Addendum to Application for Administrative Appeal On Remand of Building Permits B19-001687 and B19-001788 (ZBA No. AA2020-0001)

Applicant: Claudia Murrow
23 Park Street, Unit 2,
Somerville, MA 02143

Attorney: Philip H. Cahalin
85 Exchange Street, Suite 206
Lynn, MA 01901
781.598.3130
pcahalin@cahalinlaw.com

Claudia Murrow ("Murrow") files this appeal to the Somerville Zoning Board of Appeals ("Board") of building permits B19-001687 and B19-001788, pursuant to the Judgment of Remand issued by the Land Court on March 17, 2021 in *Murrow v. YEM, et. al.*, No. 20 MISC 000283 (RBF) which states in part:

> The court, on agreement of the parties and by order dated March 17, 2021, hereby orders this case remanded to the City of Somerville Zoning Board of Appeals (Board) so that the plaintiff Claudia Murrow (Murrow) may submit to the Board a petition, in the form of a remand petition pursuant to G.L. c. 40A, §§ 8 and 15, appealing two building permits, numbered B19-001687 and B19-001788, issued to the defendants YEM Somerville Ave, LLC, Jordan D.Warshaw, and DEVB, LLC (the Developers) for a project at 515 Somerville Avenue, Somerville, Massachusetts (Property) (Remand Petition).[1]

1 Background, History, Plans, Appeals.

1.1 Murrow's property.

Murrow resides in her home at 23 Park Street, Unit 2, Somerville, Massachusetts. 23 Park Street is approximately 256 feet from the

1 A copy of the Order is annexed hereto at Appendix, pp. 2-4 ("A:2-4")

intersection between Park Street and Somerville Ave and approximately 326 feet from 515 Somerville Ave ("Property") which is across Somerville Ave at the intersection of Park Street and Somerville Ave. The entrance into the hotel at the Property is directly across Somerville Ave from Park Street. Murrow has one on-site parking space and uses the public on-street curb parking in the neighborhood for visitors and persons making deliveries. There is substantial congestion of traffic in the area of 515 Somerville Ave and her neighborhood, especially at the Somerville Ave/Park Street and Beacon Street/Park Street intersections on either side of her property, with the queuing of traffic from the Somerville Ave/Park Street intersection often extending past her property.

1.2 The property, zoning, and plans for development of 515 Somerville Ave and history of Murrow's administrative and judicial appeals.

In 2018, the Property was a vacant lot of land consisting of 46,852 s.f., of which 38,341 s.f. was in the BA zoning district and 8,511 s.f. was in the RB zoning district. A portion of the soil toward the rear of the property is contaminated with asbestos and under an Activity and Use Limitation ("AUL Area"). The maximum height for a hotel under the BA zoning was 50 feet and 4 stories, SZO, § 8.5.F[2], which was reduced to 3 stories and 40 feet for any part of the building within 30 feet of an RA, RB, or RC Zone, SZO, § 8.6.20. The requirements for on-site parking for hotels was governed by SZO, §

2 All references to the Somerville Zoning Ordinances are to the ordinances in effect before they were revised in December, 2019 unless otherwise noted by the designation "(new)".

9.5.10.d. Under SZO, § 7.11.10.5.b, hotels with over 10,000 s.f. of floor space required a special permit with site plan review under SZO, § 5.2.

In August, 2018, YEM Somerville Ave, LLC, et. al. ("YEM") proposed to develop the Property with a six story hotel that was 63.9' high and had 98,851 s.f. of floor space ("OA Plans"). Under SZO, § 9.5.10.d, the minimum number of on-site parking spaces needed for a hotel that size was 142. YEM's proposal had 80 on-site parking spaces with 60 spaces in an underground garage and 20 on the surface in the rear of the proposed building. Although the requirements for on-site parking could be modified by special permit, the hotel didn't qualify for any of the modifications. SZO, § 9.13a-g. Accordingly, on August 30, 2018, YEM filed an original application ("Original Application" or "OA") with the Board for a special permit with site plan review under SZO, § 5.2 and for three variances under SZO, § 5.5: one from the height requirement, one from the number of stories requirement, and one from the on-site parking requirements. The Board issued a decision approving the special permit with site plan review and the variances ("OA Decision"), which was filed on October 25, 2018 with the City Clerk who certified no appeal of same on November 15, 2018.

