambridge, MA 02139
(617) 498-9020



CITY OF CAMBRIDGE

Office of the City Solicitor
City Hall

795 Massachusetts Avenue
Cambridge, Massachusetts 02139

(617) 498-9020

Russell B. Higley
City Solicitor

Donald A. Drisdell
Deputy City Solicitor

Michael C. Costello
Assistant City Solicitor

Birge Albright
Legal Counsel

Gail S. Gabriel
Legal Counsel

Joseph M. Kaigler
Legal Counsel

Diane Wynshaw-Boris
Legal Counsel

September 22, 1989

Richard D. Clarey, Esq.
Berlin, Clarey, Deptula and Levee
50 Staniford Street
Boston, MA 02114

Re: Esther Gibson, et al. v. Board of Zoning Appeal
of the City of Cambridge, et al.

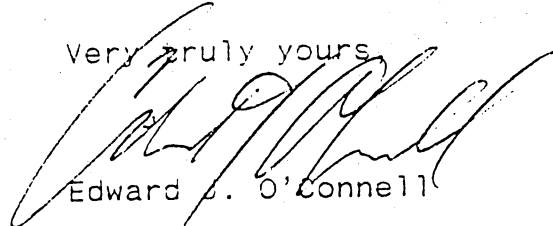
Dear Mr. Clarey:

Please be informed that, pursuant to your request, I have rescheduled the five depositions which were originally sheduled for Monday, September 25, 1989.

The depositions will now be conducted on Tuesday, October 10, 1989. Accordingly, I have enclosed herewith the proper notices.

Thank you for your attention to this matter.

Very truly yours


Edward J. O'Connell

EJO/jab
Enclosures

cc: John J. Campbell, Esq.

000010

11.828

JOHN J. CAMPBELL

COUNSELLOR AT LAW

90 ELLERY STREET, SUITE 23

CAMBRIDGE, MA 02138

TELEPHONE: (617) 868-6700

September 27, 1989

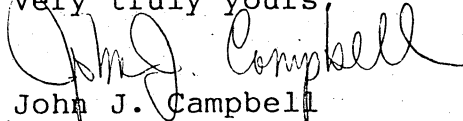
Clerk's Office
Massachusetts Land Court
Old Court House
Boston, MA 02108

Re: Esther Gison, et al
v. Board of Zoning Appeal of the City of Cambridge, et al
Case No. 136686

Dear Sir:

Please enter my appearance as attorney for Yoffa Co., Inc.
d/b/a Midas Muffler in the above-entitled action.

Very truly yours,


John J. Campbell

JJC:mm

cc: Edward J. O'Connell, Student Attorney ✓
Richard D. Clarey, Esq.

000611

October 19, 1989

Dear Neighbor:

RE: Midas Muffler Appeal

The Stabilization Committee will take up the Midas Muffler case on Wednesday, October 25, at 7:00 p.m. at either the Gately Center or the Senior Citizens Center. I hope you can attend.

The two fundamental issues this case raises are (1) the invasion of a residential area by a commercial enterprise; and (2) the ignoring of the Massachusetts Avenue Overlay rules.

As to the first, Midas is doing what any business wants to do--buy a property cheap which will have a significant yield. If Midas can do it, Nai Nan Ko and Uncle Russ will not be far behind. Both the Planning Board and the Stabilization Committee objected to this aspect of the original proposal. I enclose their comments made February 8 and March 2, respectively.

City Paint has already bought an adjacent house and attempted the same thing across the street. The zoning is residential at that point. The Board of Zoning Appeals would have allowed City Paint to knock down the house and double the size of its store. The Board of Zoning Appeals pays almost no attention to the Zoning Code. City Paint lost only because the neighborhood resisted.

As to the second point, the Massachusetts Avenue Overlay was a long, hard-fought battle by many people. I enclose a copy of the Overlay Rules. It makes very clear that only certain things are to be done on Massachusetts Avenue, and the Planning Board is to have design controls. All of us will have to live with whatever Midas does on the Avenue, and the ignoring of these Rules by the Board of Zoning Appeals is an outrage. The Planning Board is being asked to look into this matter.

Two other technical matters which should be of interest to people generally are (1) the ignoring by the Board of Zoning Appeals of the procedural Rules; and (2) the attitude of the City that only a few people can appeal Board of Zoning Appeals decisions.

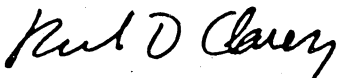
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As to the first, the Board of Zoning Appeals allowed Midas to radically change its original plan. This of course is terrible, because the neighborhood, the Community Development Department and the Planning Board didn't know about the change. The Board of Zoning Appeals should not be allowed to get away with this.

As to the second, Don Drisdell tells me that it is the City's contention that only the closest abutters have standing in a zoning appeal. That is one reason why the City is taking the depositions of the plaintiffs. They want to establish that none of you have standing. In our case, if the City prevails, a person in your location would not have standing to complain about anything that happened only a few feet from your door. I consider this to be an outrageous restriction of your rights which should be fought very vigorously.

Another thing that is accomplished by limiting those who can appeal is that buying off the neighbors' rights is made that much easier. It doesn't make sense to have a residential zone if one or two people can sell it off.

Sincerely yours,


Richard D. Clarey

RDC:es

Enclosures

cc: George McCray,
North Cambridge Stabilization Committee

5272S

LAW OFFICES OF
ANTHONY R. PELUSI, JR.

BULFINCH SQUARE
43 THORNDIKE STREET
CAMBRIDGE, MASSACHUSETTS 02141-1714

TELEPHONE (617) 577-8400
FAX (617) 225-0515

November 6, 1989

Constance V. Vecchione, First Assistant Bar Counsel
Office of the Bar Counsel
Board of Bar Overseers of the Supreme Judicial Court
75 Federal Street, Seventh Floor
Boston, MA 02110

Re: BBO File No. B2-89-393V (Richard D. Clarey)

Dear Ms. Vecchione:

I am writing you this letter regarding your communication to me dated October 18, 1989. In reviewing the letter to the Board of Bar Overseers, Attorney Richard D. Clarey is challenging my integrity and honesty. As a former Assistant District Attorney for Middlesex County for six years, my integrity and honesty have always been above reproach. Much of what Attorney Clarey states in his letter are misstatements of fact and distortions of truth.

In Attorney Clarey's letter he indicates that he represents seven plaintiffs in the Land Court case; that I represent Midas; and that the meeting was held on Thursday, October 5, 1989. Wrong on all counts. It would seem that Attorney Clarey hasn't looked at his complaint, for if he did it would show that there are nine plaintiffs. Furthermore, I do not represent Midas. I represent, as general counsel, Yoffa Company, Inc. Attorney John J. Campbell, 90 Ellory Street, Suite 23, Cambridge, Massachusetts, has represented Yoffa Company, Inc. throughout the zoning process and has filed his appearance, also, in the Land Court case.

Furthermore, there is a glaring fact that springs out from Attorney Clarey's letter: that he doesn't seem to be talking to his clients, for if he had, he would have known that the meeting took place on Friday, October 6, 1989, not Thursday, October 5. Why hasn't Attorney Clarey just called his clients and found out what really happened, or is it that they are really not his clients i.e., the nine plaintiffs in the Land Court case. He or his clients had a period of time between October 6, and October 12 to talk about these matters, but it seems they didn't. Why?

000013

November 6, 1989

In the first sentence of the second paragraph of Attorney Clarey's letter, he states that: "...Pelusi met...with two of my clients..." Wrong again. If Mr. Clarey had spoken with his clients, he would have been informed that one of his clients, Mr. Bell, called John Campbell asking to set up a meeting with neighbors (emphasis supplied) concerning the special permit matter, i.e., the architectural plans and exact layout of the building. Since Attorney Campbell was going away, he inquired if I would be available to meet with the neighbors and the owner of the Midas Franchise (Yoffa Company, Inc.) In response to a call to me by Alan Bell, I advised him that he should contact his lawyer, Attorney Clarey, before setting up any neighborhood meeting. Mr. Bell acknowledged my concern and statement.

A meeting was set up by Mr. Bell and the son of the owner of the Midas Franchise. I attended the meeting, but I did not participate nor did I take notes during the meeting. There were approximately 10 or 11 neighbors including 2 or 3 plaintiffs in the Land Court case present.

After this meeting, I was again contacted by Mr. Bell on Saturday, October 7, 1989. My answering service received a call at my office, and I returned the call on Tuesday morning at about 7:45 a.m., for I had been down to Cape Cod with my family for the weekend. Mr. Bell wanted to cancel the deposition that was to be taken that morning at the Cambridge City Hall by the City, who was also involved in the Land Court case. Once again I informed Mr. Bell to contact his attorney. I then went to the deposition and to the best of my memory the following people were present: Myself, Attorney Donald A. Drisdell, Cambridge Law Department, Edward J. O'Connell, Student Attorney, Attorney Clarey, Michael Brandon, Mr. Dixet, and later, a Mrs. Carmen McNeil.

In none of the above conversations did I ever speak about the subject matter of Attorney Clarey's representations. As a matter of fact, it can clearly be seen that I advised Mr. Bell on at least two occasions to contact his lawyer.

I think that it might be appropriate to inquire of Mr. Bell why he hadn't contacted Attorney Clarey concerning the above matter, or why for that matter that other neighbors or plaintiffs wanted to attend the neighborhood meeting without Attorney Clarey's presence.

On October 10, 1989, the date of the Deposition at the Cambridge City Hall, I was present at a conversation that was held between Mr. O'Connell, the Student Attorney, and Attorney Clarey, wherein Mr. O'Connell inquired of Attorney Clarey: "I thought that it was improper for a lawyer to initiate litigation?" This question was left unanswered and unaddressed by Attorney Clarey. It would seem that an immediate

Constance V. Vecchione, First Assistant Bar Counsel

Page 3

November 6, 1989

answer should have been forthcoming. Furthermore, Mr. O'Connell asked Attorney Clarey if he had read the Green and the Harvard Square cases, because it was the City's contention that they wanted to keep as narrow as possible the range of plaintiffs who really had standing to challenge the City's action on this and every case. Mr. O'Connell made the point that the purpose of the Deposition that morning was to show who really had legal standing in the City's eyes. The City seemed to feel that the plaintiffs didn't satisfy the requirements of those cases for standing.

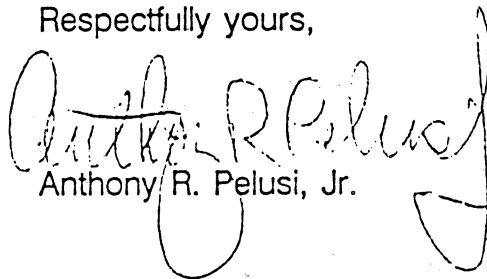
I vehemently deny that I ever made a monetary offer of settlement to at least one abutter who is not a plaintiff. As I have indicated, Attorney John Campbell is the Attorney of record in these matters.

Attorney Clarey has been at many, if not all, of the Board of Zoning Appeal's hearings and has been very vocal in his opposition to any relief sought by Yoffa Company, Inc. Attorney Clarey has stated and written that the Cambridge Planning Board is against the proposal. It is interesting to note that another vocal opponent is Carolyn Meith, a member of the Planning Board who also happens to be Attorney Clarey's wife. She spoke out against this matter of the Board of Zoning Appeals.

In conclusion, from information I have received, it would seem appropriate to inquire as to how Attorney Clarey came to represent these nine plaintiffs in the Land Court case, and as to how much time he has spent with them concerning the law suit and what it actually entails. How is Attorney Clarey getting paid in these matters? Has he received any fees in these matters or is he only doing the work to get paid reasonable attorney's fees in the court case or a forced settlement in this matter.

If I can be of any further assistance in this matter, please contact me.

Respectfully yours,



Anthony R. Pelusi, Jr.

ARP:KD

27 Seven Pines Avenue
Cambridge, MA 02140
248-2436 (W); 864-3520 (H)
December 6, 1989

Councillor Francis Duehay
Cambridge City Council
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Dear Frank:

Sorry for the delay in sending you this background material on the Midas Muffler case. I've ordered the items chronologically and have tagged a section of the pending appeal that lists more than a dozen specific zoning law violations stemming from the Board of Zoning Appeal decision.

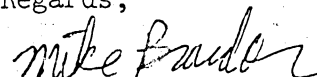
It appears that the developer's attorneys, the BZA, the Inspectional Services Dept., the Building Commissioner, the City Solicitor and Law Dept., and possibly the City Manager are working in collusion with each other not only to circumvent city and state zoning laws, but also to disregard or selectively enforce departmental policies and procedures in order to limit public involvement, avoid an open assessment of the legal issues entailed, and justify or conceal blatant improprieties.

Please call me if you want more details before approaching the City Manager. I am very eager to hear how he explains:

1. The BZA's gross breaches of zoning law and refusal to abide by established procedures.
2. Various officials attempts to avoid the issuance of a written legal opinion.
3. The Law Dept's defense and support of improper BZA actions; its active role in attempting to undermine the citizen appeal (including the unusual step of deposing the plaintiffs); and its questionable judgment in simultaneously giving advice to the Building Commissioner while representing the BZA's interests, which may conflict with his.
4. The Building Commissioner's reluctance to enforce the zoning law as required, and various city officials' refusal to take steps to ensure compliance with the law and thus prevent the current lawsuit.

Thanks very much for taking the time to look into this, Frank.

Regards,



Michael Brandon

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c: Dick Clarey
encl

P.S. Rent Control Board and Historical Commission have both signed off (okayed) the demo permit for the house at 10 Clarendon Ave; RC says it's a single-family house never rented since 1970, so apparently no removal permit was deemed necessary.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT
NO. 136686

ESTHER GIBSON, ET AL,
Plaintiffs

V.

BOARD OF ZONING APPEALS OF
THE CITY OF CAMBRIDGE, ET AL,
Defendants

MOTION TO ADD PLAINTIFFS

Plaintiff Esther Gibson moves that the following persons, who are residents at the following numbered addresses on Clarendon Avenue, be added as Plaintiffs:

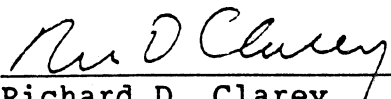
#28	Upendra Dixit
#46	Rhodes Williams
#61	Jill Larcombe
#62	John F. and Esther A. Splaine
#63	Richard Ploss and Susan Rich
#65	Paula M. Wooley
#70	Anna A. Ippolito

In support, Plaintiff says that these persons are aggrieved by the decision of the Board of Zoning Appeals herein and wish to assert their interest in retaining the residential zoning of 10 Clarendon Avenue, in working with the Defendants toward developing housing on that locus, and in preventing the traffic

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congestion, pedestrian hazards, parking problems, noise, exhaust fumes, hazardous waste, litter, commercial disruption of the neighborhood, depressed property values, visual blight and other public dangers, disruptions and nuisances that the decision appealed from will cause.

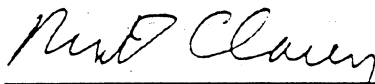
ESTHER GIBSON, ET AL
By their attorney,


Richard D. Clarey
Berlin, Clarey, Deptula & Levee
50 Staniford Street
Boston, MA 02114
(617) 227-0720
BBO #084780

Dated: October 18, 1990

AFFIDAVIT OF NOTICE

I, Richard D. Clarey, attorney for the Plaintiffs, hereby certify that I served the foregoing Motion to Add Plaintiffs upon the Defendants by mailing copies, postage prepaid, to their counsel of record, Diane Winshaw Boris, Esquire, Office of the City Solicitor, City Hall, 795 Massachusetts Avenue, Cambridge, MA 02139, and John J. Campbell, Esquire, 90 Ellery Street, Cambridge, MA 02138, this 18th day of October, 1990, together with notice that I have marked the Motion for hearing in the Land Court at Boston for hearing on Wednesday, October 31, 1990, at 11:00 a.m.


Richard D. Clarey

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT
NO. 136686

ESTHER GIBSON, ET AL,
Plaintiffs

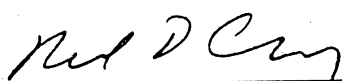
V.

BOARD OF ZONING APPEALS OF
THE CITY OF CAMBRIDGE, ET AL,
Defendants

MOTION OF PLAINTIFFS ALAN BELL AND SOOJA BELL TO WITHDRAW
AS PLAINTIFFS FROM THIS ACTION

Plaintiffs Alan Bell and Sooja Bell move that the Court
grant them permission to withdraw as plaintiffs from this action.

ALAN AND SOOJA BELL
PLAINTIFFS
By their attorney,

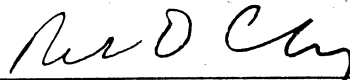

Richard D. Clarey
Berlin, Clarey, Deptula & Levee
50 Staniford Street
Boston, MA 02114
(617) 227-0720
BBO #084780

Dated: November 2, 1990

000016

AFFIDAVIT OF NOTICE

I, Richard D. Clarey, attorney for the Plaintiff, hereby certify that I served the foregoing Motion of Plaintiffs Alan and Sooja Bell to Withdraw on the Defendants by mailing a copy, postage prepaid, to their counsel of record, John J. Campbell, Esquire, 90 Ellery Street, Cambridge, Massachusetts 02138, and Diane Winshaw Boris, Office of the City Solicitor, City Hall, 795 Massachusetts Avenue, Cambridge, Massachusetts this 2nd day of November, 1990.



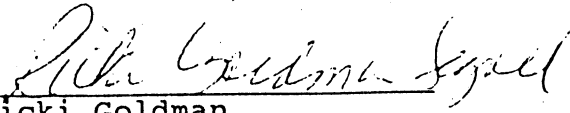
Richard D. Clarey

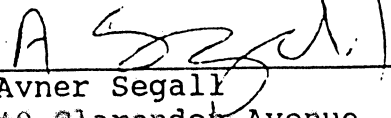
Kenneth D. May
Attorney at Law
241 Cardinal Medeiros Avenue
Cambridge, Massachusetts 02141

617/492-4759

Date: December 6, 1990

We, Ricki Goldman and Avner Segall, request the court to remove our names as plaintiffs from the action docketed as Land Court No. 136686. We have no further interest in pursuing the appeal. We thank the court for its time and consideration. We further ask that Attorney Kenneth D. May present our wishes to the court.


Ricki Goldman
40 Clarendon Avenue
Cambridge, MA


Avner Segall
40 Clarendon Avenue
Cambridge, MA

000017

1/888
Kenneth D. May
Attorney at Law
241 Cardinal Medeiros Avenue
Cambridge, Massachusetts 02141

(617) 492-4759

December 19, 1990

Motion Clerk
Land Court
Room 408
Old Court House
Boston, Massachusetts 02108

Re: Esther Gibson, et al
V. Board of Zoning Appeals of The City of Cambridge
No. 136686

Dear Madam/Sir:

I enclose a Motion to Dismiss, which I ask to be put on
the list for hearing on December 27, 1990 at 10:00 a.m.

Sincerely,

Kenneth D. May
Kenneth D. May

cc: Diane Winshaw Boris
John J. Campbell
Richard D. Clarey

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Commonwealth of Massachusetts

Middlesex, ss.

Land Court
NO. 136686

Esther Gibson, Et AL,
Plaintiffs

V.

Board of Zoning Appeals of
The City of Cambridge, ET AL,
Defendants

MOTION TO DISMISS

Plaintiffs Esther Gibson, Jayanti Dixit, Amesuya Dixit, Alan Bell, Sooja C. Bell, Patricia Rauch, and Barbara Hunt move that the court dismiss WITH PREJUDICE the action filed August 28, 1989 (See attached authorization and discharge notice). Plaintiffs Avner Segall and Ricki Goldman state they have no further interest in this appeal and ask the court to remove their names from this action. (See attached authorization). Plaintiffs move that this dismissal be with prejudice pursuant to M.R.C.P. 41(a)(1). All defendants assent to dismissal (See attached).

Plaintiffs

By their attorney,

Kenneth D. May

Kenneth D. May
241 Cardinal Medeiros Ave.
Cambridge, MA 02141
(617) 492-4759
BBO # 555103

Dated: December 19, 1990

Affidavit of Notice

I, Kenneth D. May, attorney for the plaintiffs above, hereby certify That I served the foregoing motion to dismiss upon the defendants by mailing copies, postage prepaid, to their counsel of record, Diane Winshaw Boris, Esquire, Office of the City Solicitor, City Hall, 795 Massachusetts Avenue, Cambridge, MA 02139, John J. Campbell, Esquire, 90 Ellery Street, Cambridge, MA 02138; And to Richard D. Clarey, Esquire, Berlin, Clarey, Deptula & Levee, 50 Staniford Street, Boston, MA 02114 this 19th day of December, 1990, together with notice that the court has marked the motion for hearing in the Land Court at Boston for Thursday, December 27, 1990 at 10:00 a.m.

Kenneth D. May
Kenneth D. May

RE: Midas Muffler Appeal
DA: November 23, 1990

Docket: Case # 136686
Commonwealth of Massachusetts
Land Court Complaint, Appeal from Zoning Board
Chap.40A Sec.17, on Land in Cambridge. Petition filed 08/28/89

WE, the undersigned, are listed plaintiffs on the complaint filed August 8, 1989. After further consideration and with all the facts before us, we have directed Attorney Richard D. Clarey to move for dismissal with prejudice of this appeal as soon as possible. However, he has refused to honor our request and we therefore discharge him from acting for us in any manner.

We believe that the proposed condemnation and demolition of the vacant building at 10 Clarendon Avenue should be allowed. Further, we believe that once this appeal is dismissed that the special permit granted Yoffa Co. Inc. d/b/a/ Midas Muffler should be immediately effective allowing the construction of the proposed parking lot.

In addition, Ms. Carmen McNeill, owner of 14 Clarendon Avenue and the immediate abutter, joins with us in this request for action. The adjacent building has been a potential firetrap and an attractive nuisance for over two years endangering not only Ms. McNeill and her family, but her neighbors.

We therefore authorize Attorney Kenneth D. May to represent our interests in this matter only. We direct that he file an appearance in the land court and move that the court dismiss this appeal with prejudice.

Esther Gibson Esther Gibson
18 Clarendon Avenue
Jayanti Dixit Jayanti Dixit
28 Clarendon Avenue
Amesuya Dixit Amesuya Dixit
28 Clarendon Avenue
Alan Bell Alan Bell
32 Clarendon Avenue
Sooja C. Bell Sooja C. Bell
32 Clarendon Avenue
Patricia Rauch Patricia Rauch
40 Clarendon Avenue
Barbara Hunt Barbara Hunt
40 Clarendon Avenue
Avner Segall _____
40 Clarendon Avenue
Ricki Goldman _____
40 Clarendon Avenue

In addition, the following Clarendon Ave. residents support the above action:

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT
NO. 136686

ESTHER GIBSON, ET AL,
Plaintiffs

V.

BOARD OF ZONING APPEALS
OF THE CITY OF CAMBRIDGE, ET AL,
Defendants

OPPOSITION TO MOTION TO DISMISS COMPLAINT

Now comes Ricki Goldman Segall, Rhodes Williams, Jill Larcomb, John F. Splaine, Esther Splaine, Richard Ploss, Susan Rich, Paula M. Wooley and Anna A. Ippolito, and object to the Motion to Dismiss filed December 19, 1990, on the grounds that said Motion was procured by false representations and harassment, denying them their fundamental right of access to the Courts.

In support, Opponents allege that the Defendant Yoffa Co., Inc. d/b/a Midas Muffler, has engaged in a campaign to intimidate certain Plaintiffs and other residents of Clarendon Avenue, Cambridge, to drop this appeal of a decision of the Cambridge Board of Zoning Appeals allowing by special permit the invasion of the residential zone of Clarendon Avenue for a commercial purpose.

The history of this matter is as follows:

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1. F. Stanley Litchman, the principal of Yoffa, Inc., purchased the house at 10 Clarendon Avenue which is the subject of this litigation in 1988. He failed to keep the house occupied as required by the full occupancy ordinance of the City of Cambridge and allowed it to become a derelict property.

2. Litchman devised a plan to demolish the house and move his business into the property, for which he sought a variance at the Cambridge Board of Zoning Appeals.

3. The Board of Zoning Appeals granted a special permit rather than a variance allowing the invasion of the residential zone of 10 Clarendon Avenue and the construction of a parking lot there, as well as the construction of an addition to the business property facing Massachusetts Avenue. The Board did not advertise the grant, which was substantially different from the relief requested. Plaintiffs brought suit alleging a violation of the zoning ordinance by the invasion of the residential zone and the placing of a structure on Massachusetts Avenue, in violation of the Massachusetts Avenue Overlay Zoning District, which requires, inter alia, consideration by the Planning Board, not the Board of Zoning Appeals of proposals on Massachusetts Avenue.

4. Following the filing of the Complaint, Plaintiff Alan Bell instructed Plaintiffs' counsel not to communicate with the Plaintiffs but to leave negotiation of the case to Mr. Bell. Hearing nothing from Mr. Bell for six months, the undersigned wrote him on April 2, 1990, asking him whether there was any

progress. Mr. Bell never replied, and on May 29, 1990, the undersigned moved in Court to mark the case up for a hearing.

5. The hearing was set for October 31, 1990.

6. In or about September, 1990, residents of Clarendon Avenue who are not Plaintiffs discovered that there was a possibility of saving the residential property. They gathered at the home of Susan Rich on October 13, 1990, and voted to join the lawsuit. See Exhibit A attached hereto.

7. Among the persons signing in support of the lawsuit was Plaintiff Esther Gibson.

8. Esther Splaine avers that Alan Bell mislead her to the effect that the neighbors had no rights to prevent the development. See Affidavit of Esther Splaine, attached hereto as Exhibit B.

9. A few days before the October 31 hearing, Midas' lawyer, John Campbell, informed the undersigned that he was going to withdraw from the case and ask for a postponement in order to leave the case to younger lawyers. He postponed both the pre-trial conference and the Motion to Add Plaintiffs to January 30, 1991.

10. Attorney Campbell never did withdraw from the case, nor has any successor counsel appeared for him.

11. Instead there has been a campaign of harassment in which the Opponents have been accused of allowing a fire hazard to exist at 10 Clarendon Avenue.

12. Plaintiff Ricki Goldman Segall says that constant harassment of one Carmen McNeil caused her to eventually sign

that she would agree to withdraw from the case. See Affidavit of Ricki Goldman Segall, attached hereto as Exhibit C.

13. Varicus persons, including the undersigned, saw a document appearing to be a contract between Midas Muffler and Carmen McNeil for the payment of money. See Affidavit of Michael Brandon, attached hereto as Exhibit D.

14. On November 29, 1990, Mr. Campbell stated that he had not withdrawn from the case.

15. On or about December 11, 1990, Attorney Kenneth May, who had earlier introduced himself as representing Carmen McNeil, filed documents seeking to dismiss this action. Although Attorney May made a Certificate of Service, no copy of these documents was served on Attorney Richard Clarey.

THE SURREPTITIOUS ATTEMPT TO WIPE OUT THE
RIGHTS OF PLAINTIFFS AND THOSE WHO WISH TO
JOIN THIS LITIGATION IS A VIOLATION OF THEIR
FUNDAMENTAL RIGHTS UNDER THE DECLARATION OF RIGHTS

The Declaration of Rights provides for a fundamental right of access to the Courts by citizens of the Commonwealth. Article XI.

The conduct of Alan Bell in misrepresenting the status of the litigation, the harassment of Plaintiff Segall by Carmen McNeil, as well as the requesting of a long continuance of this case on the grounds that counsel wished to withdraw, and the attempt by Attorney May to process the dismissal without notice to the undersigned, are part of a scheme by which the Defendant Yoffa, Inc. wishes to deny the Opponents their right to have a judicial determination of whether they can prevent an invasion

of their residential zone by Yoffa. This scheme denies Opponents their rights under the Federal and State Civil Rights Acts, 42 USC 1962, and G.L. c.12, §§11H and 11I.

Rule 41(a)(1) is limited in "its application to an early stage of the proceeding," 27 Fed. Proc. §62:483. Here Attorney May is attempting to terminate the litigation on the eve of a hearing which will lead to a trial. There is no apparent benefit to the Plaintiffs in surrendering their rights. The Court should hold an evidentiary hearing into the issue of whether Opponents' rights have been denied.

By their attorney,

Richard D. Clarey
Berlin, Clarey, Deptula & Levee
50 Staniford Street
Boston, MA 02114
(617) 227-0720
BBO #084780

Dated: December 24, 1990

8980S

We the neighbors gathered at the home of Susan Rich and Richard Ploss, located at 63 Clarendon Ave. on October 13, 1990 to discuss the current situation having to do with the empty house on and abutting Midas Muffler, have mutually agreed to ^{enter} in the suit to prevent Midas Muffler from eliminating the foresaid house and/or land from the rolls as a residential structure. Specifically, in as much as possible it is our desire to work with Midas Muffler around our goal to develop housing at that location.

Richard Ploss	#	
	63	
Josanne	JILL LARCOMBE	61
Charles Williams		46
Esther Gibson		18
Ray Smith		28
Esther A. Splaine		62
Anna A. Ippolito		64
Susan J. Rich		63
Paul M. Woolley	PAUL M WOOLLEY	65
JOHN F. SPLAINE	John F. Splaine	10-13-90
	62	

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT
NO. 136686

ESTHER GIBSON, ET AL,
Plaintiffs

V.

BOARD OF ZONING APPEALS
OF THE CITY OF CAMBRIDGE, ET AL,
Defendants

AFFIDAVIT OF ESTHER SPLAINE

I, Esther Splaine, being first sworn, depose and say as follows:

1. I live at 62 Clarendon Avenue in Cambridge in a house I first lived in in 1952, and I am one of the persons who have moved to be added as Plaintiffs in this case.

2. The reason why I have moved to enter this case is that for several years I was misinformed as to what my rights were. I was told by Alan Bell that the neighborhood had no rights to prevent the loss of residential housing on our street, the destruction of the house at 10 Clarendon Avenue or the erection of a commercial parking lot in its place.

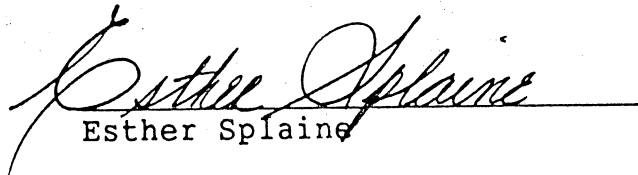
3. It was not until I and Susan Rich began making inquiries as to the status of the property that we discovered that the residents have a claim that the attempt to remove this property from residential use may be unlawful.

4. Among the persons who attended a meeting at Susan Rich's house on October 13, 1990, and who signed a statement in support of the rights to retain housing on that property, was Esther Gibson, one of the original Plaintiffs.

5. I was present at Esther Gibson's house on November 19, 1990, when Carmen McNeil described that there was a great danger of fire from the property at 10 Clarendon Avenue as well as danger from teenagers being on the property. It is my belief that any danger that exists has been caused by the conduct of the owner of the property, who is a principal in the Defendant corporation in this case.

6. At the meeting described in the previous paragraph, Mr. Kenneth May was present and introduced himself as Carmen McNeil's attorney.

Signed under the pains and penalties of perjury this 14 day of December, 1990.


Esther Splaine

8948S

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT
NO. 136686

ESTHER GIBSON, ET AL,
Plaintiffs

V.

BOARD OF ZONING APPEALS
OF THE CITY OF CAMBRIDGE, ET AL,
Defendants

AFFIDAVIT OF RICKI GOLDMAN SEGALL

I, Ricki Goldman Segall, being first sworn, depose and say as follows:

1. I was a Plaintiff in this action.
2. I agreed to sign the statement dated December 6, 1990, which has been filed in this Court, only after a period of harassment.
3. Approximately one month ago, Carmen McNeil came and rang my doorbell on a couple of occasions. She told me that I was the only one holding up the agreement to dismiss the case. I told her I was reluctant to sign, that I knew that there were two sides to the case, and that I would prefer not to sign anything at this time. I thought that I would then be left alone.
4. There then followed a series of nights when Ms. McNeil came and rang my doorbell insistently several times. At first I

C

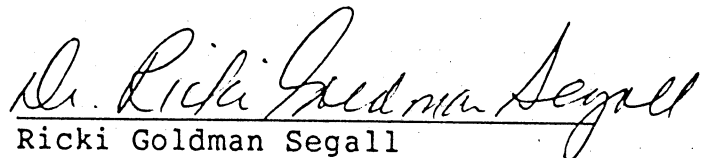
did not answer the bell, but on about the fourth or fifth night, on a night when I was sick with a cold, my husband did answer the bell. Ms. McNeil presented him with a different set of papers which did not require us to agree to a dismissal of the case but simply to withdraw our names. My husband was extremely aggravated by the disruption in our lives, and I eventually agreed simply to stop the harassment.

5. Ms. McNeil made me feel very unneighborly and in conflict with all the other neighbors who she claimed had agreed.

6. Ms. McNeil also told me there was a danger of fire and of teenagers hanging out at the derelict house which is the subject of this case.

7. I signed the statement simply to stop Ms. McNeil from harrassing my husband and me.

Signed under the pains and penalties of perjury this 10 day of December, 1990.


Ricki Goldman Segall

8947S

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT
NO. 136686

ESTHER GIBSON, ET AL,
Plaintiffs

V.

BOARD OF ZONING APPEALS OF THE
CITY OF CAMBRIDGE, ET AL
Defendants

AFFIDAVIT OF MICHAEL BRANDON

I, Michael Brandon, being first sworn, depose and say:

1. I am a resident of North Cambridge and a member of the North Cambridge Stabilization Committee concerned with issues of real estate development.
2. I attended several hearings at the Cambridge Board of Zoning Appeals in early 1989 on the petition of Yoffa Co., Inc dba Midas Muffler to develop property at 2501 Massachusetts Avenue and 10 Clarendon Avenue.
3. At one of those hearing I saw a document that appeared to be a draft agreement between Yoffa and Carmen McNeill, an abutter, involving the payment of \$10,000 in consideration of McNeill not ^{appealing} the Yoffa petition. McNeill also told me directly that Yoffa was trying to buy her off.
4. On October 10, 1989, Yoffa's attorney, Anthony Pelusi, admitted to me and others at the office of the Cambridge City Solicitor that McNeill had been offered money by the Company.

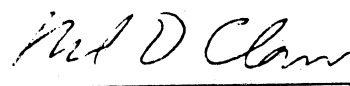
Signed under the pains and penalties of perjury this 23rd day of December, 1990.


Michael Brandon

D

CERTIFICATE OF SERVICE

I, Richard D. Clarey, attorney for the Plaintiffs, hereby certify that I served the foregoing upon the Defendants by mailing copies, postage prepaid, to Diane Winshaw-Boris, Esquire, Office of the City Solicitor, City Hall, 795 Massachusetts Avenue, Cambridge, MA 02139; John J. Campbell, Esquire, 90 Ellery Street, Cambridge, MA 02138; and Kenneth D. May, Esquire, 241 Cardinal Medeiros Avenue, Cambridge, MA 02141, this 24th day of December, 1990.



Richard D. Clarey

8968S

11/888

Berlin, Clarey, Deptula & Levee

ATTORNEYS AT LAW

50 STANIFORD STREET, BOSTON, MASSACHUSETTS 02114

GERALD A. BERLIN
RICHARD D. CLAREY
GEORGE C. DEPTULA
NEWTON H. LEVEE
KAREN D. HURVITZ
PHILLIPS AXTEN
LESLIE LOCKARD
KARIN A. GREGORY

TELEPHONE (617) 227-0720
TELECOPIER (617) 227-0243

ALVIN LEVIN
1924-1987
OF COUNSEL
LINDA G. LEFFERT
STANLEY M. EPSTEIN
LAWRENCE P. FRAZER

December 26, 1990

Motion Clerk
Land Court
Room 408
Old Courthouse
Boston, MA 02108

RE: Esther Gibson, et al
v. Board of Zoning Appeals to the City of Cambridge
No. 136686

Dear Sir:

I enclose an Affidavit of Richard D. Clarey to be presented
at the hearing on December 27, 1990 at 10:00 a.m.

Sincerely yours,



Richard D. Clarey

/sfh

Enclosures

cc: ✓ Diane Winshaw-Boris, Esq.
John J. Campbell, Esq.
Kenneth D. May, Esq. (VIA FAX 617-868-9124)

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MIDDLESEX, ss

LAND COURT
NO. 136686

ESTHER GIBSON, ET AL,
Plaintiffs

V.

BOARD OF ZONING APPEALS
OF THE CITY OF CAMBRIDGE, ET AL,
Defendants

AFFIDAVIT OF RICHARD D. CLAREY

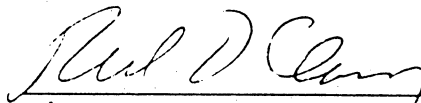
I, Richard D. Clarey, being first sworn depose and say:

1. I am an attorney in the private practice of law in Boston, Massachusetts. I have represented the plaintiffs in this action.
2. Although Attorney Kenneth May filed an affidavit of Notice certifying that he served a Motion to Dismiss on me on December 11, 1990, I never received that document.
3. The "Authorization and Discharge Notice" attached to the Motion to Dismiss contains materially false statements. The statement that "(plaintiffs) have directed Attorney Richard D. Clarey to move for dismissal with prejudice of this appeal as soon as possible. However, he has refused to honor our request..." is substantially false.
4. In the first place, Plaintiffs Segal and Goldman have refused to sign that document and in her affidavit, plaintiff Goldman describes the harrassment she underwent in connection with it.

5. Plaintiffs Esther Gibson, Jayanti Dixit, Amesuya Dixit, Patricia Rauch and Barbara Hunt never requested me to dismiss this case.
6. In addition, I question the authenticity of the signature of Barbara Hunt. Attached hereto marked "A" is a certified copy of Ms. Hunt's city census return showing a signature significantly different than the one appearing on the so-called authorization. Ms. Hunt and Ms. Rauch moved away from Cambridge in 1989 and I have not been able to locate them.
7. Plaintiff Esther Gibson as recently as October 13, 1990 re-affirmed her support of this action. (See attachment B hereto.) However, after the defendant Yoffa Co. Inc. postponed a hearing on this matter from October 31, 1990 to January 31, 1991 Ms. Gibson indicated her wish to withdraw from the case. Ms. Gibson is 76 years old. She recited to me her fear of teenage vandals at the property.
8. Plaintiff Alan Bell has long stated his hostility to this appeal. In October 1989 at a time when he was a candidate for election to the Cambridge City Council he instructed me that he and the other plaintiffs would work out a settlement of the matter and that I was not to communicate with any of the plaintiffs.

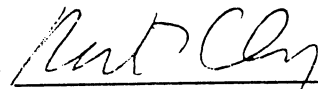
9. I complied with this demand and heard nothing further from Mr. Bell except for occasional statements that the appeal should be withdrawn. I have complied with Mr. Bell's request by filing a motion to withdraw his name and that of his wife from the action.
10. After Mr. Bell did not reply to an inquiry of mine dated April 2, 1990 I marked the matter for hearing. The hearing was set for October 31, 1990 and a few days before then Attorney John Campbell representing Yoffa told me he was going to withdraw from the case on the grounds that a younger attorney should try it and ask for a postponement. He also asked for a postponement of my motion to add seven (7) plaintiffs. The case was postponed until January 31, 1991 in order to give Yoffa Co. ample time to secure new counsel.
11. Attorney Campbell has not, to this day, withdrawn from the case and has stated that he still remains as counsel in the case. (See Attachment C hereto, his letter dated November 29, 1990.)

Signed under the pains and penalties of perjury this 26th day of December, 1990.


Richard D. Clarey, Esq.

CERTIFICATE OF SERVICE

I, Richard D. Clarey, attorney for the Plaintiffs, hereby certify that I served the foregoing upon the Defendants by mailing copies, postage prepaid, to Diane Winshaw-Boris, Esquire, Office of the City Solicitor, City Hall, 795 Massachusetts Avenue, Cambridge, MA 02139; John J. Campbell, Esquire, 90 Ellery Street, Cambridge, MA 02138; and Kenneth D. May, Esquire, 241 Cardinal Medeiros Avenue, Cambridge, MA 02141, this 26th day of December, 1990.