YEM stated in the OA Decision that the original design of the hotel had been 5 stories and 54' high, which it stated, incorrectly, was *de minimis*. OA Decision, pp. 9 and 10. However, it stated that the design was changed substantially because of public input concerning the height, size, and setbacks. According to YEM, there was a significant increase in the setback

from Laurel Street which resulted in an extra floor and nearly ten feet of height on the other side of the building, which, YEM claimed, was setback from all lot lines. OA Decision, p. 9.

1.3 The application for revision under SZO, § 5.3.8 ("Revised Application" or "RA") and revised plans ("RA Plans") for the hotel on the Property.

YEM took no further action to exercise the variances and special permit before filing the Revised Application under SZO, § 5.3.8 on or about July 18, 2019 to revise the plans and extend the variances. An application for revision of plans under SZO, § 5.3.8 is required if the Planning Director determines that changes to plans previously approved for special permits are *non de minimis*, i.e. substantive. Such plans are subject to *de novo* notice, hearing, and approval by the Board. *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 319-320 (2005) (stating that "on submission of the revised plan, the permit granting authority must again exercise its discretion in weighing the factors relevant to a decision"); SZO, § 5.3.8.

The RA Plans that YEM requested the Board to review under SZO, § 5.3.8 included "changes to the parking layout, floor plans, site plan, and architecture. The Applicant provided a comprehensive list of all the proposed revisions in a memo[3] dated July 12, 2019." RA Decision, p. 1. The RA Plans substantially widened the building, increased its size, and changed its location and moved the setbacks significantly further from the lot line and AUL Area in the rear and closer to Somerville Ave and Laurel Street and,

3 A:13-14.

because of the increased width, somewhat closer to lot line to the left of the hotel. The RA Plans also substantially reduced the number of on-site parking spaces. Among the reasons YEM gave for the revisions in its "comprehensive memo" was to avoid the contaminated soil in the AUL Area at the rear of the property; to reduce costs; to add an HCP Van Parking space required by Code; to increase the size of the trash enclosure to comply with requirements; and to change structural components in the building such as the walls between rooms and the elevator core to comply with the hotel's standards. Nowhere in the memo is there any indication that YEM or the Planning Director considered any of the proposed revisions to the building *de minimis,* because obviously, they were not. The RA Plans substantially changed the location, dimension, and setbacks of the building above the garage. The front of the building was closer to the front lot line by 3' and 1/2"; the Laurel Street side of the building was closer to the Laurel Street side lot line by 3' 4"; the rear of the building was at least 4' further from the rear lot line and AUL Area, although most of it was two to three times further than that and a length of 16' and 2.5" of the rear wall was over 50' further away from the lot line because of an increase in the width of the opening in the rear wall; and the left side of the building was 7" closer to the left side property lot line.[4] In short, the building was expanded in width by over 4' and moved substantially away from the rear lot line and toward the Laurel Street

4 See RA Plans, Sheets A1.0 - A1.6, A:35-41, which show the garage and each floor of the OA Plans and as proposed in the RA Plans. Also compare RA Plan Sheets A1.7-A, *Approved Zoning Considerations,* A:42, and A1.7-P, *Proposed Zoning Considerations*, A:43.

and Somverville Ave lot lines. In addition, the square footage of the floor space in the building was increased by over 3% from 98,851 to 102,115.[5]

The location of the garage and configuration of its walls and footprint in the RA Plans were also substantially different from the garage in the OA Plans.[6] The RA Plans garage also had a substantial change in the layout of the parking spaces from the OA Plans garage and substantially reduced the size of the garage and the number of parking spaces from 60 to 37.[7]