Richard D. Clarey

0986H

ANNUAL CITY CENSUS

WARE	INCINCT	FORM NUM
11	04	314191

Massachusetts law requires the information requested below with respect to population characteristics from all residents.
See enclosed instruction sheet.

A. ADDRESS JANUARY 1, 1989
THIS YEAR

B. ADDRESS JANUARY 1, 1988
LAST YEAR

☐ SAME

☒ DIFFERENT, IT WAS:

CR#4010
THE HUNT RESIDENCE
OR CURRENT RESIDENT AT
40 CLARENDON AVE 1
CAMBRIDGE MA 02140

1091 Baylston St. #44
STREET NO. STREET NAME
Boston MA 02215
CITY STATE

PLEASE READ INSTRUCTIONS AND PRINT CAREFULLY

[illegible]

SIGNATURE AND PHONE NUMBER OF PERSON PROVIDING INFORMATION:
SIGNED UNDER THE PENALTIES OF PERJURY.

CHILDREN (16 OR YOUNGER AS OF JAN. 1)

[illegible]

We the neighbors gathered at the home of Susan Rich and Richard Ploss, located at 63 Clarendon Ave. on October 13, 1990 to discuss the current situation having to do with the empty house on and abutting Midas Muffler, have mutually agreed to ^{enter} in the suit to prevent Midas Muffler from eliminating the foresaid house and/or land from the rolls as a residential structure. Specifically, in as much as possible it is our desire to work with Midas Muffler around our goal to develop housing at that location.

Richard Ploss	#	63
Joseph L. LARCOMBE	61	
Charles Williams	46	
Esther Gibson	18	
Ann Smith	28	
Esther A. Splaine	62	
Anna C. Spolito	64	
Susan J. Rich		
Paul M. Woolley	65	
JOHN F. SPLAINE - John F. Splaine	62	10-13-90

JOHN J. CAMPBELL

COUNSELLOR AT LAW

90 ELLERY STREET, SUITE 23
CAMBRIDGE, MA 02138

TELEPHONE: (617) 868-6700

FAX: (617) 661-7770

Received 12-3

November 29, 1990

Richard Clarey, Esq.
Bertin, Clarey, Deptula & Levee
50 Staniford Street
~~Boston~~, Mass 02114

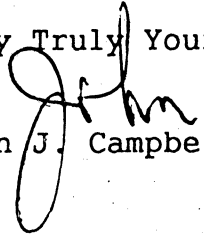
Re: Middas Muffler

Dear Dick:

I wish to acknowledge receipt of your letter dated November 27, 1990.

Please be advised that I have not withdrawn my appearance as counsel for Midas Muffler.

Very Truly Yours,


John J. Campbell

C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

LAND COURT
CIVIL ACTION NO. 136686

ESTHER GIBSON, ET AL., *

Plaintiffs *

-v- *

BOARD OF ZONING APPEAL, ET AL., *

Defendants *

BRIEF IN OPPOSITION OF BOARD OF ZONING APPEAL TO
MOTION TO ADD PLAINTIFFS

Now comes Defendant Board of Zoning Appeal ("BZA") and opposes
the Motion to Add Plaintiffs for the reasons set forth below.

AUTHORITY OF COUNSEL TO BRING MOTION

First, it appears that the movant, Esther Gibson, has
dismissed the moving counsel as her attorney. (See Plaintiffs'
Motion to Dismiss and supporting documents). Therefore, Defendant
maintains that said counsel lacks the authority and the standing to
bring the within Motion.

PERSONS NAMED IN MOTION ARE NOT AGGRIEVED PERSONS

Second, it appears as none of the persons named in the motion
is an aggrieved person and, therefore, none has standing pursuant
to M.G.L. c.40A, §17 which provides in pertinent part:

Any person aggrieved by a decision of the board of
appeals or any special permit granting authority...may
appeal...

"Parties in interest," as defined in M.G.L. c.40A, §11, are
presumptively considered to have standing in a §17 appeal. Harvard
Square Defense Fund, Inc. v. Planning Board of Cambridge, 27

000021

Mass.App.Ct. 491 (1989). M.G.L. c.40A, §11 provides in pertinent part:

"Parties in interest" as used in this chapter shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list....

None of the persons listed in the Motion are "parties in interest"; therefore, they have no presumptive standing. Accordingly, they must affirmatively show that they are aggrieved persons:

[W]hether a party is "aggrieved" is a matter of degree...and the variety of circumstances which may arise seems to call for the exercise of discretion rather than the imposition of an inflexible rule. Rafferty v. Sancta Maria Hospital, 367 N.E.2d 856, 859 (1977).

In determining whether a plaintiff is a "person aggrieved" under Section 17 with standing to prosecute zoning appeals,

the court must first decide whether plaintiff has sustained some degree of harm as a proximate result of the challenged zoning decision. The injury must be real, substantial, and directly caused by the zoning relief challenged to support, on balance, judicial intervention to protect against such injury. Boston Edison Co. v. Boston Redevelopment Authority, 374 Mass. 37, 46, 371 N.E.2d 728, 736-37 (1977).

Second, the court must identify the nature of the interests the zoning scheme was intended to protect. Zoning appeals may be brought only to protect those "legal rights" the zoning ordinance or bylaw was intended to create. Redstone v. Board of Appeals of Chelmsford, 11 Mass.App.Ct.383, 385, 416 N.E.2d 543, 544 (1981).

Third, the plaintiff's property and the use of that property must be among the class of property and the class of uses the zoning scheme was intended to protect. If either the interest claimed to be injured or the property sought to be protected against such injury is not within the "scope of concern" of the zoning scheme at issue, the plaintiff will be denied standing. Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 429-30, 86 N.E.2d 920, 922 (1949). Martin Healy, et al., Massachusetts Zoning Manual, 11-23.

WHETHER PLAINTIFF HAS SUSTAINED SOME DEGREE OF HARM
AS A PROXIMATE RESULT OF THE CHALLENGED ZONING DECISION

Movant has failed to show a "direct, substantial, and ascertainable" loss. Boston Edison Co., supra, at 46. The property which is the subject of this motion is a residentially zoned lot located at 10 Clarendon Avenue ("subject property"). The special permit required the owner to use the property for parking only, pursuant to the plans that were submitted which showed eight parking spaces.

Of the persons named in the Motion, the closest to the subject property is five lots away, each lot having between a 35 foot and a 38 foot frontage. The next closest is nine or ten lots away. All the other are still farther away. Based on the significant distances, those persons cannot be said to be within the scope of those who would sustain substantial injury as a direct result of the existence of a small parking facility.

It is relevant and significant that the direct abutter did not appeal the BZA decision and the abutter to the abutter within 300 feet currently is seeking a dismissal of the appeal. See, Boston Edison Co., supra, fn. 17.

WHETHER INJURY AND PROPERTY IS WITHIN THE
SCOPE OF CONCERN OF THE ZONING ORDINANCE

The movant has failed to allege "a plausible claim of a definite violation of a private right resulting from the administrative decision." Prudential Ins. Co. of America v. Board of Appeals Westwood, 18 Mass.App.Ct. 632, 633 (1984). "[A] general civic interest in the enforcement of the zoning ordinance" does not create standing as an aggrieved person. Waltham Motor Inn, Inc. v.

LaCava, 3 Mass.App.Ct. 210, 218 (1975). Movant alleges "traffic congestion, pedestrian hazards, parking problems, noise, exhaust fumes, hazardous waste, litter, commercial disruption of the neighborhood," etc. The courts have rejected such bases for being an aggrieved person. For instance, in Circle Lounge & Grill v. Board of Appeal of Boston, 324 Mass. 427 (1939), the court rejected the contention by holding that the traffic problems do not infringe on private legal rights. They amount to no more than "a general civic interest." Waltham Motor Inn, supra, at 218. Moreover, in the within matter, the BZA addressed these concerns in its decision:

Five members voted in favor of the motion to grant the special permit and found as follows: that the existing building is in conformance with current zoning; that no additional traffic will be generated; that no substantial change in established neighborhood character will be created; that no change of use is presented and that no adjacent uses will be adversely affected; that all equipment [sic] to be used in the proposed addition and the methods of installation will meet the highest standard, [sic] of safety and will ensure the health of the building occupants; and finally, that the proposed use will be served by sufficient parking for its employees and customers. BZA decision, page 2.

Defendant maintains that none of the allegations of the movant falls within the scope of concern of the zoning ordinance and they all rise to the level of "a general civic interest"; therefore, the persons listed in the motion are not aggrieved persons.

DOCTRINE OF LACHES

The Motion should be denied based on the doctrine of laches. The within lawsuit was filed eighteen (18) months ago. In Chiuccariello, v. Building Commissioner of Boston, 562 N.E.2d 96 (1990), the Court affirmed the Superior Court's decision to bar the

appeal based on the doctrine of laches where the abutting landowner delayed six (6) months in bringing suit to challenge the issuance of a variance. The delay in the matter sub judice was roughly three times more egregious than the delay in Chiuccariello, which was held to constitute laches sufficient to bar the abutters' action. Under these circumstances, equitable considerations require the denial of the motion.

CONCLUSION

The Motion to Add Plaintiffs appears to be nothing more than an attempt to fish for a person who this Court would deem to be an "aggrieved person." Defendants maintain that the line has come up without a catch; no facts have been alleged sufficient to qualify any of persons named in the Motion as an aggrieved person pursuant to M.G.L. c. 40A, §17. Accordingly, the movant failed to sustain the burden of proving that the persons named in the Motion were aggrieved.

For the reasons set forth above, Defendant respectfully requests this Court to deny the motion.

BOARD OF ZONING APPEAL
By its attorney,

Diane Wynshaw-Boris

Diane Wynshaw-Boris
Law Department
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139
(617) 349-4121
BBO# 554160

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail (by hand) on 3-6-91.

Diane Wynshaw-Boris

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT
No. 136686

.....

ESTHER GIBSON, JAYANTI DIXIT,
AMESUYA DIXIT, ALAN and SOOJA C.
BELL, PATRICIA RAUCH, BARBARA
HUNT, AVNER SEGALL, and RICKI
GOLDMAN,

Plaintiffs,

v.

BOARD OF ZONING APPEALS Of The
CITY OF CAMBRIDGE, MELVIN GADD,
EDWARD R. GOODE, LISA DELIMA,
SUSAN SPURLOCK, JACQUELINE T.
RICKARD, GEORGE SPARTICHINO,
JOSHUA T. ANDERSON and YOFFA
CO., INC. d/b/a MIDAS MUFFLER,

Defendants.

.....

MOTION TO INTERVENE AS PLAINTIFFS

Pursuant to Mass. R. Civ. P. 24(a)(1) and 24(a)(2), Paul F. Dietrich, as he is Chairman, and David Kennedy, Acheson Callaghan, Jr., Clarence Cooper, Alfred B. Cohn, Carolyn Mieth and Hugh Russell, as they are members of the Planning Board of the City of Cambridge (collectively, the "Planning Board"), hereby move to intervene as plaintiffs in the above-captioned action.

The grounds for this motion are as follows:

1. Petitioner Yoffa Co., Inc.'s proposed use of the subject property would violate provisions of the Cambridge Zoning Ordinance (the "Ordinance"), including without limitation the use

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restrictions set out in Section 11.106 of the Ordinance.

2. Pursuant to Section 11.108 of the Ordinance, only the Planning Board has the authority to allow divergence from the standards set forth in Sections 11.105 through 11.107 of the Ordinance. Under the Ordinance, the Cambridge Board of Zoning Appeals ("BZA") lacks the authority to grant a special permit allowing the proposed use of the subject property.

3. Accordingly, the BZA's decision that is the subject of this lawsuit should be declared null, void, and of no effect.

4. The members of the Planning Board are persons aggrieved by the BZA's decision who are "municipal officer(s) or (a) board" authorized to challenge it in court pursuant to the provisions of Mass. Gen. Laws c. 40A §17.

5. The members of the Planning Board are entitled to intervene as of right pursuant to Mass R. Civ. P. 24(a)(2) in that: (1) they have an interest in this action; (2) disposition of this action may as a practical matter impair or impede their ability to protect that interest; and (3) their interest is not being adequately represented by existing parties. See Mayflower Development Corp. v. Town of Dennis, 11 Mass. App. 630, 635 (1981). Each of these criteria is plainly satisfied. The Planning Board's rightful authority pursuant to the provisions of Section 11.108 of the Ordinance may be usurped unless the Planning Board is allowed to intervene in order to protect its interests. Further, the Planning Board's interest is not and cannot be adequately represented by existing plaintiffs, many of

whom have apparently decided not to pursue this litigation, none of whom has a direct interest in vindicating the authority of the Planning Board, and none of whom has the same clear standing under the "municipal officer or board" language of c.40A, §17.

6. The members of the Planning Board also satisfy the criteria for permissive intervention pursuant to Mass. R. Civ. P. 24(b)(2). The test for permissive intervention is less stringent than that for intervention as of right. See SEC v. Everest Management Corp., 475 F.2d 1236 (2d Cir. 1972). For the same reasons that the members of the Planning Board are entitled to intervene as of right, they should be allowed to intervene under the more liberal standards of permissive intervention.

WHEREFORE, the Planning Board asks that its Motion To Intervene As Plaintiffs be allowed.

Dated: *March 8, 1991*

By their attorney,

Richard d'A. Belin

Richard d'A. Belin BBO #036070
Foley, Hoag & Eliot
One Post Office Square
Boston, Massachusetts 02109
(617) 482-1390

CERTIFICATE OF SERVICE

I hereby certify that the above document was mailed on March 8, 1991 to the following:

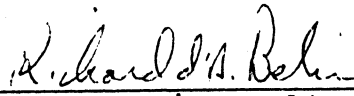
Richard D. Clarey
Berlin, Clarey, Deptula & Levee
50 Staniford Street
Boston, MA 02114

Alexandre A. Adams
Adams & Rafferty
323 Broadway
Cambridge, MA 02139

Kenneth D. May
241 Cardinal Medeiros Avenue
Cambridge, MA 02141

John J. Campbell
90 Ellery Street, Suite 23
Cambridge, Ma 02138

Diane Wynshaw-Boris
Law Department
City of Cambridge
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139



Richard d'A. Belin

Commonwealth of Massachusetts

Middlesex, ss.

Land Court
NO. 136686

Esther Gibson, Et Al,
Plaintiffs

V.

Board of Zoning Appeals of
The City of Cambridge, Et Al,
Defendants

AFFIDAVIT

1. My name is Amesuya Dixit
2. I reside at 28 Clarendon Avenue, Cambridge, MA.
3. I was initially listed as a plaintiff in the above-captioned matter.
4. On or about November 23, 1990 I executed the attached document discharging Attorney Richard D. Clarey from representing me and requesting this Court to dismiss this action.
5. I freely and willingly executed the aforementioned document and hereby authenticate my signature as affixed thereto.

Signed under the pains and penalties of perjury this
14th day of March 1991.

AMESUYA DIXIT

000023

Commonwealth of Massachusetts

Middlesex, ss.

Land Court
NO. 136686

Esther Gibson, Et Al,
Plaintiffs

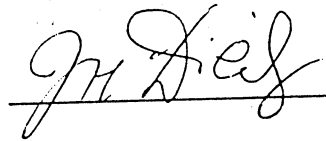
V.

Board of Zoning Appeals of
The City of Cambridge, Et Al,
Defendants

AFFIDAVIT

1. My name is Jayanti Dixit
2. I reside at 28 Clarendon Avenue, Cambridge, MA.
3. I was initially listed as a plaintiff in the above-captioned matter.
4. On or about November 23, 1990 I executed the attached document discharging Attorney Richard D. Clarey from representing me and requesting this Court to dismiss this action.
5. I freely and willingly executed the aforementioned document and hereby authenticate my signature as affixed thereto.

Signed under the pains and penalties of perjury this
14th day of March 1991.



000024

Commonwealth of Massachusetts

Middlesex, ss.

Land Court
NO. 136686

Esther Gibson, Et Al,
Plaintiffs

V.

Board of Zoning Appeals of
The City of Cambridge, Et Al,
Defendants

AFFIDAVIT

1. My name is Esther Gibson
2. I reside at 18 Clarendon Avenue, Cambridge, MA.
3. I was initially listed as a plaintiff in the above-captioned matter.
4. On or about November 23, 1990 I executed the attached document discharging Attorney Richard D. Clarey from representing me and requesting this Court to dismiss this action.
5. I freely and willingly executed the aforementioned document and hereby authenticate my signature as affixed thereto.

Signed under the pains and penalties of perjury this
14th day of March 1991.

Esther Gibson

000025

Commonwealth of Massachusetts

Middlesex, ss.

Land Court
NO. 136686

Esther Gibson, Et Al,
Plaintiffs

V.

Board of Zoning Appeals of
The City of Cambridge, Et Al,
Defendants

AFFIDAVIT

1. My name is Patricia Rauch.
2. I formally resided at 40 Clarendon Avenue, Cambridge, MA.
3. I was initially listed as a plaintiff in the above-captioned matter.
4. On or about November 23, 1990 I executed the attached document discharging Attorney Richard D. Clarey from representing me and requesting this Court to dismiss this action.
5. I freely and willingly executed the aforementioned document and hereby authenticate my signature as affixed thereto.

Signed under the pains and penalties of perjury this
26th day of March 1991.

Patricia Rauch

000026

Commonwealth of Massachusetts

Middlesex, ss.

Land Court
NO. 136686

Esther Gibson, Et Al,
Plaintiffs

V.

Board of Zoning Appeals of
The City of Cambridge, Et Al,
Defendants

AFFIDAVIT

1. My name is Barbara Hunt.
2. I formally resided at 40 Clarendon Avenue, Cambridge, MA.
3. I was initially listed as a plaintiff in the above-captioned matter.
4. On or about November 23, 1990 I executed the attached document discharging Attorney Richard D. Clarey from representing me and requesting this Court to dismiss this action.
5. I freely and willingly executed the aforementioned document and hereby authenticate my signature as affixed thereto.

Signed under the pains and penalties of perjury this
26 day of March 1991.

Barbara E. Hunt

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Commonwealth of Massachusetts

Middlesex, ss.

Land Court
NO. 136686

Esther Gibson, Et Al,
Plaintiffs

V.

Board of Zoning Appeals of
The City of Cambridge, Et Al,
Defendants

AFFIDAVIT

1. My name is Alan Bell

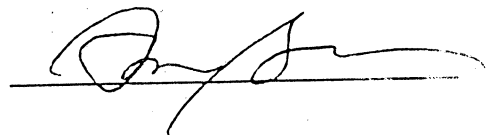
2. I reside at 32 Clarendon Avenue, Cambridge, MA.

3. I was initially listed as a plaintiff in the above-captioned matter.

4. On or about November 23, 1990 I executed the attached document discharging Attorney Richard D. Clarey from representing me and requesting this Court to dismiss this action.

5. I freely and willingly executed the aforementioned document and hereby authenticate my signature as affixed thereto.

Signed under the pains and penalties of perjury this
23 day of March 1991.



000028

Commonwealth of Massachusetts

Middlesex, ss.

Land Court
NO. 136686

Esther Gibson, Et Al,
Plaintiffs

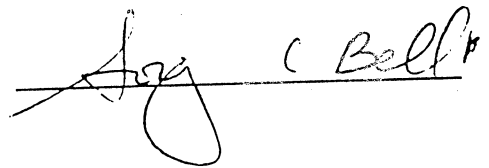
V.

Board of Zoning Appeals of
The City of Cambridge, Et Al,
Defendants

AFFIDAVIT

1. My name is Sooja C. Bell
2. I reside at 32 Clarendon Avenue, Cambridge, MA.
3. I was initially listed as a plaintiff in the above-captioned matter.
4. On or about November 23, 1990 I executed the attached document discharging Attorney Richard D. Clarey from representing me and requesting this Court to dismiss this action.
5. I freely and willingly executed the aforementioned document and hereby authenticate my signature as affixed thereto.

Signed under the pains and penalties of perjury this
23rd day of March 1991.


Sooja C. Bell

RE: Midas Muffler Appeal
DA: November 23, 1990

Docket: Case # 136686
Commonwealth of Massachusetts
Land Court Complaint, Appeal from Zoning Board
Chap.40A Sec.17, on Land in Cambridge. Petition filed 08/28/89

WE, the undersigned, are listed plaintiffs on the complaint filed August 8, 1989. After further consideration and with all the facts before us, we have directed Attorney Richard D. Clarey to move for dismissal with prejudice of this appeal as soon as possible. However, he has refused to honor our request and we therefore discharge him from acting for us in any manner.

We believe that the proposed condemnation and demolition of the vacant building at 10 Clarendon Avenue should be allowed. Further, we believe that once this appeal is dismissed that the special permit granted Yoffa Co. Inc. d/b/a/ Midas Muffler should be immediately effective allowing the construction of the proposed parking lot.

In addition, Ms. Carmen McNeill, owner of 14 Clarendon Avenue and the immediate abutter, joins with us in this request for action. The adjacent building has been a potential firetrap and an attractive nuisance for over two years endangering not only Ms. McNeill and her family, but her neighbors.

We therefore authorize Attorney Kenneth D. May to represent our interests in this matter only. We direct that he file an appearance in the land court and move that the court dismiss this appeal with prejudice.

Esther Gibson

18 Clarendon Avenue

Jayanti Dixit

28 Clarendon Avenue

Amesuya Dixit

28 Clarendon Avenue

Alan Bell

32 Clarendon Avenue

Sooja C. Bell

32 Clarendon Avenue

Patricia Rauch

40 Clarendon Avenue

Barbara Hunt

40 Clarendon Avenue

Avner Segall

40 Clarendon Avenue

Ricki Goldman

40 Clarendon Avenue

In addition, the following Clarendon Ave. residents support the above action:



CITY OF CAMBRIDGE

Office of the City Solicitor
City Hall

795 Massachusetts Avenue
Cambridge, Massachusetts 02139

(617) 498-9020

Russell B. Higley
City Solicitor

Donald A. Drisdell
Deputy City Solicitor

Michael C. Costello
Assistant City Solicitor

Birge Albright
Legal Counsel

Gail S. Gabriel
Legal Counsel

Joseph M. Kaigler
Legal Counsel

Diane Wynshaw-Boris
Legal Counsel

Edward J. O'Connell
Legal Counsel

March 28, 1991

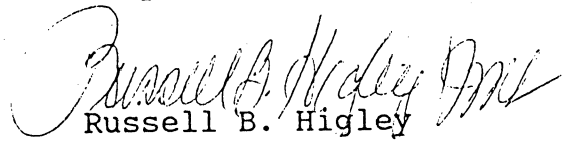
Attorney Sandra Shapiro
Foley, Hoag & Eliot
One Post Office Square
Boston, MA 02109

Re: Gibson, et al. v. Board of Zoning Appeal of the City
of Cambridge, et al.
Land Court No. 136686

Dear Attorney Shapiro:

Enclosed is an executed copy of the letter agreement for services to be rendered to the Planning Board in connection with the above matter.

Very truly yours,


Russell B. Higley

RBH/jml
Enclosure

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SUFFOLK, SS.

ESTHER GIBSON, ET AL.,

Plaintiffs

-v-

BOARD OF ZONING APPEAL, ET AL.,

Defendants

Now comes Defendant Board of Zoning Appeal and opposes the Motion to Intervene for the reasons set forth below.

The Motion to Intervene has not been timely filed within the contemplation of Rule 24 of the Massachusetts Rules of Civil Procedure, which provides that such a motion shall be granted only "upon timely application." The within Complaint was filed on August 28, 1989, one and a half years ago. The Planning Board has failed to demonstrate that it did not have an "opportunity to intervene at an earlier stage of the litigation." Corcoran, et al. v. Wigglesworth Machinery Company, et al., 389 Mass. 1002 (1983), quoting J.W. Smith & H.B. Zobel, Rules Practice §24.4 at 164-165 (1975). Certainly, a delay of eighteen months in filing the application cannot be considered timely.

Moreover, contrary to the Movant's contention, currently, its interests are adequately represented by the Plaintiffs who have

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raised the identical issues as the Planning Board, i.e., the Board of Zoning Appeal exceeded its authority in issuing the Special Permit:

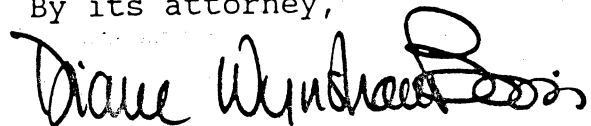
'[W]hen the applicant for intervention and an existing party have the same interests or ultimate objectives in the litigation, the application should be denied unless a showing of inadequate representation is made.' Mass. Fed. of Teachers v. School Com., 564 N.E.2d 1027, 1029 (1991) quoting 3B Moore's Federal Practice par. 24.07[4] (2d ed. 1987).

The burden of showing the inadequacy of the representation is on the applicant. Attorney General v. Brockton Agricultural Society, 390 Mass. 431, 434, 456 N.E.2d 1130 (1983).

Movant Planning Board has not sustained its burden of showing that it has satisfied the conditions precedent to an allowance of a Motion to Intervene. Attorney General v. Brockton Agricultural Society, 390 Mass. 431, 456 N.E.2d 1130 (1983). Here, as in Attorney General, there was no showing at all that the movants' representation would be inadequate. Id., at 435.

Wherefore, based on the foregoing Defendant respectfully requests that this Court deny the motion of the Planning Board to intervene in the within matter.

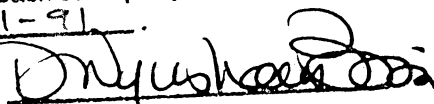
CITY OF CAMBRIDGE
By its attorney,



Diane Wynshaw-Boris
Law Department
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139
(617) 349-4121
BBO# 554160

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail (by hand) on 4-1-91.



COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT
No. 136686

.....

ESTHER GIBSON, JAYANTI DIXIT,
AMESUYA DIXIT, ALAN and SOOJA C.
BELL, PATRICIA RAUCH, BARBARA
HUNT, AVNER SEGALL, and RICKI
GOLDMAN,

Plaintiffs,

v.

BOARD OF ZONING APPEALS Of The
CITY OF CAMBRIDGE, MELVIN GADD,
EDWARD R. GOODE, LISA DELIMA,
SUSAN SPURLOCK, JACQUELINE T.
RICKARD, GEORGE SPARTICHINO,
JOSHUA T. ANDERSON and YOFFA
CO., INC. d/b/a MIDAS MUFFLER,

Defendants.

.....

PLANNING BOARD'S REPLY
MEMORANDUM IN SUPPORT
OF MOTION TO INTERVENE

The Cambridge Planning Board files this reply to address the arguments raised by the Board of Zoning Appeal ("BZA") and Midas Muffler in their briefs in opposition to the Planning Board's Motion To Intervene. The BZA and Midas both challenge the timeliness of the Planning Board's Motion To Intervene. In addition, the BZA argues that the Planning Board's interests are adequately represented by existing parties. Neither of these arguments has merit.

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1. Timeliness Of The Planning Board's Motion.

The Planning Board's Motion To Intervene was timely filed. While the Complaint in this case was filed a year and a half ago, very little has happened to date in the litigation. There has been no discovery, for example. Further, the Planning Board's intervention would not delay the resolution of this action since the Planning Board is raising a single legal issue as to whether it is the Planning Board or the BZA that has the authority under the Zoning Ordinance to grant special permits of the sort the BZA purported to grant in this case.¹

The issue of "timeliness" is analyzed with reference to three factors (only one of which--the opportunity to intervene earlier--is addressed by Midas and the BZA): 1) whether the intervenor had the opportunity to intervene earlier; 2) whether intervention at a particular stage of the litigation will cause prejudice to existing parties and 3) the applicant's particular need to intervene. Corcoran v. Wigglesworth Machinery Company, 389 Mass. 1002, 1003 (1983). These factors strongly support intervention.

The determination of "timeliness" pursuant to Rule 24 is based on all of the circumstances of the case. Where, as here, there is a claim of intervention as of right, courts typically view such applications leniently because denial entails serious consequences to the rights of the would-be intervenor. Smith &

¹ See Ordinance Section 11.08, which allows only the Planning Board to issue a special permit of the sort purportedly granted by the BZA.

Zobel, Mass. Practice, §24.4. Further, "the requirement of timeliness is not a means of punishment for the dilatory, and the mere lapse of time by itself does not make an application untimely." Wright & Miller, Federal Practice and Procedure, §1916. In this case it is the mere passage of time that Midas and the BZA rely upon in urging the court to deny the Planning Board's Motion To Intervene.

Moreover, one important circumstance in evaluating timeliness is when the intervenor became aware that its interest no longer would be protected adequately by existing parties. See Legal Aid Society of America v. Dunlop, 618 F.2d 48 (9th Cir. 1980). In this case, it was not until recently that the desire of certain original plaintiffs to withdraw from the litigation, in conjunction with the attack on the standing of certain other would-be plaintiffs, made it clear to the Planning Board that its interests would not be adequately represented by existing parties, and that it would have to hire counsel and seek to intervene.

Ordinarily, a motion to intervene is denied only on a showing of prejudice to existing parties. See Meyer v. Macmillan Publishing Co., 85 F.R.D. (D.N.Y. 1980), (EEOC allowed to intervene five years after initial complaint filed in the absence of prejudice to existing parties.) See also Wright & Miller, supra, §1916 (if intervention will not delay termination of the litigation, intervention will ordinarily be allowed). Here, as noted above, the intervention of the Planning Board will not

delay termination of the litigation. Midas and the BZA have not and cannot substantiate a showing of prejudice.

Finally, the third factor relevant to intervention, the intervenor's particular need to intervene, weighs strongly in favor of allowing intervention. The Planning Board is the only plaintiff with a determination to pursue this matter which also has unassailable standing under the clear language of Chapter 40A. The Planning Board is also uniquely suited to presenting the issue of the usurpation by the BZA of the Planning Board's authority under the Zoning Ordinance.

2. Adequacy of Representation By Existing Parties.

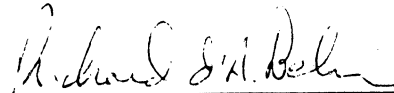
The BZA has also argued that the Planning Board's interests are adequately represented by existing plaintiffs. This is not so. Indeed most of the existing plaintiffs have moved to dismiss their claims. The would-be plaintiffs have been opposed in their attempts to be added as plaintiffs, and they have been challenged on the issue of standing, whereas the Planning Board has standing under the clear language of the statute. Only by intervening can the Planning Board be assured a court determination on the issue of the exclusive authority of the Planning Board to issue special permits pursuant to §11.108 of the Zoning Ordinance. Also, permissive joinder does not require proof of inadequate representation in any event. Smith & Zobel, Mass. Practice, §24.3.

Conclusion

For the foregoing reasons, and for the additional grounds set forth in its motion, the Planning Board respectfully requests that this Court allow its Motion To Intervene as Plaintiffs.

Dated: April 4, 1991

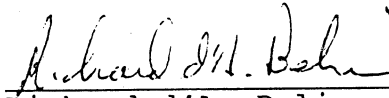
By its attorneys,



Richard d'A. Belin BBO #036070
Foley, Hoag & Eliot
One Post Office Square
Boston, MA 02109
(617) 482-1390

CERTIFICATE OF SERVICE

I hereby certify that I caused true copies of the above-captioned document to be served by hand and/or by telecopier on all counsel of record on April 4, 1991.



Richard d'A. Belin

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT
NO. 136686

ESTHER GIBSON, ET AL,
Plaintiffs

V.

BOARD OF ZONING APPEALS FOR
THE CITY OF CAMBRIDGE, ET AL,
Defendants

MEMORANDUM OF ADDITIONAL PLAINTIFFS
IN SUPPORT OF THEIR MOTION TO BE ADDED

Rhodes Williams, Jill Larcombe, John Splaine, Esther Splaine, Richard Ploss, Susan Rich, Paula Wooley, and Anna Ippolito (not including Upendra Dixit) assert their interest in retaining the residential zoning of 10 Clarendon Avenue. A map of Clarendon Avenue is attached hereto showing where the additional Plaintiffs live (in green), where the original Plaintiffs live (in red), and where the subject locus is (in black) adjacent to the property owned by Defendant Yoffa Co., Inc. d/b/a Midas Muffler, at the intersection of Massachusetts Avenue and Clarendon Avenue.

Also shown on this map are the following:

a. Somerville city line. Somerville does not allow north bound vehicular access from Clarendon Avenue beyond the city line.

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b. Clarendon apartments, a large senior citizen complex.

c. Playground across Clarendon Avenue from the locus.

The purpose of zoning land is the "preservation in the public interest of certain neighborhoods against uses which are believed to be deleterious to such neighborhoods." Circle Lounge & Grille, Inc. v. Board of Appeals of Boston, 324 Mass. 427, 430.

A look at this map will readily demonstrate the interest of the moving parties. The city of Somerville forbids access and requires the movants to exit their street at Massachusetts Avenue. The invasion of the residential zone by the Midas Muffler business will greatly increase traffic at this egress point. There will also be the problem of increased traffic at the playground which is used by neighborhood residents.

Attorney May is antagonistic to the interests of the movants because he is seeking to dismiss this case and allow the commercial invasion of the residential zone (as well as the unlawful usurpation of the Planning Board's jurisdiction). Midas has admitted an offer to pay money to an abutter represented by Attorney May. See previously filed Affidavit of Michael Brandon dated December 23, 1990. This admission was repeated by Midas' attorney in open court on December 27, 1990. At least one of the Plaintiffs was harassed by the abutter. See previously filed Affidavit of Ricki Goldman Segall dated December 20, 1990.

It is obvious from these facts that the moving Plaintiffs should be added to the Complaint and the Motion of the Cambridge Planning Board to Intervene should be allowed.

ESTHER GIBSON, ET AL
By their attorneys,

Richard D. Clarey
Berlin, Clarey, Deptula & Levee
50 Staniford Street
Boston, MA 02114
(617) 227-0720
BBO #084780

Dated: April 4, 1991

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COVETAGE PK AV

DMUNDS

MASSACHUSETTS AV



COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

LAND COURT
NO. 136686

ESTHER GIBSON, JAYANTI DIXIT,
AMESUYA DIXIT, ALAN AND SOOJA C.
BELL, PATRICIA RAUCH, BARBARA HUNT,
AVNER SEGALL, and RICKI GOLDMAN.
Plaintiffs

V.

BOARD OF ZONING APPEALS OF THE
CITY OF CAMBRIDGE, MELVIN GADD,
EDWARD R. GOODE, LISA DELIMA,
SUSAN SPURLOCK, JACQUELINE T.
RICKARD, GEORGE SPARTICHINO,
JOSHUA T. ANDERSON and YOFFA CO.,
INC. d/b/a MIDAS MUFFLER,
Defendants

DEFENDANT YOFFA CO., INC. D/B/A MIDAS MUFFLER'S
OPPOSITION TO MOTION TO ADD PLAINTIFFS AND MOTION
TO INTERVENE AS PLAINTIFFS

The Defendant, Yoffa, Co., Inc. d/b/a Midas Muffler, opposes the Motion to Add Plaintiffs and the Motion of the Cambridge Planning Board to Intervene as Plaintiffs and requests this Honorable Court to deny both motions.

Statement of the Case

On June 22, 1989, the Cambridge Board of Zoning Appeals voted unanimously (5-0) to grant a special permit to the Defendant Yoffa Co., Inc., d/b/a Midas Muffler, to allow construction of an addition to its existing muffler repair facility at 2503 Massachusetts Avenue (Business A2 District) and to also allow the required parking to be located at an adjacent site at 10 Clarendon Avenue (Residence B District).

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On or about March 8, 1990 the Planning Board of the City of Cambridge filed a Motion with this Court to Intervene as Plaintiffs. Both defendants oppose the motion.

On or about March 29, 1991 the seven plaintiffs who had earlier filed a Motion to Dismiss their Complaint on December 19, 1990 (including Plaintiff Esther Gibson) further affirmed their intentions by filing a Stipulation of Dismissal pursuant to Mass. R. Civ. P. 41 (a) (2). In addition, the seven plaintiffs also filed Affidavits with the Court authenticating, inter alia, their earlier instructions of "discharging Attorney Richard D. Clarey from representing me."

Argument

1. THE MOTION OF PLAINTIFF ESTHER GIBSON TO ADD PLAINTIFFS SHOULD BE DENIED BECAUSE OF HER SUBSEQUENT MOTION TO DISMISS AND THE FAILURE OF THE PERSONS NAMED THEREIN TO QUALIFY AS "PERSONS AGGRIEVED" WITHIN THE REQUIREMENTS OF M.G.L. c.40A, §17.

- A. Plaintiff Esther Gibson's subsequent filing of a Motion to Dismiss requires a denial of her Motion to Add Plaintiffs.

Since the filing of her Motion to Add Plaintiffs on October 19, 1990, Esther Gibson has sought to withdraw as a plaintiff and have this action dismissed. Accordingly, the filing of two subsequent Motions to Dismiss now renders Gibsons's earlier Motion to Add Plaintiffs moot.

An appeal from that decision was timely filed with this Court on August 28, 1989 by the above-captioned plaintiffs.

On October 19, 1990, the Plaintiff Esther Gibson filed a Motion to Add Plaintiffs. The motion is scheduled for hearing before this Court on April 4, 1991 and is opposed by both defendants.

On December 19, 1990, seven of the original nine Plaintiffs, including plaintiff Esther Gibson, filed a Motion with this Court to dismiss their complaint. The remaining two plaintiffs, Ricki Goldman and Avner Segall, filed a signed statement informing the Court that "We have no further interest in pursuing this appeal."

On December 24, 1990, an Opposition to the Plaintiffs' Motion to Dismiss was filed by Attorney Richard Clarey on behalf of plaintiff, Ricki Goldman Segall (a/k/a Ricki Goldman) and eight other individuals, none of whom are parties to this action. Contained therein was an affidavit by Ricki Goldman Segall stating that her earlier statement was signed "only after a period of harassment." \1/

\1/ Segall's Affidavit is unclear as to whether she wishes to prosecute her appeal. Nonetheless, the defendant has concluded that insofar as the Affidavit was offered in support of an Opposition to the Motion to Dismiss, the affiant must wish to remain as a plaintiff in this case.

Moreover, Gibson's affidavit of March 14, 1991 specifically discharges Attorney Richard D. Clarey from representing her. Attorney Clarey, therefore, is without authority to bring the Motion to Add Plaintiffs before this Court on behalf of Ms. Gibson.

- B. The individuals named in the Motion to Add Plaintiffs are not "persons aggrieved" within the meaning of M.G.L. c.40A, §17.

Massachusetts General Laws, c. 40A, section 17, provides for a "person aggrieved" by the decision of a Board of Zoning Appeal to appeal the decision to the Land Court or the Superior Court Department in which the land concerned is situated. Significant limitations exist, however, in defining what constitutes a "persons aggrieved".

A party with property adjacent to or abutting land upon which a Board of Appeals has taken affirmative action is aggrieved under section 17 if he can demonstrate "a plausible claim of a definitive violation of a private right resulting from the administrative decision." Prudential Ins. Co. of America v. Board of Appeals of Westwood, 18 Mass. App. Ct. 632, 633 (1984). Thus a "general civic interest in the enforcement of the zoning ordinance" does not create standing as an aggrieved person. Waltham Inn, Inc. v. LaCova, 3 Mass. App. Ct. 210, 218 (1975);

Circle Lounge & Grill, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 430-431 (1949); Amherst Growth Study Committee, Inc. v. Board of Appeals of Amherst, 1 Mass. App. Ct. 826, 827 (1973).

In a fact pattern similar to the case at bar, the Appeals Court in Prudential Insurance Company of American v. Board of Appeals of Westwood upheld the trial court's denial of a Motion to Intervene holding that "the same considerations that render the applicants not "aggrieved" for purposes of Section 17 also count against their being able to claim a cognizable "interest" under Rule 24(a)(2)." Conversely, in the case at bar, the lack of standing preventing the named individuals in the Motion to Add Defendants to intervene as of right under Mass. R.Civ.P. 24(a)(2) should be sufficient to demonstrate that they are not "persons aggrieved" within the meaning of Section 17.

None of the individuals listed in the Motion to Add Plaintiffs qualify as a "party in interest" and, therefore, do not appear on the list of residents notified by the Board of Zoning Appeals of the public hearing on the application for a special permit. (Attachment A) Accordingly, they are not entitled to any presumption as aggrieved persons. Rafferty v. Sancta Maria Hospital, 367 N.E. 2d 856, 859 (1977).