On August 21, 2019, the Board voted to approve the Revised Application ("RA Decision"). On September 9, 2019, Murrow timely filed her appeal of the RA Decision to the Land Court, *Murrow v YEM, et. al.*, No. 19MISC000434 (“RA Appeal”) under G.L. c. 40A, § 17 on the grounds that 1) the Revised Application involved a *de novo* review and approval that replaced the OA Decision and Plans with the RA Decision and Plans and 2) YEM was not entitled to approval of a special permit with site plan review under SZO, § 5.2 because the project clearly added to the already significantly congested public on-street curb parking in the neighborhood and traffic and queuing of traffic in the neighborhood and particularly in front of her home and that YEM was not entitled to the variances because YEM and the Board had failed to satisfy the requirements of SZO, § 5.5 and G.L. c. 40A, § 10 for same.

---

5 Compare RA Plan, Sheets A1.7-A, A:42, and A1.7-P, A:43.

6 Compare OA Plan, Sheet, A1.0, A:35, with BP Plan A1.0, A:44. In fact, except for the front wall, the BP Plan garage has the same configuration as the RA Plan garage, not the OA Plan garage. Compare A:44 with A:35.

7 RA Plan, Sheet A1.0. A:35.

After Murrow filed the RA Appeal, YEM recorded the OA Decision certified by the Clerk in the registry of deeds pursuant to G.L. c. 40A, § 11[8] and purchased the property. YEM also filed applications with the ISD for building permits with building permit plans ("BP Plans").

The building above the garage in the BP Plans was identical to the building above the garage in the RA Plans, not the OA Plans.[9] The location, dimension, and setbacks of the building in the BP Plans were also identical to the location, dimension, and setbacks of the building in the RA Plans, not the OA Plans.[10] Only the BP Plans garage was different from the RA Plans garage.[11] However, the BP Plans garage had the same location and configuration of the rear and side walls as the RA Plans garage and was nothing like the OA Plans garage.[12] It also had a different parking space layout and one less parking space than the OA Plans garage.

Despite the fact that Murrow had timely appealed the RA Decision and Plans and the BP Plans were identical to the RA Plans except for the garage, the ISD issued building permits B19-001687 and B19-001788 on October 23, 2019. Because the RA Decision approved variances and the BP Plans were based on the RA Plans, not the OA Plans, the ISD's issuance of the permits during Murrow's RA Appeal violated G.L. c. 40A, § 11. Murrow filed her appeal

---

8 By that time the original decision and OA Plans had been replaced by the RA and RA Plans.

9 Compare RA Plans, Sheets A1.1-A1.6, A:35-41, with BP Plans, Sheets A1.1-A1.6, A:44-51.

10 Compare RA Plans, Sheets A1.7-A, A:42, and A1.7, A:43, with BP Plan Sheet A0.0, A:42.

11 Compare RA Plan, Sheet A1.0, A:35, with BP Plan, Sheet A1.0, A:44.

12 *Id.*

of the building permits to the Board on November 22, 2019, ("BP Appeal").[13] Although the Board originally denied her appeal on the grounds that it was improperly made to the ISD under G.L. c. 40A, § 7, the Land Court determined that she had properly and timely appealed pursuant to G.L c. 40A, §§ 8 and 15 and remanded back with an order for her to file this appeal as a remand petition to the Board. A:2-4.

Although the BP Plans were identical to the RA Plans except for the garage, YEM represented to the court in Murrow's RA Appeal that it had abandoned the RA Plans, was proceeding with the OA Plans, and requested an annulment of the RA Decision. Based on YEM's assertion, the Land Court on March 19, 2020, made no ruling on whether the Board's decision to approve the RA Plans exceeded the Board's authority and ruled that the RA Decision did not replace the OA Decision, i.e. that they were two separate decisions and sets of approved plans. It, therefore, dismissed Murrow's RA Appeal and remanded the "matter to the Board with instructions for th Board to consider the Developers' request to withdraw their application for modification of the 2018 decision." Murrow appealed the Land Court judgment to the Appeals Court ("RA AC Appeal"), and that appeal is pending.