In the absence of such a presumption, there must be a showing of more than a "general civic interest". Waltham Motor Inn, supra. The Motion to Add Plaintiffs, however, fails to meet

that standard insofar as it only alleges a "wish" on the part of the named individuals "to assert their interest in retaining the residential zoning of 10 Clarendon Avenue, in working with the Defendants toward developing housing on that locus, and in preventing the traffic congestion, pedestrian hazards, parking problems, noise, exhaust fumes, hazardous waste, litter, commercial disruption of the neighborhood, depressed property values, visual blight and other public dangers, disruptions and nuisances that the decision appealed from will cause".

2. THE MOTION OF THE PLANNING BOARD OF THE CITY OF CAMBRIDGE TO INTERVENE AS PLAINTIFFS SHOULD BE DENIED BECAUSE IT HAS NOT BEEN TIMELY FILED.

The Planning Board of the City of Cambridge may not rely upon Rule 24 of the Massachusetts Rules of Civil Procedure in seeking to intervene as plaintiffs in the case at bar. Mass. R.Civ.P. 24(a) and 24(b) both require "timely application" in permitting a party to intervene.

On February 8, 1989, more than three months before a final vote was taken by the Board of Zoning Appeal, the Planning Board notified the BZA of its position concerning the Defendant Yoffa Co., Inc., d/b/a Midas Muffler's zoning application. (Attachment B) Nowhere therein, did the Planning Board assert any claim of exclusive authority to grant zoning relief in the affected area.

Furthermore, on or about July 12, 1989 Richard Clarey forwarded a letter to "Mel Gadd, Chairman Cambridge Board of Zoning Appeals" containing the issues which form the basis of the Planning Board's cause of action. (Attachment C) A copy of the letter was forwarded to "Chairman Paul Dietrich, Cambridge Planning Board." Now, more than eighteen months after a vote of the Board of Zoning Appeals and seventeen months after receipt of a copy of Mr. Clarey's letter, the Planning Board seeks to intervene as a party.

In addition, the decision of the Planning Board to seek intervention was made unlawfully and violates the property rights of Yoffa Co., Inc. The minutes of the January 8, 1991 Planning Board meeting indicate that the members heard an appeal by Attorney Richard Clarey requesting the Board to intervene in this action. (Attachment D) However, despite publishing an Agenda which indicated that the matter would be heard by the Planning Board (Attachment E), the property owner, Yoffa Co., Inc. was never given notice or informed by the Board that a hearing which could possibly affect its interest and rights in property was going to occur. As a result, the property owner was never given an opportunity to be heard before the Board acted.

It would, therefore, be an improper application of Rule 24 to allow intervention by the Planning Board eighteen months after the fact, in order to accommodate plaintiff's counsel in prosecuting this appeal. Moreover, this Court should be guided by the language of Mass. R.Civ.P. 24(b) and "consider whether the intervention will unduly delay or prejudice the adjudication or rights of the original parties."

Defendant Yoffa Co., Inc. has already had its rights prejudiced by the action of the Planning Board in this case. This Court should not allow any further such prejudice to occur and, therefore, should deny the Motion to Intervene.

Conclusion

For the reasons set forth above, Defendant Yoffa Co., Inc., d/b/a Midas Muffler, requests this Court deny the Motion to Add Plaintiffs and the Motion to Intervene.

Respectfully submitted,
for the Defendant Yoffa Co. Inc.
by its attorney:

Alexandre A. Adams BBO #12000
Adams & Rafferty
323 Broadway
Cambridge, MA 02139
Telephone: (617) 492-4100

City of Cambridge

BOARD OF SELECTS

List of abutters notified of public hearing held with reference to Case No. map 184
 relative to premises located 10 Clarendon Street

NAMEADDRESSAttorneyJohn J. Campbell,90 Ellery Street Suite 23Cambridge, Ma 02138

Clarendon Ave - 8-32 (L. 191, 27, 26, 25, 24, 23, 22) 9-21 (L. 147, 7)
Mass Ave - 2485-2505 (L. 31, 192, 180, 188, 15, 147)
Washburn Ave - 7-35 (L. 32, 33, 34, 35, 36, 37, 38)

Clarendon Ave - 02140

27 - Frederick, Telesia, Conant Rose, City of Cambridge tax title % F. Stanley Littleman
340 Aussett Road S. Brookline Ma 02167

26 - Carmen McNeil, 1425 - Carl E. + Esther Gibson 1824 - Dighton + Muriel Spooner 2223 - Phyllis Taube Greenleaf 2622 - Jayanti + Anusuya Dixit 2821 - Alan D. + Sooja Bell 32191 - Gerald J. Realty Co. Inc & City of Cambridge tax title147 - City of Cambridge 2511 Mass Ave7 - City of CambridgeMass Ave - 02140

192 - Mai Wan ko, + Julia Kiang-Shih ko, Huckleberry Hill, Lincoln
Ma 01773

31 - Russell + Irene Holbrook c/o Russell Holbrook 2485168 - George Spantichinis, City of Cambridge tax title, 2409 Mass Ave180 - Mai, Wan ko, Julia Kiang Shih ko, Huckleberry Hill Lincoln, Ma147 - 2511 Mass Ave City of Cambridge City of Cambridge 02140

City of Cambridge

BOARD OF SELECTS

List of abutters notified of public hearing held with reference to Case No. Map 184
relative to premises located 10 Clarendon Street

NAME

ADDRESS

02140

Washburn Ave - 7-35 (L. 32, 33, 34, 35, 36, 37, 38)

L. 34-33, John S. Cley Jr., traf J.S.O Park trust 20.

L. 35, 36 - Steven L. Janet M. Sainte P.O. Box 508, Cambridge 02139

L. 37 - Hamdoun Morise Awad, 29

L. 38 - George & Jean Pierre Neger, 33-35

L. 32 - Irene S. Holbrook c/o Russell Holbrook 2485 Mass Ave.



CITY OF CAMBRIDGE, MASSACHUSETTS

PLANNING BOARD

CITY HALL ANNEX, 57 INMAN STREET, CAMBRIDGE 02139

February 8, 1989

To: The Board of Zoning Appeal

From: The Planning Board

Re: BZA cases 5819 - 5825

The Planning Board has a comment on the variance request from the Midas Muffler Shop, Case #5819. The Planning Board's position is to discourage automobile oriented uses on Massachusetts Avenue and the policy of the Board is not to grant non-residential uses in the residential zones.

The rest of the cases are left to the Board of Zoning Appeal without comment.

July 12, 1989

CITY OF CAMBRIDGE
INSPECTIONAL SERVICES
JUL 25 AM 8 35

Mel Gadd, Chairman
Cambridge Board of Zoning Appeals
831 Massachusetts Avenue
Cambridge, MA 02139

RE: Midas Muffler Petition (Yoffa Company)
10 Clarendon Avenue/2501 Massachusetts Avenue
Case No. 5819

ATTACHMENT "C"

Dear Mr. Gadd:

As requested, we write to point out the following zoning violations that stem from the plan conditionally approved by the BZA on June 22, 1989:

1. The plan acted on differs significantly from the original proposal in terms of its subject matter, the nature of the legal action, and the specific relief sought. This new plan was not properly submitted to the Board, nor was advance notice of the public hearing provided through publication, nor was the matter referred to the Planning Board for review. These procedural defects violate Massachusetts law (G.L. c.40A, Sections 9 and 11) as well as the Cambridge ordinance (Sections 10.16 and 10.42).
2. The proposed parking lot on Clarendon Avenue is not allowable by special permit because it creates an accessory use that is explicitly disallowed in the Residence B zone (Sec. 4.32b, note 18).
3. In addition, the proposed parking lot is not allowable by special permit because the ordinance expressly forbids the siting of accessory off-street parking in a more restrictive zone than the zone it serves (Sec. 6.221 and 6.222a).
4. The proposed enlargement of the auto repair garage and parts warehouse violates the Massachusetts Avenue Overlay zoning (Sec. 11.100). The planned annex does not meet the district's setback requirements (Sec. 11.105), it expands industrial uses that are no longer allowed (Sec. 11.106), and it does not conform to the mandatory design standards established to enhance the Avenue (Sec. 11.107.1). Moreover, only the Planning Board--not the BZA--is authorized to grant special permits that allow divergence from these Overlay requirements (Sec. 11.108).
5. The planned Mass. Ave. annex also violates the dimensional requirements of the base zoning in the Business A-2 district (Sec. 5.33).
6. The proposed expansion of the preexisting, nonconforming building and use is not allowable by special permit because it further violates the dimensional requirements and exceeds the limitations imposed by the ordinance on the extent of such increases (Sec. 8.22a).
7. Consequently, the permits granted in this case are improper in that they derogate from the intent and purpose of the ordinance and are in other ways detrimental to the public interest according to the specific criteria set forth in the zoning code (Sec. 10.43).

(more)

July 12, 1989

In addition, we note that the new parking spaces may violate the Cambridge parking freeze mandated by the Environmental Protection Agency.

Finally, it has been suggested that the nearby neighbors do not object to Midas's expansion plans. Actually, as the attached memorandum and petition indicate, the neighbors are opposed to the proposal that was publicized.

In closing, we ask the Board to reconsider several matters carefully:

- * The probable negative impacts of the approved plan--
traffic congestion, pedestrian hazards, parking problems, noise, exhaust fumes, hazardous wastes, litter, commercial intrusions in residential areas and loss of potential housing, depressed property values, visual blight, and other public dangers, disruptions, and nuisances
- * The substantial community opposition that has been expressed--
by the immediate abutter, other parties in interest, Trolley Square neighbors, the North Cambridge Stabilization Committee, and the Cambridge Planning Board, among others
- * The highly dubious legality of the Board's approval and the likelihood that it will expose the city and its taxpayers to costly litigation

In view of the above, we urge the BZA to reopen this case, revise its findings, reverse its decision, revoke the special permits, and deny the petition.

We look forward to your timely response.

Sincerely yours,

Richard D. Clarey (Ly 4558)

Richard D. Clarey
15 Brookford Street

Michael O. Brandon

Michael O. Brandon
27 Seven Pines Avenue

cc: City Manager Robert Healy; Cambridge City Council; City Solicitor Russell Higley; Building Commissioner Joseph Cellucci & Zoning Specialist Ranjit Singanayagam; Chairman Paul Dietrich, Cambridge Planning Board; Asst. City Manager for Community Development Michael Rosenberg & Zoning Specialist Lester Barber; Chairman George McCray, North Cambridge Stabilization Committee; Traffic Commissioner George Teso; Atty John J. Campbell

CITY OF CAMBRIDGE, MASSACHUSETTS

PLANNING BOARD

CITY HALL ANNEX, 57 INMAN STREET, CAMBRIDGE 02139

January 8, 1991

Regularly scheduled meeting of the City of Cambridge Planning Board. Partial minutes.

Board members present: Alfred Cohn, Clarence Cooper, Hugh Russell, David Kennedy, Acheson Callaghan, and Paul Dietrich

CDD staff present: Michael Rosenberg, Mary Flynn, Roger Boothe, Lester Barber, and Liza Malenfant

During the General Business portion of the meeting the Planning Board members present heard from Michael Brandon, 27 Seven Pines Road and Richard Clarey, 15 Brookford Road, discussing the Board of Zoning Appeal Case #5819 - 10 Clarendon Street. This case involved the granting of a special permit to construct a two story building with three garage bays for the expansion of an automobile use, Midas Muffler Shop, and for tandem parking in the setback requirement. Specifically the Planning Board was asked to participate in the pending lawsuit against the Board of Zoning Appeal for granting the special permit.

Mr. Brandon and Mr. Clarey outlined their view of the case; specifically that the special permit issued was at least inadequate in that a number of variances were required and that another special permit was required from the Planning Board as required by the North Massachusetts Avenue Overlay District. As some original parties to the suit had withdrawn, Mr. Clarey was asking the court to permit other parties to substitute for those who had withdrawn; the Planning Board was asked if they would allow themselves to one of the new objectors, as the Board would clearly have standing in the case.

The Planning Board voted unanimously to investigate the case; this investigation would cover the adequacy of the permits granted, as well as the requirements of the North Massachusetts Avenue Overlay District as applied to this site. Should the staff find merit in claims made by Messrs Clarey and Brandon they were authorized to request funding from the manager to permit the Board to hire its own council to take appropriate action. The motion was made by Mr. Cohen and seconded by Mr. Cooper, and unanimously adopted, to authorized the staff in consultation with Mr. Dietrich, to investigate the matter, seek permission from the Manager if warranted, and to proceed with appropriate action.

Lester Barber, Clerk 3/22/91

CITY OF CAMBRIDGE, MASSACHUSETTS

PLANNING BOARD

CITY HALL ANNEX, 57 INMAN STREET, CAMBRIDGE 02139

Tuesday, January 8, 1991

Community Development Department Conference Room
third floor, City Hall Annex
57 Inman Street
Cambridge, Massachusetts

AGENDA

PUBLIC HEARING

7:30 - 9:00 p.m. City Council Petition to amend Article 7.000,
Signs and Illuminations

GENERAL BUSINESS

9:00 - 9:30 p.m. Request that the Planning Board intervene in
the Board of Zoning Appeal case #6138, 2503
Massachusetts Avenue, regarding Midas Muffler
(February, 1989)

9:30 - 10:30 p.m. Cambridgeport Rezoning Proposal, discussion
Board of Zoning Appeal Cases

FOLEY, HOAG & ELIOT

ONE POST OFFICE SQUARE
BOSTON, MASSACHUSETTS 02109

TELEPHONE (617) 482-1390

CABLE ADDRESS "FOLEYHOAG"

TELECOPIER (617) 482-7347

TELEX 940693

IN WASHINGTON, D.C.

1615 L STREET, N.W.

WASHINGTON, D.C. 20036

TELEPHONE (202) 775-0600

RICHARD d'A. BELIN

April 12, 1991

BY HAND

Justice Marilyn M. Sullivan
Land Court
Room 408
Old Court House
Pemberton Sq.
Boston, MA 02108

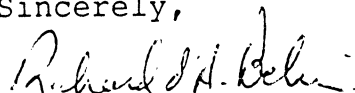
Re: Gibson v. Board of Zoning Appeals
Land Court No. 136686

Dear Justice Sullivan:

Your honor heard oral argument on this case on Thursday, April 4, 1991. The enclosed supplemental brief of the Cambridge Planning Board responds to certain issues raised at the oral argument and in the brief of Midas Muffler which was served right before the court hearing.

Thank you for your honor's attention to these matters.

Sincerely,



Richard d'A. Belin

RDAB/jh
Enclosures
cc: Counsel of Record



CITY OF CAMBRIDGE

INSPECTIONAL SERVICES DEPARTMENT CITY HALL
CAMBRIDGE, MASSACHUSETTS 02139 (617) 498-9013

JOSEPH J. CELLUCCI
COMMISSIONER OF BUILDINGS
AND HOUSING

September 8, 1989

Mr. Michael J. Brandon
27 Seven Pines Avenue
Cambridge, MA 02140

RE: Board of Zoning Appeal - Case No. 5819

Dear Sirs:

In response to your letter of August 18, 1989 I state as follows:

1. I have asked the City Manager to authorize the City Solicitor to advise me relative to the above-referenced matter and I have had contact with the City Solicitor's staff in this regard.
2. As Mr. Clarey has brought on appeal of the above referenced case, I see no reason to do so myself.
3. Mr. Clarey's lawsuit, if brought in accordance with M.G.C. Chapter 40A, Section 17, renders your third request moot.
4. Finally, it is my understanding that all signs found to be in violation of Article 7 of the Cambridge Zoning Ordinance have been removed.

I trust you will find the above to be responsive to your recent letter. As always thank you for your interest in this matter.

Sincerely yours,

Joseph J. Cellucci
Joseph J. Cellucci
Building Commissioner

JJC/mp

11.100 MASSACHUSETTS AVENUE OVERLAY DISTRICT

11.101 Establishment and Scope. There is hereby established the Massachusetts Avenue Overlay District which shall be governed by the regulations and procedures specified in this Section 11.100. It is the intent of this section that these regulations will apply to the

area described generally as Northern Massachusetts Avenue and certain abutting portions of the neighborhood abutting it.

11.102 Purpose. It is the purpose of this Section 11.100 to augment base zoning regulations in the District in order to create a more harmonious and consistent image for the development along the Avenue and adjacent areas, to encourage good building design and site development which enhances the pedestrian amenities along the Avenue, to ensure that changes along the Avenue are compatible with the scale and character of the abutting neighborhoods, to encourage the retention of existing buildings of historic value and uses which serve the abutting neighborhoods, and to discourage new development inappropriate in both scale and design.

11.103 Applicability. The Massachusetts Avenue Overlay District shall be an overlay district on the zoning map established by Section 3.20.

11.103.1 The buildings and land uses within said district shall be controlled by the pertinent regulations within the base zoning district, except as modified by the requirements of this Section 11.100 which shall apply in addition to regulations imposed by the base zoning map designations. Where the base zoning regulations differ from the requirements of this Section 11.100 the stricter provisions shall apply.

11.104 *Dimensional Standards in the Massachusetts Avenue Overlay District.*

11.104.1 Maximum Height. The maximum height of any structure in the Overlay District shall be sixty (60) feet or the height applicable in the base district, whichever is less.

11.104.2 Modifications to the Definition of Gross Floor Area. Notwithstanding the definition of Gross Floor Area contained in Article 2.000 - Definitions, the following shall not be included as part of the gross floor area of any building in the Overlay District:

- a. Enclosed bays and other small projections from the principal wall plane of a building normally included as gross floor area, provided they are three (3) feet or less in depth and further provided that the following conditions are met:
 - (1) the maximum width of the projection does not exceed six (6) feet in length;
 - (2) no more than fifty (50) percent of the area of each principal wall plane is covered with such projections.

11.105 Restrictions in Required and/or Provided Setbacks. That area between the principal wall plane of a building and a public street or public park whether required or provided shall be devoted to Green Area as defined in Article 2.000 of this Ordinance, an expansion of the adjacent public sidewalk, park, or other landscaped or paved area devoted exclusively to pedestrian use and extending along the entire length of the lot facing the street or park. Areas devoted to vehicular use are prohibited from this area with the exception of access drives to parking facilities located elsewhere on the site and which shall be limited to a total of thirty (30) feet of width for each one hundred (100) feet of lot frontage.

The required green area, landscaping or other paved area devoted to pedestrian uses shall be located at the mean grade of the relevant public street or open space at the property line unless an exception is granted under the provisions of Section 11.108 of this Section 11.100.

- 11.106 Use Restrictions.** The ground (first) floor of that portion of a building facing a public street or public park shall consist of gross floor area devoted to any one or combination of the following uses: Residential (Section 4.31), Office (Section 4.34), retail business (Section 4.35), Institutional (Section 4.33) meeting the following conditions:
- At least eighty (80) percent of the floor elevation of the ground (first) floor shall be no higher than the four and a half feet (4 1/2') above the mean grade of the adjacent public sidewalk or public park, at the property line, except that Retail Business uses in new construction shall be located at mean grade;
 - The use shall have a depth of at least twenty (20) feet;
 - Where a lot fronts on two streets the provisions of this Section 11.106 shall apply only to the principal arterial street frontage provided the remainder of the ground floor of the building facing the public street shall be screened with a permanent wall in materials equal in quality to those of the rest of the building and having a minimum opacity of fifty (50) percent.
 - One parking space for each unit in a Townhouse shall be exempt from the limitations of this Section 11.106.

11.107 Design Standards

- 11.107.1 Building Facades.** Building facades shall be designed to enhance the visual quality of the Overlay District, create an environment pleasant and inviting for the pedestrian and compatible with the residential neighborhoods in close proximity to the district. The following standards shall apply:
- Principal building entrances shall face Massachusetts Avenue where a lot abuts the Avenue;
 - Where office and/or retail uses are accommodated on the ground floor each separately leased space shall have an individual public entrance onto the abutting street where any portion of the space fronts towards the street;
 - Facades facing a public street, a public park, or designated city landmark building, or building in a local historic district or neighborhood conservation district, on an abutting lot, shall consist of a minimum twenty-five (25) percent clear glass in total for the facade, with clear glass increased to fifty (50) percent on the ground floor where retail and office uses are established. The maximum amount of clear glass permitted shall be seventy-five (75) percent of the facade. Reflective and opaque glass shall be prohibited.