On April 15, 2020, the Board voted to allow YEM to withdraw their Revised Application, without prejudice, A:53-54, and to annul the RA Decision. A:33-34. Murrow appealed the Board's approval of YEM's withdrawal of the Revised Application and its annulment of the RA Decision

---

13 Copy annexed to the Appendix at A:9-28.

to the Land Court ("RA Annulment Appeal"). The Land Court has stayed that appeal pending her RA AC Appeal.

1.4 Planning Director memoranda concerning *de minimis* changes.

None of the changes in the RA Plans submitted by YEM with the Revised Application were determined by the Planning Director to be *de minimis.* It is obvious they are not. They significantly change the size, width, location, and setbacks of the building in the OA Plans, all of which were of concern to the public. The RA Plans showed all of the changes in the six stories above the garage, and in particular, showed the revised distances of the proposed building to the lot lines in the zoning site plan.[14] YEM sought the Board's approval for all of these changes pursuant to the Board's authority to review and approve substantive revisions under SZO, § 5.3.8. Nowhere in the RA Staff Report or the RA Decision was there any indication that any of these changes were *de minimis.*

After the RA Decision, but before the building permits were issued, the Planning Director issued a Memorandum concerning changes to the rear stair well of the building ("First Memorandum"). A:29. After Murrow filed her BP Appeal, the Planning Director issued a second Memorandum concerning changes in the plans ("Second Memorandum"). A:31. Both Memorandums determined that changes in BP Plans were *de minimis* though neither specifically identified what those changes were or which plans the Director

14 Compare RA Plans, Sheets A1.7-A, A:42, and A1.7, A:43, with BP Plan Sheet A0.0, A:52.

was comparing the BP Plans to when she made that determination. Because the approval of the RA Plans were subsequently withdrawn and annulled, those plans obviously could not serve as the basis for the Planning Director's decision.

In Murrow's BP Appeal, the Planning Staff subsequently issued a Staff Report to the Board[15]which vaguely stated in footnote 1 that the Second Memorandum was issued to "clarify some differences between the submitted plans and the ZBA plans." Again, no reference was made to which "ZBA plans" it was referring. Footnote 1 concludes that "the project being built is substantially similar to the project proposed in the original 2018 approval, not the 2019 amended version that was appealed." From this, it can be inferred that the Planning Director's Second Memorandum compared the BP Plans to the OA Plans. However, the statement is obviously not true, as a simple review of the plans shows. The BP Plans are not "substantially similar" to the OA Plans. They are in fact identical to the RA Plans in every aspect except for the garage and the BP garage is unlike either the OA garage or the RA garage and contains a mix of both. Moreover, no plausible explanation is given in the Staff Report for the Planning Director's not making the *de minimis* determination at the time the Revised Application was filed; for YEM's including the changes to the location, setbacks, and dimensions of the building in the RA Plans and seeking the Board's approval of same under SZO, § 5.3.8; and for there being no indication in the RA Staff Report or the

---

15 A:5-8.

RA Decision that any of the changes shown in the RA Plans were *de minimis*.

2 The BP Appeal.

2.1 The BP Plans are substantively different from the OA Plans and, therefore, are subject to *de novo* review and approval for a special permit with site review and variances.

Building permit plans that are substantively different from plans approved for special permits and variances require notice and hearing and *de novo* review and approval for special permits and variances. *Barlow, supra,* 64 Mass. App. Ct. at 319-320 (2005). "If a developer wishes to undertake significant modifications to a site plan, it is required to submit a revised site plan to the permit-granting authority for consideration at another public hearing." *Chambers v. Building Inspector of Peabody*, 40 Mass. App. Ct. 762, 768 (1996). A "significant increase in the building's size or footprint and the change (however slight) in the building's actual location upon the locus were changes of substance." *Id.* 40 Mass. App. Ct. at 766. Any substantive change to site plans, particularly to those elements which were of direct public concern and the approval of which cannot be delegated to other authorities, requires notice and hearing. See *Tebo v. Board of Appeals of Shrewsbury*, 22 Mass. App. Ct. 618 , 624 (1986); see also *Weld v. Board of Appeals of Gloucester*, 345 Mass. 376 , 378-379 (1963). Such changes are significant enough "to be noticeable to persons generally familiar with" the original plans. SZO, § 5.3.8.1.a.iv. Plans with such changes require the same *de novo* review and approval for a special permit and variances as plans filed with a new application for a special permit. *Barlow, supra,* 64 Mass. App. Ct.

at 319. As the RA Decision states, quoting SZO, § 5.2.5, when an applicant seeks substantive revisions under SZO, § 5.3.8, "The Applicant must comply 'with such criteria or standards as may be set forth in this Ordinance which refer to the granting of the requested special permit.'" RA Decision, p. 3. They do not receive the benefit of prior decisions on the special permits and variances.

2.1.1 The BP Plans contain substantive changes from the OA Plans under G.L. c. 40A, §§ 9, 10, and 15 and SZO, § 5.3.8 and, therefore, required *de novo* review and approval for special permits and site plan review under G.L. c. 40A, § 9 and SZO, § 5.2 and variances under G.L. c. 40A, § 10 and SZO, § 5.5.

If the Director was comparing the BP Plans to the RA Plans in her Memorandums, the findings are no longer operative because the approval of the RA Plans has been annulled. If the Director was comparing the BP Plans to the OA Plans, as inferred in the subsequent Staff Report, then the Director's determination is inconsistent with her prior determination that the Revised Application and the RA Plans were *non de minimis* and required notice and hearing for *de novo* review and approval. Moreover, a *non de minimis* determination would be plainly in error. As with the RA Plans, the BP Plans substantially changed the location, dimension, and setbacks of the building and garage from the OA Plans by moving them substantially away from the rear lot line and towards the Laurel Street and front lot lines, expanding the building's width by nearly 4', and increasing the square footage of the floor space by 3%. As stated, the front of the building was 3' and 1/2" closer to the front property line; the Laurel Street side of the

building was 3' 4" closer to the Laurel Street side property line; the rear of the building was at least 4' further from the rear property line and AUL Area, although most of it was two to three times further than that and a length of 16' and 2.5" of the rear wall was over 50' further away; and the left side of the building was 7" closer to the left side property line.[16] In addition, the square footage of the floor space in the BP Plans was over 3% larger than the square footage of the floor space in the OA Plans.[17] The changes in the location, width, and size of the building and the setbacks from the lot lines was particularly significant given the previously expressed public concern regarding the building's size, height, location, and setbacks. OA Decision, p. 9. The location of the BP Plans garage and configuration of its walls were also substantially different from the OA Plans garage, thus changing its footprint.[18] The BP Plans garage substantially changed the layout of the parking spaces from the OA Plans garage and reduced the size of the garage and number of parking spaces in the garage from 60 to 59.[19]

These changes in the BP Plans in the location, dimensions, and setbacks of the building from the OA Plans were clearly substantive and

---

16 Compare RA Plans, Sheets A1.0 - A1.6, A:35-41, which show the garage and each floor of the OA Plans and as proposed in the RA Plans with BP Plans, Sheets A1.0 - A1.6, A:44-51. Also compare RA Plan Sheets A1.7-A, *Approved Zoning Considerations,* A:42, and A1.7-P, *Proposed Zoning Considerations*, A:43 with BP Plans, Sheet A0.0, *Zoning Considerations*, A:45.

17 Compare RA Plans, Sheets A1.7-A, A:42, and A1.7-P, A:43.

18 Compare RA Plans, Sheet, A1.0, A:35, with BP Plans, Sheet A1.0, A:44. In fact, except for the front wall, the BP Plan garage has the same configuration has the same configuration as the RA Plan garage, not the OA Plan garage. Compare A:44 with A:17.