- 11.108** Divergence from the standards specified in Sections 11.105 - 11.107 may be allowed by issuance of a special permit from the Planning Board. The Board shall grant such a permit upon its determination that the development proposed will better serve the

objectives of this Section 11.100 than if the standards were followed and that the criteria specified in Section 10.43 will be satisfied.

The Board shall be guided in its determination by *"Northern Massachusetts Avenue Urban Design Guidelines"* and other such guidelines as may be established for this portion of Massachusetts Avenue. This Section 11.108 is intended for variations from the standards which may be appropriate in specific locations and circumstances and where careful design detail is a controlling factor.

11.109 The Massachusetts Avenue Overlay District shall be considered an area of special planning concern. Development proposals exceeding six thousand (6,000) square feet in gross floor area shall be subject to the Large Project Procedure (Section 11.44) of Section 11.40.

11.110 Nonconforming structures. Notwithstanding the provisions of Section 8.23, that portion of a legal, nonconforming structure lying within the Massachusetts Avenue Overlay District which is destroyed or damaged by fire, explosion, or other catastrophe may be rebuilt or restored and used again, in the same way as it had been legally used immediately before the damage, without limit as to cost of such rebuilding or restoring provided the following conditions are met:

- (a) Any restoration or rebuilding shall commence within twelve (12) months after the catastrophe;
- (b) The structure shall be restored or rebuilt to the same design, including materials and design details as existed previously; or should the restoration not be feasible necessitating that the structure be rebuilt to a different design, said design shall be at least equal to the original design of the structure in quality of materials used, the quantity and quality of design details employed, and the compatibility of the site design with abutting properties;
- (c) The Community Development Department shall certify to the Superintendent of Buildings that the above conditions have been met.

With respect to the comparability of newly designed buildings, the Community Development Department shall consult the Cambridge Historical Commission for structures greater than fifty (50) years old. Should the Community Development Department find that said conditions have not been met the restoring or rebuilding shall require a special permit from the Board of Zoning Appeal.

The restored or rebuilt structure shall in no aspect increase the nonconforming nature of the original structure; nothing in this Section 11.110, however, shall prohibit a rebuilding or restoring which reduces the nonconforming nature of the original structure.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT
No. 136686

.....

ESTHER GIBSON, JAYANTI DIXIT,
AMESUYA DIXIT, ALAN and SOOJA C.
BELL, PATRICIA RAUCH, BARBARA
HUNT, AVNER SEGALL, and RICKI
GOLDMAN,

Plaintiffs,

v.

BOARD OF ZONING APPEALS of The
CITY OF CAMBRIDGE, MELVIN GADD,
EDWARD R. GOODE, LISA DELIMA,
SUSAN SPURLOCK, JACQUELINE T.
MILKMAN, DEBORAH SPARTAN, INC.,
JOSHUA W. ANDERSON and HOMER
CO., INC. d/b/a MIDAS MUFFLER,

Defendants.

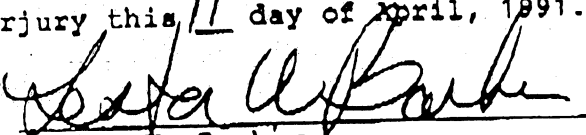
AFFIDAVIT OF LESTER W. BARBER

Lester W. Barber hereby deposes and states as follows:

1. I am the Director of Land Use and Zoning for the City of Cambridge.

2. Some time before the Planning Board a hearing on January 8, 1991 I received a telephone call from a representative of Midas Muffler stating that he had heard that a request that the Planning Board intervene in this case was on the agenda for the January 8 meeting. I confirmed that such was the case.

Signed under the penalties of perjury this 11 day of April, 1991.


Lester W. Barber

ADAMS & RAFFERTY
ATTORNEYS AT LAW
323 BROADWAY
CAMBRIDGE, MASSACHUSETTS 02139

ALEXANDRE A. ADAMS
JAMES J. RAFFERTY

TELEPHONE
617 / 492-4100
TELECOPIER
617 / 864-1362

April 16, 1991

Ms. Deborah J. Patterson, Clerk
Land Court - Room 408
Old Court House
Pemberton Square
Boston, MA 02108

RE: Gibson v. Zoning Board of Appeals
Land Court No. 136686

Dear Ms. Patterson:

Enclosed please find the Defendant's Response to the Planning Board's Supplemental Memorandum in support of its Motion to Intervene.

Thank you for your assistance and cooperation in this matter.

Very truly yours,

Alexandre A. Adams

AAA:amg
encl.

copy to: Richard d'A. Belin, Esquire
Kenneth May, Esquire
Richard Clarey, Esquire
Diane Wynshaw-Boris, Esquire

000035

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

LAND COURT
NO. 136686

ESTHER GIBSON, JAYANTI DIXIT,
AMESUYA DIXIT, ALAN AND SOOJA C.
BELL, PATRICIA RAUCH, BARBARA HUNT,
AVNER SEGALL, and RICKI GOLDMAN,
Plaintiffs

V.

BOARD OF ZONING APPEALS OF THE
CITY OF CAMBRIDGE, MELVIN GADD,
EDWARD R. GOODE, LISA DELIMA,
SUSAN SPURLOCK, JACQUELINE T.
RICKARD, GEORGE SPARTICHINO,
JOSHUA T. ANDERSON and YOFFA CO.,
INC. d/b/a MIDAS MUFFLER,
Defendants

DEFENDANT YOFFA CO., INC. D/B/A MIDAS MUFFLER'S
RESPONSE TO PLANNING BOARD'S SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION TO INTERVENE

Statement of the Case

On April 4, 1991, this Court heard oral argument from the parties in the above-captioned matter concerning, inter alia, the Motion of Esther Gibson to Add Plaintiffs and the Motion of the Planning Board of the City of Cambridge to Intervene. At the conclusion of the hearing, the Court allowed the Planning Board an opportunity to submit additional information concerning what, if any, notice was given to the defendant property owner ("Midas") concerning a hearing and vote taken by the Planning Board to seek intervention as a plaintiff in this action.

In its supplemental memorandum filed with this Court on April 12, 1991, the Planning Board exceeded the Court's allowance by further attempting to justify its failure to timely move to intervene and also reiterating its earlier claim that the Planning Board has exclusive jurisdiction to grant zoning relief in the affected area.

In contrast, The Planning Board has devoted only a single paragraph and a two sentence affidavit concerning the notice provided to the property owner prior to the Board's vote to intervene.

Argument

1.) THE PLANNING BOARD FAILED TO TIMELY INTERVENE IN THIS ACTION.

As supported by the memorandum submitted by the defendant and the arguments made before the Court on April 4, 1991, the Planning Board was aware of all aspects of the defendant's petition through a variety of means. In addition to the documents submitted to Midas Muffler in his brief, Attorney Anthony Pelusi of 43 Thorndike Street, Cambridge, MA 02141, telephone 617-577-8400, will be forwarding an affidavit reflecting that a member of the Planning Board, Carolyn Mieth was present at the Board of Zoning Appeals hearing regarding the defendant application.

Therefore, eighteen months after the commencement of this action the Planning Board should not be allowed to express a sudden desire in having its interests represented. The Planning Board had full knowledge of the Board of Zoning Appeal's decision and failed to act timely.

2.) THE PLANNING BOARD'S INTEREST IN THE ORDERLY DEVELOPMENT OF THE NORTH MASSACHUSETTS AVENUE OVERLAY DISTRICT IS NOT JEOPARDIZED BY THE BOARD OF ZONING APPEALS DECISION.

As the records of the Board of Zoning Appeals hearing reflect, the decision to amend the applicants' petition to a special permit was made at the suggestion of the Chairman of the Board of Zoning Appeals. In so doing, the only need for relief involved the amount of parking spaces required. The locus affected by the parking lot lies at the rear of the property, outside of the overlay district, and not within the purview of the Planning Board.

3.) THE PLANNING BOARD FAILED TO NOTIFY MIDAS OF ITS HEARING.

As the Court indicated on April 4, 1991, concerns of equity surround the actions of the Planning Board in holding a hearing and voting to intervene in this action without notifying the property owner. In its brief, the defendant alleged that "the property owner, Yoffa Co., Inc. was never given notice or informed by the Board that a hearing that could possibly affect its interests and rights in property was going to occur. As a result, the property owner was never given an opportunity to be heard before the Board acted."

In its supplemental brief, the Planning Board does not deny that it failed to notify the property owner, but instead relies upon the affidavit of Lester W. Barber stating that he "received

a telephone call from a representative of Midas Muffler stating that he had heard the request that the Planning Board intervene in this case, and was on the agenda for the January 8 meeting. I confirmed that such was the case."

The affidavit of Mr. Barber in no way alleviates the Planning Board of its "equitable obligation" to notify the property owner of the hearing. Moreover, the affidavit of Alexandre A. Adams, (Attachment A) indicates that he did call Mr. Barber on the day of the January 8th hearing and inquire about information he had received concerning the hearing. The Planning Board apparently seeks to rely upon that telephone inquiry as satisfying its obligation to provide notice to the property owner.

Conclusion

The sole purpose for which this Court granted leave for the Planning Board to supplement its brief was to respond to the defendant's allegations that proper notice had not been provided to the property owner of the Planning Board's meeting when a vote was taken to intervene in this action. In its response, the Planning Board simply relies upon a telephone inquiry by counsel for the property owner on the day of the hearing. Nothing in the Planning Board's supplemental brief should assuage the equity concerns raised by this Court at the time of the April 4, 1991 hearing regarding the conduct of the Planning Board.

Moreover, the defendant has provided further evidence of The Planning Board's long-standing knowledge of all the developments in this case by identifying the presence of a

Planning Board member at proceedings before the Board of Zoning Appeals. For the reasons set forth above and in the argument contained in the Memorandum brief previously submitted by the Defendant, Yoffa Co., Inc. d/b/a Midas Muffler, the Defendant requests that the Planning Board's Motion to Intervene be denied.

April 16, 1991

Yoffa Co., Inc. d/b/a
Midas Muffler
by its attorney,

Alexandre A. Adams
BBO #12000
Adams & Rafferty
323 Broadway
Cambridge, MA 02139
Telephone (617) 492-4100

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

LAND COURT
NO. 136686

ESTHER GIBSON, JAYANTI DIXIT,)
AMESUYA DIXIT, ALAN AND SOOJA C.)
BELL, PATRICIA RAUCH, BARBARA HUNT,)
AVNER SEGALL, and RICKI GOLDMAN.)
Plaintiffs)

V.)

AFFIDAVIT OF
ALEXANDRE A. ADAMS

BOARD OF ZONING APPEALS OF THE)
CITY OF CAMBRIDGE, MELVIN GADD,)
EDWARD R. GOODE, LISA DELIMA,)
SUSAN SPURLOCK, JACQUELINE T.)
RICKARD, GEORGE SPARTICHINO,)
JOSHUA T. ANDERSON and YOFFA CO.,)
INC. d/b/a MIDAS MUFFLER,)
Defendants)

Now comes Alexandre A. Adams, and states the following:

1.) My name is Alexandre A. Adams.

2.) I am an attorney licensed to practice law in the Commonwealth of Massachusetts.

3.) I represent the defendant Yoffa Co., Inc. d/b/a Midas Muffler in the above-captioned matter.

4.) On January 4, 1991, I met with Mr. F. Stanley Litchman to discuss the possibility of representing Yoffa Co., Inc. d/b/a Midas Muffler in this matter.

5.) On January 8, 1991, I learned from a telephone call from Attorney Kenneth May that he had information from one of his clients that a member of the North Cambridge Planning Team intended to speak to the Planning Board concerning this action.

6.) After speaking with Attorney May, I contacted the offices of the Cambridge Planning Board to determine accuracy of the information.

7.) At that time, I had a telephone conversation with an individual who identified himself as Lester Barber. During the course of the conversation, Mr. Barber indicated that an individual was asking to speak before the Planning Board and that he would be allowed to do so as a courtesy.

8.) At no time did Mr. Barber indicate the purpose of the individual's appearance, nor did he indicate that the Planning Board would be considering or entertaining any votes to intervene in this action.

Signed and sworn to under the pains and penalties of perjury
this 16th day of April 1991.

Alexandre A. Adams
BBO #12000
Adams & Rafferty
323 Broadway
Cambridge, MA 02139
Telephone (617) 492-4100

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the above-captioned document to be served by mail on all counsel of record on April 17, 1991.

Alexandre A. Adams
BBO #12000
Adams & Rafferty
323 Broadway
Cambridge, MA 02139
Telephone (617) 492-4100

ADAMS & RAFFERTY
ATTORNEYS AT LAW
323 BROADWAY
CAMBRIDGE, MASSACHUSETTS 02139

ALEXANDRE A. ADAMS
JAMES J. RAFFERTY

TELEPHONE
617 / 492-4100
TELECOPIER
617 / 864-1362

April 19, 1991

Ms. Deborah J. Patterson, Clerk
Land Court - Room 408
Old Court House
Pemkberton Square
Boston, MA 02108

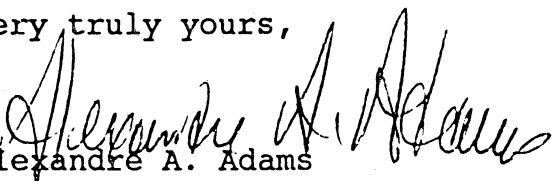
RE: Gibson v. Zoning Board of Appeals
Land Court No. 136686

Dear Ms. Patterson:

Enclosed please find an additional affidavit to Defendant Yoffa Co., Inc., et al, Response dated April 16, 1991.

Thank you for your assistance.

Very truly yours,


Alexandre A. Adams

/laf

Enclosure

cc: Richard d'A. Belin, Esquire
Kenneth May, Esquire
Richard Clarey, Esquire
Diane Wynshaw-Boris, Esquire

000036

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

LAND COURT
NO. 136686

ESTHER GIBSON, JAYANTI DIXIT,
AMESUYA DIXIT, ALAN AND SOOJA C.
BELL, PATRICIA RAUCH, BARBARA HUNT,
AVNER SEGALL, and RICKI GOLDMAN,
Plaintiffs

V.

BOARD OF ZONING APPEALS OF THE
CITY OF CAMBRIDGE, MELVIN GADD,
EDWARD R. GOODE, LISA DELIMA,
SUSAN SPURLOCK, JACQUELINE T.
RICKARD, GEORGE SPARTICHINO,
JOSHUA T. ANDERSON and YOFFA CO.,
INC. d/b/a MIDAS MUFFLER,
Defendants

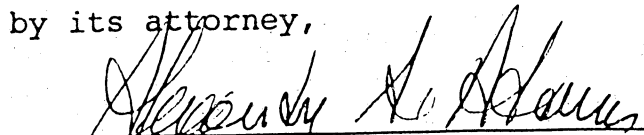
**ADDITIONAL AFFIDAVIT TO DEFENDANT YOFFA CO., INC.,
D/B/A MIDAS MUFFLER'S RESPONSE TO PLANNING BOARD'S
SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

On April 16, 1991, the Defendant submitted his response to the supplementary memorandum of the Planning Board.

At that time affidavit of Attorney Anthony R. Pelusi, Jr. was not included, therefore, I request that this Court accept same to the addition to our earlier response.

April 19, 1991

Yoffa Co., Inc. d/b/a
Midas Muffler
by its attorney,



Alexandre A. Adams
BBO #12000
Adams & Rafferty
323 Broadway
Cambridge, MA 02139
Telephone (617) 492-4100

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT
NO. 136686

ESTHER GIBSON, JAYANTI DIXIT,
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v.

BOARD OF ZONING APPEALS OF THE
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Defendants

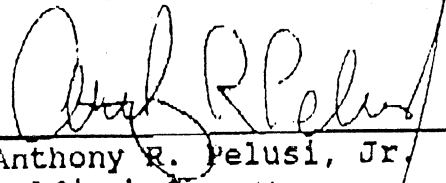
AFFIDAVIT OF
ANTHONY R. PELUSI, JR.

Now comes Anthony R. Pelusi, Jr. and states the
following:

- 1.) My name is Anthony R. Pelusi, Jr.
- 2.) I am an attorney licensed to practice law in the
Commonwealth of Massachusetts.
- 3.) I, as general counsel of Yoffa Co., Inc., d/b/a Midas
Muffler, was present with Attorney Jim Campbell, who
represented my client before the Cambridge Board of
Zoning Appeals.
- 4.) I was present at some, but not all of, the hearings
before the Board of Zoning Appeals on February 16,
1989; March 2, 1989; May 4, 1989; and June 22, 1989.

- 5.) Also present at one of the hearings before the Board of Zoning Appeals was a Carolyn Meith, a member of the planning board who I later learned from John Campbell to be the wife of Attorney Richard Cleary.

Signed and sworn to on this 19th day of April, 1991.

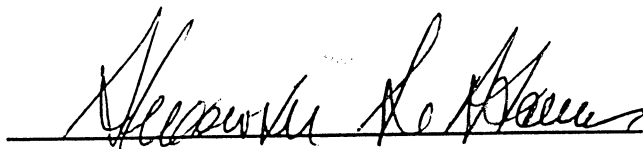


Anthony R. Pelusi, Jr.
Bulfinch Square
43 Thorndike Street
Cambridge, MA 02141-1714

Date: April 19, 1991

CERTIFICATE OF SERVICE

I hereby certify that I have mailed copies of Additional Affidavit to Defendant Yoffa Co., Inc., d/b/a Midas Muffler's Response to Planning Board's Supplemental Memorandum in Support of Motion to Intervene to all counsel of record on April 19, 1991.

A handwritten signature in cursive script, appearing to read "Alexandre A. Adams", is written over a horizontal line.

Alexandre A. Adams
BBO #12000
Adams & Rafferty
323 Broadway
Cambridge, MA 02139
Telephone (617) 492-4100

11.888

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

(SEAL)

DEPARTMENT OF THE TRIAL COURT

Middlesex, ss.

Miscellaneous
Case No. 136686

ESTHER GIBSON, JAYANTI]
DIXIT, AMESUYA DIXIT,]
ALAN BELL, SOOJA C. BELL,]
PATRICIA RAUCH, BARBARA]
HUNT, AVNER SEGALL and]
RICKI GOLDMAN,]
Plaintiffs]

vs.]

BOARD OF ZONING APPEALS OF]
THE CITY OF CAMBRIDGE,]
MELVIN GADD, EDWARD R. GOODE,]
LISA DELIMA, SUSAN SPURLOCK,]
JACQUELINE T. RICKARD,]
GEORGE SPARTICHINO, JOSHUA T.]
ANDERSON and YOFFA CO., INC.,]
d/b/a MIDAS MUFFLER,]
Defendants]

J U D G M E N T

Based upon the rulings and findings contained in the Court's Order of April 22, 1991, this Complaint is hereby dismissed.

By the Court (Sullivan, J.)

Attest: _____

Charles W. Trombly, Jr.
Recorder

Dated: June 19, 1991

ATTEST:
Charles W. Trombly, Jr.

000037

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

SEAL

DEPARTMENT OF THE TRIAL COURT

Middlesex, ss.

Miscellaneous
Case No. 136686

ESTHER GIBSON, JAYANTI]
DIXIT, AMESUYA DIXIT,]
ALAN BELL, SOOJA C. BELL,]
PATRICIA RAUCH, BARBARA]
HUNT, AVNER SEGALL and]
RICKI GOLDMAN,]
Plaintiffs]

vs.]

BOARD OF ZONING APPEALS OF]
THE CITY OF CAMBRIDGE,]
MELVIN GADD, EDWARD R. GOODE,]
LISA DELIMA, SUSAN SPURLOCK,]
JACQUELINE T. RICKARD,]
GEORGE SPARTICHINO, JOSHUA T.]
ANDERSON and YOFFA CO., INC.,]
d/b/a MIDAS MUFFLER,]
Defendants]

ORDER RELATIVE TO
DIVERSE MOTIONS

ms
This complaint pursuant to the provisions of G.L. c. 40A, §17 originally was brought by Esther Gibson, and others, who are residents of Clarendon Avenue in the City of Cambridge in which they objected to the grant of a special permit by the Board of Zoning Appeals of the City of Cambridge ("BZA") to Yoffa Co., Inc. ("Yoffa", more familiarly known as Midas Muffler). The complaint was filed on August 28, 1989 and subsequently on December 11 and 19, 1990 the plaintiffs filed motions to dismiss. Plaintiffs Alan Bell and Sooja Bell filed on November 5, 1990 a motion to withdraw as plaintiffs which was allowed on April 4, 1991. Also filed with

the Court was a request by two of the plaintiffs, Avner Segall and Ricki Goldman, that they be removed as plaintiffs. Subsequently, Dr. Goldman filed an affidavit that harassment led to her change of position. An earlier October motion had been brought by the original plaintiff Esther Gibson to add as parties plaintiff other residents of the street, but this motion was not acted upon before the motions to dismiss were heard, all of which were argued on April 4, 1991 together with a motion to intervene by the Cambridge Planning Board.

So far as the individual plaintiffs are concerned, I allow their motions to dismiss. It further appears to me that the two plaintiffs whose status is questionable, Segall and Goldman, have no standing as parties plaintiff. They admittedly are tenants at 40 Clarendon Avenue, the owners of which are neither abutters nor abutters to abutters. While the law appears to be in some flux as to the status of tenants to be parties in interest entitled to appeal in zoning matters, see Kasper v. Board of Appeals of Watertown, 3 Mass. App. Ct. 251 (1975) fn. 3, Reeves v. Board of Zoning Appeal of Cambridge, 16 Mass. App. Ct. 1011 (1983) and Quimby v. Zoning Board of Appeals of Arlington, 19 Mass. App. Ct. 1005 (1985), the owners of the property would fall without the statutory classification as to parties in interest. The original counsel for the plaintiffs contends that the owners of all the property on the street have an interest in the possible traffic problems since the street is dead-end, inasmuch as the adjoining

municipality, Somerville, has blocked it off at the city line. It appears to me, however, that the interest is merely a civic interest shared in common and does not rise to the status necessary to constitute the tenant a person aggrieved by the decision of the Board of Appeals. Accordingly, the motion by Segall and Goldman to be removed as plaintiffs is allowed.

Inasmuch as the party who originally moved to have additional residents of the street added as parties plaintiff has now changed her position and moves to have the action dismissed, her motion to add additional parties plaintiff has no continuing vitality and hereby is denied. This brings me then to the difficult issue in the case, a question as to whether now after more than nearly twenty months have elapsed since the complaint was filed, the Planning Board of the City of Cambridge should be allowed to intervene.

The Planning Board originally received notice of the petition by Yoffa Co., Inc. for a variance to construct a two story building with three garage bays at 10 Clarendon Avenue and an addition to the existing building at 2501 Massachusetts Avenue. The Chairman of the BZA suggested during the course of the hearings that a special permit rather than a variance would be the most appropriate form of relief after he had viewed the modification of the plans of the applicant. The BZA then granted the special permit. A notice of the decision was filed with the City Clerk in accordance with the requirements of G.L. c. 40A, §15. Presumably notice was

also given to the parties in interest which would have included the Planning Board. It was not until January 8, 1991 that the attorney who had represented the original plaintiffs in this case appeared before the Planning Board to convince them to seek to intervene. There is a controverted question as to whether notice of the request was given to the property owner, but there was an agenda item posted in accordance with the open meeting law that referred to this matter. The Planning Board ultimately so voted and its motion to intervene not filed until March 8, 1991 now is before me.

The motion is opposed by all the defendants including the BZA. G.L. c. 40A, §17 grants to "any municipal officer or board" the right of appeal from a decision of the Board of Appeals or any special permit granting authority and authorizes a city or town to provide such officer or board with independent legal counsel. In Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge, 27 Mass. App. Ct. 491 the Appeals Court held that a member of the Cambridge City Council did not have standing inasmuch as he was not a municipal officer with "duties to perform in relation to the building code or zoning", citing Garvey v. Board of Appeals of Medford, 334 Mass. 77, 80 (1956). The Planning Board stands in a different category since under the Cambridge Zoning Ordinances it apparently does have duties to perform in relation to zoning. The question is whether the Board's long delay in complaining that its function has been usurped by the BZA bars the intervention of the

Planning Board. If it were not for the Planning Board's motion, this action now would be dismissed in accordance with the stipulation of dismissal filed by the original plaintiffs. The problem before the Court is whether it is appropriate to allow the litigation to be prolonged when the Planning Board had the opportunity earlier to become a party. The Board argues that it had no reason not to believe that its interest was not being adequately represented by the original plaintiffs, and apparently also that it was unaware the BZA had changed the relief granted from a variance to a special permit which the Planning Board argues falls within its exclusive purview. The ordinance itself is not before me, however, and I express no opinion on that. It is, of course, no reason to deny a motion to intervene that the original parties either have no standing as in Quimby v. Zoning Board of Appeals of Arlington, 19 Mass. App. Ct. 1005 (1985) or as here seek to dismiss the action.

In ruling on a motion to intervene as of right, Chief Justice Greaney, in Mayflower Development Corp. v. Dennis, 11 Mass. App. Ct. 630 (1981) stated that the intervenor must show that it had an interest in the action, that it was so situated that the disposition of the action might as a practical matter impair or impede its ability to protect that interest and that its interest was not being adequately represented by existing parties, criterion which can only be analyzed in a practical matter. The Planning Board argues that it alone is vitally interested in the northern

Massachusetts Avenue overlay district and that the legislative body has left to it the determination as to whether a special permit is to be granted in the district. It further argues that because of the budgetary crunch affecting all cities and towns, it was prudent of it to delay intervention until it became apparent that the plaintiffs had lost interest in the litigation. It is unfortunate at this stage when municipalities are having difficulty in fulfilling their commitments to provide rudimentary services that a power struggle has arisen between municipal boards. It is particularly unfortunate that the applicant for relief, Midas Muffler, now is threatened with further delay after such a long period of time, particularly since the relief granted to it by the BZA was suggested by the chairman of that board. The litigation would be terminated at this stage if the Planning Board had not voted to intervene at the instance of an attorney for the original parties after they had elected to have the appeal dismissed. I express no opinion on the propriety of his action. It is a close question as to the Planning Board's right to litigate the relief granted by the BZA on the factual situation here, but while the Board clearly falls within the definition of a party aggrieved as set forth in G.L. c. 40A, §17, it has slept on its rights. Accordingly, I find and rule that the Planning Board is not entitled to intervene either as a matter of right or discretion. The delay occasioned by its intervention will unduly prejudice the

applicant and prolong the litigation, contrary to the statutory mandate in zoning cases.

In summary, the plaintiffs' motion to add parties is denied, the plaintiffs' motion to withdraw is allowed, the Planning Board's motion to intervene is denied, and the parties' stipulation of dismissal is approved.

By the Court (Sullivan, J.)

Attest:

Charles W. Trombly, Jr.
Recorder

Dated: April 22, 1991

ATTEST COPY
ATTEST:

Charles W. Trombly, Jr.
RECORDER

1150

CITY OF CAMBRIDGE, MASSACHUSETTS
PLANNING BOARD

CITY HALL ANNEX, 57 INMAN STREET, CAMBRIDGE 02139

May 30, 1991

Mr. Joseph Cellucci, Commissioner
Inspectional Services Department
831 Massachusetts Avenue
Cambridge, MA 02139

Dear Commissioner:

As you are undoubtedly aware the Planning Board petitioned the Land Court to be allowed to intervene in the ongoing appeal by residents of a special permit granted by the Board of Zoning Appeal for development at 2503 Massachusetts Avenue and 10 Clarendon Avenue (i.e. Midas Muffler Case #5819). The Court denied the request.

The Planning Board's interest was not in a challenge to the validity of the permit granted, as a BZA permit was clearly necessary, but rather to assert the Planning Board's jurisdiction to issue a special permit as well under the requirements of Section 11.108 of the Massachusetts Avenue Overlay District: the waiver of the use requirements of Section 11.106 and the design standards of Section 11.107 are the two most conspicuous examples. There is no authorization in the Zoning Ordinance which would permit the Board of Zoning Appeal to grant permits required from the Planning Board. Furthermore, each BZA decision explicitly cautions that all other requirements of the City of Cambridge must be met before authorization to proceed is granted.

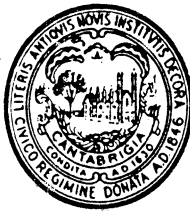
There has been no action to date by the Board of Appeal or your office which would preclude the issuance of a further special permit by the Planning Board. Therefore the Board requests that, at the conclusion of the appeal and before the issuance of a building permit for any work on the site, the permittee be directed to apply for and secure a special permit from the Planning Board as required by the Massachusetts Avenue Overlay District. You will of course want to review the approved site plans and the applicable provisions of the Massachusetts Avenue Overlay District. Should you reach a different conclusion we would ask you to convey your thoughts to the Board in a timely manner. We do expect, however, that you will find the Planning Board's jurisdiction clear.

Sincerely,

Paul Dietrich, Chairman
Cambridge Planning Board

cc: Robert W. Healy, City Manager
Don Drisdell, Deputy City Solicitor

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CITY OF CAMBRIDGE

Russell B. Higley
City Solicitor

Donald A. Drisdell
Deputy City Solicitor

Michael C. Costello
Assistant City Solicitor

Birge Albright
Legal Counsel

Office of the City Solicitor
City Hall

795 Massachusetts Avenue
Cambridge, Massachusetts 02139

Tel. (617) 349-4121
Fax. (617) 349-4307

Gail S. Gabriel
Legal Counsel

Joseph M. Kaigler
Legal Counsel

Diane Wynshaw-Boris
Legal Counsel

Laura H. Yager
Legal Counsel

MEMORANDUM

TO: RANJIT SINGANAYAGAM, Zoning Specialist
FROM: DIANE WYNshaw-BORIS, Legal Counsel
RE: 2501 Mass. Ave. - Midas Muffler
DATE: December 20, 1991

=====

As you are aware, the appeal from the decision of the Board of Zoning Appeal with regard to the special permit that was issued to Midas Muffler at the above address was dismissed upon motion by the plaintiffs. The motion to intervene by the Planning Board was denied. No appeal was taken from the dismissal of the appeal or the denial of the motion. The court did not address the merits of the special permit, but no further avenue for appeal exists. In these circumstances, it is our position that the landowner is entitled to rely upon the special permit in seeking a building permit which conforms to the plans approved by and as set forth in the decision of the BZA.

cc: Les Barber, Community Development
Members of the Planning Board
Robert W. Healy, City Manager

000039

February 18, 1992

Mr. Joseph J. Cellucci
Commissioner of Buildings and Housing
Inspectional Services Department
c/o Cambridge City Hall
Cambridge, MA 02139

RE: Yoffa Company, Inc., d/b/a Midas Muffler
2501 Massachusetts Avenue/10 Clarendon Avenue
BZA Case No. 5819

Dear Mr. Cellucci:

I again write to request immediate enforcement of the Cambridge zoning ordinance in the above matter. As noted previously, Section 9.15 requires that you institute "appropriate action or proceedings in the name of the City of Cambridge to prevent, correct, restrain, or abate violations." (Copies of our earlier correspondence are attached for your convenience.)

In view of recent developments, I ask that you take the following enforcement actions:

1. Deny the pending building permit application for 2501 Mass. Ave.
2. Notify the applicant that the project as proposed would violate various provisions of the zoning ordinance and that the law bars you from issuing the permit until valid zoning waivers are obtained from the appropriate officials--i.e., a special permit from the Planning Board pursuant to Section 11.108 (Mass. Ave. Overlay District) and specific variances properly granted by the Board of Zoning Appeal.
3. Advise the petitioner that the BZA special permit provides insufficient zoning relief and was issued unlawfully; that the unchallenged Land Court decision in Gibson v. BZA of Cambridge does not serve to validate the defective permit; that further efforts to secure a building permit will fail if they seek to rely on the existing permit; and that in the event of an administrative appeal from your decision to the BZA or to the courts, the City of Cambridge will vigorously defend the public's right to proper enforcement of the zoning law --a right repeatedly recognized by the state's highest court.
4. Take immediate steps to correct the zoning violations inherent in the 1989 BZA decision. If appropriate, ask the newly appointed BZA to reopen case 5819 and rescind the decision, or seek a declaratory judgment annulling the special permit.
5. Order the prompt removal of all illegal signs and banners at 2501 Mass. Ave. and take measures to prevent the continual violations of the sign ordinance at this location.
6. Ask the City Manager to hire impartial, outside legal counsel to advise you and him in these matters.

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Mr. Joseph J. Cellucci
Commissioner of Buildings and Housing
February 17, 1992
Page 2

The Position of the City Solicitor's Staff

I urge you to disregard the murky memorandum sent out by the city's Law Department on December 20 of last year. It appears to suggest that "the landowner is entitled to rely upon the special permit in seeking a building permit" because "no further avenue for appeal exists" in the original lawsuit; but no clear legal basis for this flawed conclusion is provided. Not only does this memo disregard applicable case law and misconstrue the effect of the Land Court ruling, it also seems to place private interests above those of the general public, thereby calling into question the conflicting roles being played by the city's legal staff. Allegations of zoning law violations by the BZA were at the core of the recent lawsuit; they are the crux of the ongoing controversy; and they may very well be the subject of further litigation. Is it appropriate for the same city attorney who has been representing the BZA (and who joined with Midas to prevent an adjudication of the merits of the BZA permit) to be rendering legal advice on this subject to the city's zoning enforcement officers and to other officials charged with protecting the public's interest in upholding the law?

The Land Court's Narrow Ruling

The Land Court did not determine that the BZA permit was validly issued, or that it provides adequate relief from the zoning restrictions, or that it entitles the petitioner to a building permit, or that it may be relied upon in place of a Planning Board special permit. "The ordinance itself is not before me," the judge emphasized, "and I express no opinion on that." The court merely ruled that the Planning Board, by delaying, had lost its right to join in the original lawsuit, and that none of the other persons who were seeking a direct judicial review of the BZA decision by means of a statutory appeal had legal standing to do so. Although no one appealed this narrow Land Court ruling, it is wrong to conclude, as the Law Department apparently has, that the city has thus lost its only opportunity to enforce the zoning law correctly in this case; or that you, the Planning Board, and other persons determined to uphold the law now have no recourse through alternative administrative and judicial remedies; or that the public has no way to secure an adjudication of its rights and enforcement by the courts, if necessary.

Relevant Case Law

The Supreme Judicial Court of Massachusetts has ruled that "the issue of the invalidity of a [zoning] permit may be raised by appropriate parties notwithstanding the absence of a valid appeal" (Lane v. Selectmen of Great Barrington, 226 NE2d 238); that the Zoning Act "does not ... establish a comprehensive statutory scheme for enforcement which restricts to the statutory procedures action by individual citizens seeking to invoke the enforcement process" (Brady v. Board of Appeals of Westport,

Mr. Joseph J. Cellucci
Commissioner of Buildings and Housing
February 17, 1992
Page 3

204 NE2d 513); that "in a proceeding for enforcement of the zoning law ... the existence of a permit is inconsequential" (ibid.); that "the loss by an aggrieved citizen of the right of direct attack on a permit does not entail loss of the right of the same citizen to bring a mandamus petition for enforcement of the law and to stop violations in the construction going forward under the permit" (ibid.); and that "the right of the public to have the zoning b)law properly enforced cannot be forfeited ..." (Cullen v. Building Inspector of No. Attleborough, 234 NE2d 727).

Moreover, courts in Massachusetts and elsewhere have repeatedly held that the doctrines of estoppel and laches "cannot stay the hand of a municipality in enforcing its zoning laws" and that "the governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance. The public has an interest in zoning that cannot thus be set at naught"; (Ferrante v. Board of Appeals of Northhampton, 186 NE2d 471, et al).

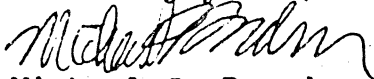
Conclusion

In short, the existing special permit was unlawfully issued by the BZA and is therefore not valid. As the city's zoning enforcement officer, you are the appropriate party to raise the issue of the permit's invalidity. The absence of a successful statutory appeal does not validate a defective permit or create any right to a building permit. The City of Cambridge will prevail if Midas brings suit because the public policy favoring proper enforcement of the zoning law outweighs other considerations. Although you declined to intercede at an earlier stage, you must now take steps in behalf of the public to block those who seek to circumvent the spirit and intent of the zoning ordinance.

In closing, I call your attention to the final sentence in Section 9.12: "In the event of doubt whether a building permit... should be issued in any particular case the Superintendent of Buildings shall deny the application therefore."

I thank you for your careful consideration of these views and await your timely written response to this request for enforcement.

Sincerely yours,



Michael J. Brandon
27 Seven Pines Avenue
Cambridge, MA 02140
encl.

cc: Cambridge City Council; City Manager Robert W. Healy; City Solicitor Russell Higley; Deputy City Solicitor DonCald Drisdell; Legal Counsel Diane Wynshaw-Boris; Cambridge Planning Board; Zoning Specialists Ranjit Singanayagam and Lester Barber; Asst. City Manager Michael Rosenberg; Don McMath and Richard Clarey, North Cambridge Stabilization Committee

Mr. Russell ~~D.~~ Higley, Mr. Donald^{A.} Drisdell, & Ms. Diane Winslow-Boris
City Solicitors Office
Cambridge City Hall
Cambridge, MA

by hand

June 12, 1992

Mr. Joseph J. Cellucci
Commissioner of Buildings and Housing
Inspectional Services Department
c/o Cambridge City Hall
Cambridge, MA 02139

11, 888
RECEIVED
JUN 12 PM 5:03
CAMBRIDGE MA.

(DELIVERED BY HAND)

RE: Yoffa Company, Inc., d/b/a Midas Muffler
2501 Massachusetts Avenue/10 Clarendon Avenue
(BZA Case 5819)

Dear Mr. Cellucci:

Once again I write to request immediate enforcement of the Cambridge Zoning Ordinance, as well as the Massachusetts Zoning Act, Building Code, and Sanitary Code. Pursuant to Section 9.15 of the ordinance, please issue a stop-work order in the name of the City of Cambridge to prevent, correct, restrain, and abate violations occurring at the above construction site.

A visit to the site this morning revealed a number of ongoing violations:

1. Construction activity has begun without obtaining the necessary special permit from the Planning Board and zoning variance from the Board of Zoning Appeal.
2. The entire stretch of public sidewalk and curbing has been removed in front of 10 Clarendon Ave., and a city street sign seems to have been torn down without permission. According to Jeffrey Nutting of the Department of Public Works, no permission from his department or the utility companies has been obtained to excavate the public way. Street Superintendent Robert Keating will be checking the site this afternoon and ordering workers to cease and desist from further activity if no permit is produced, Mr. Nutting indicated.
3. No permission has been obtained from the City Council to alter or remove the curb cut that has been destroyed.
4. In violation of Sections 4.37 and 4.38 of the zoning ordinance, the residentially zoned property at 10 Clarendon is being used for open-lot storage of dirt fill possibly contaminated with oil and other toxic waste material; sand; second-hand lumber and other used building material; concrete; dismantled used-vehicle parts; curbstones; scrap metal; junk; and other salvage material. The use of the unfenced lot in this manner, adjacent to inhabited dwellings, would seem to violate the state Sanitary Code as well as city health ordinances.

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Mr. Joseph J. Cellucci
June 12, 1992
Page 2

5. Construction debris is obstructing the streets and sidewalks at both locations and dust is not being adequately contained.
6. Despite repeated complaints to both you and Ranjit Singanayagam, violations of the sign ordinance continue at this location.

I urge you to remind the operators of Midas that they are undertaking considerable financial risk by proceeding with construction, since you cannot legally issue a certificate of occupancy until they have obtained all required permits and licenses from the appropriate city officials.

I hope that you will provide a prompt, detailed written response to this request for enforcement and to my unanswered letter of last February 18, as called for in the state zoning statute.