19 Compare RA Plans, Sheet, A1.0, A:35, with BP Plans, Sheet A1.0, A:44

"noticeable to persons generally familiar with" the OA Plans. SZO, § 5.3.8.1.a.iv.; *Barlow, supra,* 64 Mass. App. Ct. at 319-320 (2005); *Chambers v. Building Inspector of Peabody*, *supra,* 40 Mass. App. Ct. at 766-767 (1996) ("The size and location upon the locus of the proposed building was an issue of substance . . . The location of the improvements on the site, their mass, ground coverage, and distance from lot lines are of particular and prime importance"). They'd be particularly noticeable to the public which expressed concern about the size, height, location, and setbacks. It is obvious that these changes required public notice and hearing and *de novo* review and approval of the Board, which is precisely why they were included in the RA Plans.[20]

Accordingly, the BP Plans require *de novo* review and approval by the Board for compliance with the requirements of special permits with site plan review under G.L. c. 40A, § 9 and SZO, § 5.2 and variances under G.L. c. 40A, § 10 and SZO, § 5.5 because they contain substantive changes from the OA Plans. *Barlow, supra,* 64 Mass. App. Ct. at 319-320 (2005); SZO, § 5.3.8. The discretion and review required is the same discretion and review as on a new application for a special permit with site plan review and variances. *Id*. The findings and rulings in the OA Decision are not applicable to the BP Plans. This review is subject to the zoning ordinances in effect before they were

20 It is at least curious that public concern about the distance of the building from the lot lines was a critical issue in the original design and location of the building and yet nowhere in YEM's memorandum, the RA Staff Report, or the RA Decision are the changes in those distances in the RA Plans even mentioned. They are discerned only by examining the plans themselves.

revised in December 2019 because the changes to the OA Plans were made well before then. The appeals of the approval of those plans as changed, both of the RA Decision and of the building permits, were also made well before the effective date of the new zoning ordinances. SZO (new), § 1-2(a).

2.2 The BP Plans do not meet the requirements for approval of special permits with site plan review under G.L. c. 40A, § 9 and SZO, § 5.2 and variances under G.L. c. 40A, § 10 and SZO, § 5.5 and, therefore, the hotel must be taken down.

2.2.1 The BP Plans do not meet the requirements for approval of special permits with site plan review under G.L. c. 40A, § 9 and SZO, § 5.2 and, therefore, the hotel must be taken down.

> Prior to granting a special permit with site plan review, the SPGA shall make findings and determinations that the development of the site: . . . [w]ill not create adverse impacts on the public services and facilities serving the development, such as . . . the street system for vehicular traffic.

SZO, § 5.2.5(f). The street system for vehicular traffic includes the public street parking. The street system serving the development is the street system in the area or neighborhood surrounding the development. Murrow's home is in that neighborhood. Congestion and queuing of traffic and on-street curbside parking in the surrounding neighborhood are "concerns [that] are legitimately within the scope of the zoning laws." *Marashlian v. Zoning Board of Appeals of Newburyport*, 421 Mass. 719, 722 (1996).

The BP Plans has 80 on-site parking spaces. A minimum of 142 is required for its use as a hotel with restaurant and conference rooms. SZO, § 9.5.10.d. Hence, the BP Plans have 62 less parking spaces than is required by the ordinances, which is a 44% reduction in the parking spaces required.

Accordingly, the hotel will require on-street curbside parking in the surrounding neighborhood for 62 vehicles. The on-street curbside parking in the surrounding neighborhood is already overcongested and doesn't have 62 parking spaces in total much less an excess of 62 on-street curbside parking spaces to absorb the parking overflow from the hotel. Moreover, one of the conditions imposed by the OA Decision was to eliminate on-street curbside parking on Laurel Street further exacerbating the shortage of on-street curbside parking in Murrow's neighborhood.

Reductions in on-site parking can be granted by special permit only if they meet certain criteria in SZO, § 9.13a-g. The BP Plans don't meet any of these requirements. Moreover, in addition to needing to meet at least one of these criteria, any reduction in on-site parking would also have to show that it did "not cause detriment to the surrounding neighborhood through any of the following applicable criteria: 1) increase in traffic volumes; 2) increased traffic congestion or queuing of vehicles; 3) change in the type(s) of traffic; 4) change in traffic patterns and access to the site; 5) reduction in on-street parking." SZO, § 9.13. It is obvious that the addition of 62 parked vehicles to the public on-street curbside parking in the surrounding neighborhood will dramatically reduce the on-street curbside parking in the neighborhood. Also, the Traffic Assessment and Access Study that YEM had prepared by Design Consultant, Inc. as required by SZO, § 5.2.3.19[21] ("TIAS") shows a significant

21 SZO, § 5.2.3.19 required a traffic impact analysis prepared by a professional traffic engineer because the hotel had floor space greater than 25,000 s.f.

increase in traffic volumes in the neighborhood surrounding 515 Somerville Ave and increased traffic congestion and queuing of vehicles at the Somerville Ave/Park Street intersection, the Beacon Street/Park Street intersection, and the Somerville Ave/Laurel Street intersection. Furthermore, on both the OA Plans and the RA Plans, YEM proposed to make up for the 62 parking space deficit by "valet parking." Although the TIAS did not study the effect of such a plan on the local traffic, it is obvious that valet parking for 62 vehicles will have a significant impact on the traffic volumes, queuing, and type and pattern of traffic in the neighborhood.

The TIAS shows that there is currently excessive queuing of traffic at the Somerville Ave/Park Street and Beacon Street/Park Street intersections and, in particular, in front of Murrow's home on Park Street during the afternoon weekend hour and during the evening rush hour, when it backs up all the way from Somerville Ave to Beacon Street a fifth of a mile away. The queuing at the intersections causes gridlock and the excessive queuing of vehicles past Murrow's home in fact occurred frequently at all hours during the weekdays and weekends, not just the rush hours. The TIAS assessed the existing Level of Service ("LOS") at the Park Street/Somerville Ave intersection to have a LOS of F in several directions, which is the lowest level and "generally considered to be inadequate traffic operation in suburban and urban areas." TIAS, p. 43. In short, YEM's TIAS showed significant queuing of traffic in front of Murrow's home and unacceptable LOS at the Park Street/Somerville Ave intersection 256 feet from her home and at the Park

Street/Beacon Street intersection in the other direction.

The hotel is roughly 10 times larger than that allowed as of right and the traffic generated is directly related to the number of rooms, so it is likely to generate traffic that is roughly 10 times more than an as of right use. The TIAS stated that the hotel "is expected to generate 1,140 vehicle-trips during a typical Weekday and 1,028 vehicle-trips during a typical Saturday" and will "generate 62 vehicle-trips during the Weekday AM Peak Hour, 78 vehicle-trips during the Weekday PM Peak Hour, and 94 vehicle-trips during the Saturday Midday Peak Hour." TIAS, p. 25. It will also "generate 20 public transportation trips during the Weekday AM Peak Hour, 25 public transportation trips during the Weekday PM Peak Hour, and 30 public transportation trips during the Saturday Midday Peak Hour." *Id.* The TIAS didn't state what the daily generation of public transport trips will be but these will obviously add to the traffic and queuing of traffic and delays at the three intersections in the Property's and Murrow's neighborhood. The TIAS shows that the traffic[22] will result in substantial increases to the already unacceptable queuing in front of Murrow's home and further degradation in all of the traffic LOS at the Somerville Ave/Park Street, Beacon Street/Park

---

22 For some reason the TIAS used an assumption of only 5% of the traffic generated would travel on Park Street although the Senior Transportation Planner at the City of Somerville estimated that 20% of the traffic generated would be to and from the area that would travel over Park Street. TIAS, p. 25. The TIAS also assumed that the restaurant would only be 4,500 feet, although the plans, which include the use of exterior space, appear to be substantially larger. And as mentioned, the TIAS doesn't assess the impact of the use of substantial valet parking on the local traffic. The TIAS makes no assessment of the effect of the hotel on the neighborhood public street curbside parking.

Street, and Somerville Ave/Laurel Street intersections with some additional traffic being degraded to the unacceptable F LOS level. Hence, the TIAS that YEM commissioned clearly showed that the hotel will "cause detriment to the surrounding neighborhood" by "1) increase in traffic volumes; 2) increased traffic congestion or queuing of vehicles; 3) change in the type(s) of traffic; 4) change in traffic patterns and access to the site." For that reason alone, YEM is not entitled to a Special Permit for the reduction of on-site parking.