Sincerely,


Michael J. Brandon
27 Seven Pines Avenue
Cambridge, MA 02140

cc: Zoning Specialist Ranjit Singanayagam
City Manager Robert W. Healy
Cambridge City Council
DPW Coordinator Jeffrey Nutting
Street Supt. Robert Keating
Traffic and Parking Commissioner George Teso
North Cambridge Stabilization Committee

11, 888
NORTH CAMBRIDGE STABILIZATION COMMITTEE

OFFICE OF CITY CLERK

1992 JUN 18 PM 4:21

CAMBRIDGE MA.

June 18, 1992

Cambridge City Council
c/o City Clerk's Office
City Hall
Cambridge, MA 02139

RE: Midas Muffler
2501 Mass. Ave./10 Clarendon Ave.

Dear Councilors:

By unanimous vote the North Cambridge Stabilization Committee respectfully urges the City Council to take immediate action to halt the dangerous and illegal expansion of the Midas Muffler facility at the corner of Clarendon and Mass. Ave.--just feet away from private homes, a neighborhood park, playground, and tot lot about to be extensively renovated with public funds, and the Burns Apartments, a 199-unit city-run housing complex for elderly and disabled Cambridge residents.

We would like permission to address you on this pressing matter at the June 22 City Council meeting, at which time we expect to present you with a citizens' petition seeking your formal intervention; a summary of past events and an update on current ones; and a list of possible actions the Council could take to remedy this intolerable situation.

In exasperation and desperation we are appealing to you--the elected representatives of the people of Cambridge and our delegated policymakers--and asking that you put the city back on the course of respecting and upholding the rule of law. We are tired of city officials who subvert due process and circumvent the Council's stringent land-use regulations in apparent collusion with private interests who show slim regard for the public's welfare, cynical contempt for your authority to establish zoning policy on behalf of the electorate, and open disdain for the role of the Planning Board, the agency you have designated to monitor development and oversee city-approved urban design guidelines and growth plans.

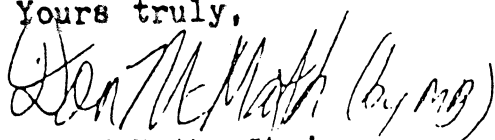
Blind to the sleazy tactics that have been used by Midas--and deaf to the repeated objections of neighbors, the Stabilization Committee, the Planning Board, and individual city councilors--executives at the top levels of the current city administration, including the City Manager, the Community Development Director, the Building Commissioner, and the City Solicitor and his deputy, are compounding the outrageous actions of a renegade Board of Zoning Appeal by allowing this project to proceed not only without proper zoning waivers, required permits, and adequate public input, but in probable violation of more than a dozen sections of various city ordinances and state statutes.

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Cambridge City Council
June 18, 1992
Page 2

We hope that the Council will give this deplorable state of affairs the close attention it demands, and we look forward to appearing before you on Monday evening.

Yours truly,

A handwritten signature in dark ink, appearing to read "Don McMath (by mg)". The signature is written in a cursive, somewhat stylized script.

Don McMath, Chairman
North Cambridge Stabilization Committee
97 Pemberton Street
Cambridge, MA 02140

June 29, 1992

Mr. Joseph J. Cellucci
Commissioner of Buildings and Housing
Inspectional Services Department
831 Massachusetts Avenue
Cambridge, MA 02139

(DELIVERED BY HAND)

RE: Yoffa Co., Inc., d/b/a MIDAS MUFFLER
2501 Massachusetts Ave./10 Clarendon Ave.
BZA Case 5819/Building Permit No. 031902

Mr. Cellucci:

I write to renew my February 18 and June 12 requests for immediate enforcement of the building, sanitary, and zoning laws. I again urge you to revoke the improperly issued building permit and order all contractors and subcontractors to cease and desist from further construction activity at the above site.

As I mentioned to you in person and by telephone last week, there are several additional reasons why you should rescind the flawed building permit.

1. Contrary to the express conditions of the Board of Zoning Appeal special permit in Case No. 5819, this project is not being constructed "as per the plans submitted" to the BZA. The final plans approved by your department differ from the Board-approved plans in several significant respects.

2. The general contractor, Craig Sutton of Stand Corp., has not abided by his affidavit certifying that he would notify you by February 5 of where he will dispose of solid waste from this project. Thus, in violation of MGL Ch. 40, Sec. 54, the building permit lacks the necessary indication that the possibly contaminated waste from this automotive facility is being removed in accordance with applicable law.

Since the construction and demolition debris is being dumped on the residentially zoned lot at 10 Clarendon Ave. (a few feet away from inhabited dwellings) rather than taken to a licensed disposal facility, a legally required condition of the building permit is being violated by the contractor and ignored by your department. I have called this to the attention of Ron Bentubo, John Fallon, and Ranjit Singanayagam of your staff, as well as discussing the problem with you directly.

Mr. Bentubo has maintained that he found no building code violations at this site, and you have asserted to me that compliance with this provision is merely "a courtesy" that falls outside your actual duties as Building Commissioner. All three of the inspectors witnessed the illegal dumping firsthand, however, and it has been recorded on videotape and witnessed by many neighbors and by other city officials. Moreover, as Building Commissioner you are clearly responsible for enforcing compliance, since the pertinent provisions have been incorporated in the Fifth Edition of the Massachusetts Building Code as Section 114.1.3.

000043

15 minutes NO 2

Mr. Joseph J. Cellucci
June 29, 1992
Page 2

N/A *Unw/ Apt* *Carrie Yash*

3. You cannot issue a valid building permit for this project until the Community Development Department certifies in writing that the Midas proposal has undergone a small-project review pursuant to Sections 11.40 and 11.109 of the Cambridge Zoning Ordinance. According to Elizabeth Malenfant of the CDD, Midas has not complied with this requirement and no CDD certificate has been issued; so this document cannot have been submitted to you with the building permit application as required by Sections 11.41 and 11.43, which you are also required to enforce.

Long *Long*

4. The ongoing open-lot storage of cinder blocks, wooden pallets, and other building materials, the continuing dumping and unfenced storage of dirt fill and construction debris, the repeated overnight parking of trucks and heavy construction machinery, and other unreasonable, unpermitted industrial activities in the Res. B and BA-2 districts constitute patent violations of the zoning ordinance, especially in the absence of a temporary permit to allow reasonable construction activities.

5. Your approval of the building permit application violates several provisions of Section 6.50 of the ordinance, which requires the submission of detailed parking plan information.

Long

Even in the absence of this material, it should be obvious that Midas cannot comply with the BZA-approved plans unless the company secures improved access to the proposed Clarendon Street parking lot. To do so, it must restore the sidewalk and preexisting curb cut unlawfully removed by the subcontractor and then successfully petition the City Council for permission to widen or relocate the curb opening after appropriate departments and affected neighbors have been notified and been given an opportunity to respond.

If the Council does not grant permission, you will be forced to order the demolition and removal of the garage annex that the company has shortsightedly started to build in violation of the law and without first obtaining all necessary permits and licenses from the city.

6. The existence of even a valid BZA special permit would not justify your allowing construction activities to continue in the absence of a valid building permit, a Planning Board special permit waiving the provisions of the Mass. Ave. Overlay District, a solid-waste-disposal certificate, a CDD small-project-review certification, a valid sidewalk-and-street excavation license, a City Council curb cut permit, an expanded fuel-storage license from the License Commission, and a BZA variance.

Long

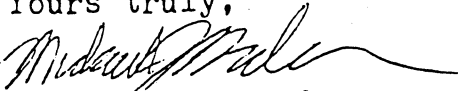
7. As I reminded Mr. Singanayagam last week, temporary signs that violate the sign ordinance are still in place at this site.

In closing, I note that per Section 9.16 of the ordinance you may be fined \$100 daily for every violation you continue to allow by refusing to enforce the law. And as you know, the Massachusetts Building Code provides for stiffer fines--and even imprisonment--to discourage ongoing violations of its provisions.

Mr. Joseph J. Cellucci
June 29, 1992
Page 3

I await your timely written response in accordance with applicable law.

Yours truly,



Michael J. Brandon
27 Seven Pines Avenue
Cambridge, MA 02140

cc: Zoning Specialist Ranjit Singanayagam
Chief Inspector Ron Bentubo
Inspector John Fallon

City Manager Robert W. Healy
Cambridge City Council

Elizabeth Malenfant, Lester Barber, Michael Rosenberg/CDD
Massachusetts Board of Building Regulations and Standards
North Cambridge Stabilization Committee
North Cambridge News, Cambridge Chronicle, Cambridge Tab
Cambridge Planning Board
Cambridge Board of Zoning Appeal

June 12, 1992

Mr. Joseph J. Cellucci
Commissioner of Buildings and Housing
Inspectional Services Department
c/o Cambridge City Hall
Cambridge, MA 02139

(DELIVERED BY HAND)

RE: Yoffa Company, Inc., d/b/a Midas Muffler
2501 Massachusetts Avenue/10 Clarendon Avenue
(BZA Case 5819)

Dear Mr. Cellucci:

Once again I write to request immediate enforcement of the Cambridge Zoning Ordinance, as well as the Massachusetts Zoning Act, Building Code, and Sanitary Code. Pursuant to Section 9.15 of the ordinance, please issue a stop-work order in the name of the City of Cambridge to prevent, correct, restrain, and abate violations occurring at the above construction site.

A visit to the site this morning revealed a number of ongoing violations:

- Low Cellucci*
1. Construction activity has begun without obtaining the necessary special permit from the Planning Board and zoning variance from the Board of Zoning Appeal.
 2. The entire stretch of public sidewalk and curbing has been removed in front of 10 Clarendon Ave., and a city street sign seems to have been torn down without permission. According to Jeffrey Nutting of the Department of Public Works, no permission from his department or the utility companies has been obtained to excavate the public way. Street Superintendent Robert Keating will be checking the site this afternoon and ordering workers to cease and desist from further activity if no permit is produced, Mr. Nutting indicated.
 3. No permission has been obtained from the City Council to alter or remove the curb cut that has been destroyed.
 4. In violation of Sections 4.37 and 4.38 of the zoning ordinance, the residentially zoned property at 10 Clarendon is being used for open-lot storage of dirt fill possibly contaminated with oil and other toxic waste material; sand; second-hand lumber and other used building material; concrete; dismantled used-vehicle parts; curbstones; scrap metal; junk; and other salvage material. The use of the unfenced lot in this manner, adjacent to inhabited dwellings, would seem to violate the state Sanitary Code as well as city health ordinances.
- N/A*
- Photos
taken
on 6/12/92*

Mr. Joseph J. Cellucci
June 12, 1992
Page 2

- N/A
5. Construction debris is obstructing the streets and sidewalks at both locations and dust is not being adequately contained.
 6. Despite repeated complaints to both you and Ranjit Singanayagam, violations of the sign ordinance continue at this location. *GIN*

I urge you to remind the operators of Midas that they are undertaking considerable financial risk by proceeding with construction, since you cannot legally issue a certificate of occupancy until they have obtained all required permits and licenses from the appropriate city officials.

I hope that you will provide a prompt, detailed written response to this request for enforcement and to my unanswered letter of last February 18, as called for in the state zoning statute.

Sincerely,


Michael J. Brandon
27 Seven Pines Avenue
Cambridge, MA 02140

cc: Zoning Specialist Ranjit Singanayagam
City Manager Robert W. Healy
Cambridge City Council
DPW Coordinator Jeffrey Nutting
Street Supt. Robert Keating
Traffic and Parking Commissioner George Teso
North Cambridge Stabilization Committee



CITY OF CAMBRIDGE
COMMUNITY DEVELOPMENT DEPARTMENT

MICHAEL ROSENBERG,
Assistant City Manager for
Community Development

July 21, 1992

MARY FLYNN,
Deputy Director for
Community Development

Mr. Michael Brandon
27 Seven Pines Avenue
Cambridge, Mass. 02140

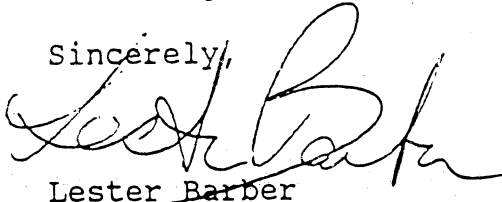
Dear Michael:

Let me take this opportunity to respond to your inquiry regarding the application of Section 11.109 of the Massachusetts Avenue Overlay District. In looking at the provision in more detail my earlier confident assertion that the Section mandated small project review may have been too hastily drawn.

The intent of the Section is, I believe, to require the application of all provisions of Section 11.40 (the development consultation procedure) to activity within the Massachusetts Avenue Overlay District with the exception that large project reviews should only occur for developments of 6,000 square feet or more rather than the 2,000 square foot threshold normally applicable. Unfortunately the language of Section 11.109 is much abbreviated and, unlike the language for the Harvard Square Overlay District for instance, makes no reference to Section 11.42 which lists the activities subject to the procedure, either small or large.

One interpretation of the condensed language is that only very large projects were intended to be regulated by Section 11.40. In the years since adoption of the Overlay District I do recall the extensive discussion about the appropriate threshold for a large project review; I have no recollection, however, whether there was any discussion about the small project review process, either to retain it or forego it. Unfortunately it would appear that the language is sufficiently imprecise as to invite the differing interpretations which have arisen.

Sincerely,



Lester Barber

cc. Rangit Singanayagam, Inspectional Services



CITY OF CAMBRIDGE
INTEROFFICE CORRESPONDENCE

TO: Diane Wynshaw-Boris
Legal Counsel

DATE: August 3, 1992

FROM: Ranjit Singanayagam *RS*
Zoning Specialist

SUBJECT: 2501 Mass Avenue, Cambridge MA.
Midas Muffler

The following, are the responses to the questions raised by Mr. Brandon's letter dated June 12, 1992.

- 1) Requirement of Special Permit from the Planning Board is not necessary as per City Solicitor's memorandum dated December 20, 1991.
- 2) Sidewalk is the responsibility of the Department of Public works (DPW) and I understand all permits from DPW were obtained.
- 3) Regarding permission from City Council , the DPW has already issued the permit.
- 4) Regarding storage of material as per Sec. 4.37 & 4.38 of the Cambridge Zoning Ordinance. This storage only took place for one day during construction but it has already been removed.
- 5) Obstruction of the sidewalk comes under the jurisdiction of the DPW.
- 6) As per the sign ordinance the owner has removed the big temporary sign, the 1x1 sign in question is an informational sign and was removed today.

Letter dated June 29, 1992.

The site was inspected on July 16, 1992 by Commissioner Joseph Cellucci and myself, we met with the contractor.

- 1) The footprint of the building is exactly the same as on the plan signed by the then Chairman of the Board of Zoning Appeal Case #5819. The building is not completed yet, therefore the height and other aspects of the building cannot be inspected now.

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- 2) The requirements of the Massachusetts General Laws, Chapter 40, Section 54 regarding dumping of solid waste and information to the building department only applies to alteration and repairs to building. This is considered as a new building under the building code. This site was inspected by Ron Bentubo, John Fallon and myself and found no violations.
- 3) As regards to the review by the Community Development Department (CDD) for a small scale permit, Art. 11, Sec. 11.109 of the Cambridge Zoning Ordinance does not indicate that small projects have to be reviewed by CDD, Les Barber's letter will clarify this.
- 4) This is a construction site, the storage of material and trucks may have been for a day or two but it was all removed immediately.
- 5) The building is not complete and no Certificate of Occupancy has been sought or issued. Therefore, before issuance of the Certificate of Occupancy compliance will be required as per Board of Zoning Appeal's Case #5819.
- 6) The building permit as issued on March 19, 1992, and no violations of the Building Code or the Zoning Ordinance exists.
- 7) The temporary sign has been removed, and the small sign has been taken down.

The occupancy for this building will not be issued until the building is completed and with all requirements are met.

EDWARD J. O'CONNELL

Attorney At Law
392 Cambridge Street
Cambridge, Massachusetts 02141-1204
Tel. (617) 354-8787
Fax (617) 661-4677

December 8, 1992

VIA FACSIMILE: 349-4134

Attorney Donald Drisdell
Deputy City Solicitor
Cambridge Law Department
795 Massachusetts Avenue
Cambridge, MA 02139

RE: Midas Muffler - North Cambridge

Dear Attorney Drisdell:

I am writing, from recollection only and without the benefit of reviewing any documents, in response to your recent inquiry regarding the above-referenced business.

While I was employed as Legal Counsel in your office, I was assigned a case involving said business. Specifically, Midas Muffler had proposed to build an addition to their existing structure on Massachusetts Avenue in North Cambridge. In this regard, Midas applied to the Cambridge Board of Zoning Appeal (hereinafter, the "Board") for zoning relief necessary to proceed with the project. After at least two public hearings, the Board granted the needed relief. Among the matters discussed at the hearings was what zoning relief was actually needed. I seem to recall that the issues were whether the provisions of a particular overlay district were applicable, whether the Board was the appropriate permit granting authority, and whether Midas needed a special permit or a variance. Regardless, the Board granted what it deemed to be the appropriate relief necessary for the project to go forward.

Thereafter, a Complaint was served on the Board appealing its decision. As Legal Counsel, I was assigned to represent the Board. In reviewing the Complaint, I became concerned that some if not all of the plaintiffs named did not have "standing" to bring the suit. I seem to recall that some of them lived a substantial distance away from Midas and others were not property owners. Moreover, I seem to recall that few if any of them attended the Board's hearings. In any event, I scheduled depositions for some if not all of the named plaintiffs and sent out the required notices. My objective was to determine if these people were "aggrieved persons" under the relevant provisions of the Zoning Act.

Soon thereafter, some of the plaintiffs whose depositions I

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LAW DEPARTMENT

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Midas Muffler

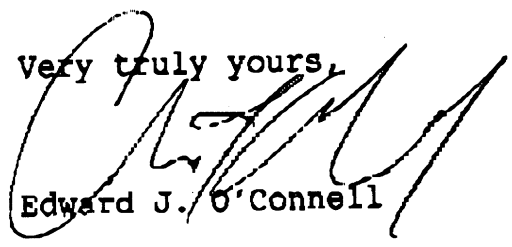
Page 2

had scheduled contacted me by telephone to ask why I wanted to depose them. While I advised each of the people I spoke with to talk to their lawyer, it was obvious to me, just from the brief telephone conversations I had with them, that these people had no idea that they were plaintiffs in a lawsuit against the City.

On the date the depositions were scheduled to take place, the stenographer failed to show up. Unfortunately, it was too late to call each of the people scheduled to appear in order to cancel. Among those appearing at the Law Department offices that day were Attorney Richard Cleary, apparently on behalf of the plaintiffs, and Attorney Anthony Pelusi, on behalf of Midas. I recall that there was a heated discussion between the attorneys present, myself included. The gist of the discussion was that the people named in the pending lawsuit apparently did not know that they were parties to the suit or that a suit had even been filed. I recall that Attorney Pelusi specifically accused Attorney Cleary of champerty. I also recall that, while the attorneys were discussing the matter, at least one of the plaintiffs whose deposition had been scheduled arrived at the office. Upon my informal inquiry of this individual, it became obvious that the gentleman had no idea why he was there, nor did he know anything about any lawsuit to which he was a party. Soon thereafter, the discussion broke up. Beyond that date, I have no further specific recollections regarding this matter.

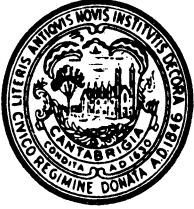
If you have any further questions in this regard, please don't hesitate to contact me.

Very truly yours,


Edward J. O'Connell

92 DEC 8 AM 11 10

LAW DEPARTMENT



CITY OF CAMBRIDGE
CAMBRIDGE, MASSACHUSETTS 02139

TEL. 349-4300
FAX. 349-4307

EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

RICHARD C. ROSSI
Deputy City Manager

December 14, 1992

To The Honorable, The City Council:

With reference to Awaiting Report Item No. 28, regarding Midas Muffler site on Massachusetts Avenue, please find attached a response received from Russell B. Higley, City Solicitor, relative to this issue.

Very truly yours,

Robert W. Healy
City Manager

RWH/mev
attachment

S-1049

Awaiting Report Item No. 28 regarding the
Midas Muffler site on Massachusetts
Avenue.

In City Council,

December 14, 1992

12/14/92 No action taken
Reconvened meeting held
on 12/16/92

12/16/92 Placed on file
Order adopted