It is because YEM cannot come close to meeting any of the criteria for reduced parking that it sought a variance from the on-site parking requirements. However, it cannot avoid these requirements by way of a variance because it would not only have to show that it met the requirements of G.L. c. 40A, § 10 for variances, but that "[t]he granting of the variance will be in harmony with the general purpose and intent of this Ordinance and will not be injurious to the neighborhood or otherwise detrimental to the public welfare." SZO, § 5.5.3. In short, to be entitled to a parking variance, YEM would not only have to show that it met the variance requirements of G.L. c. 40A, § 10 but also show that the shortage of 62 on-site parking spaces would not result in detriment to the surrounding neighborhood by 1) increase in traffic volumes; 2) increased traffic congestion or queuing of vehicles; 3) change in the type(s) of traffic; and 4) change in traffic patterns and access to the site as well as to result in detriment by reducing the on-street curb parking. This it cannot do. As a matter of law, YEM is not entitled to the approval of a special permit with site

plan review. As a matter of law, the hotel is over ten times larger than allowed by right and, thus, violates the zoning ordinances. As a matter of law, the hotel must be taken down.

2.2.2 The BP Plans violate the zoning ordinances because YEM cannot prove that the only reasonable development of the property is one that has at least 6 stories and 64' in height and a 44% reduction in the on-site parking requirements. Therefore, the hotel must be taken down.

"Variances are always in derogation of the zoning system adopted by the town under its lawful powers." *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555, 557 (1954); *Lopes v. Board of Appeals of Fairhaven*, 27 Mass. App. Ct. 754, 756 (1989). They are strongly disfavored under the law and "are to be granted sparingly." *Pendergast, supra* 331 Mass. at 557. There is no such thing as a *de minimis* variance as YEM stated in the OA Decision. The requirements of the statute are strictly applied and the applicant bears the burden of producing "evidence at trial that the statutory prerequisites for relief have been met," *Ranney v. Board of Appeals of Nantucket*, 11 Mass. App. Ct. 112, 118 (1981), and the Board must provide detailed, specific findings and rulings that the requirements have been met and not just vague recitals of the statutory requirements. Additionally, because variances must not derogate "from the intent or purpose" of the height and parking ordinances, they must only be "the minimum variances that will grant reasonable relief to the owner, and [are] necessary for a reasonable use of the building or land." SZO, § 5.5.3.b.

The statutory requirements are as follows:

> General Laws c. 40A, § 10, as appearing in St. 1975, c. 808, § 3, authorizes a board of appeals to grant a variance with respect to particular land where it "specifically finds [a] that owing to circumstances relating to the soil conditions, shape, or topography of such land ... and especially affecting such land ... but not affecting generally the zoning district in which it is located, [b] a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, ... [c] that desirable relief may be granted without substantial detriment to the public good and [d] without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law."

Warren v. Zoning Board of Appeals of Amherst, 383 Mass. 1, 10-11 (1981) (quoting G.L. c. 40A, § 10).

Personal reasons such as declining profits or the fact that the owner wants to make a more profitable use of their property than allowed under the ordinances is not a substantial financial hardship. *City Council of Waltham v. Vinciullo*, 364 Mass. 624, 631 (1974) ("There is no substantial hardship merely because there may be expense involved in continuing an existing use, [citation omitted], or because higher profits may result from a nonconforming use."); *Abbott v. Appleton Nursing Home, Inc.*, 355 Mass. 217, 221 (1969) ("declining profit derived from a nonconforming use" is not a hardship when "the premises could continue to be used as in the past, probably less profitably, for the same or other purposes.") The fact that there is an AUL Area on the Property and that YEM has substantially built the hotel, unlawfully and at risk, are not hardships. See *Raia v. Board of Appeals of N. Reading*, 4 Mass. App. Ct. 318, 321-322 (1976) (the expenditure of substantial sums of money on a foundation is not a hardship nor is the division of the property into two non-conforming lots); *Huntington v. Zoning*

Bd. of Appeals of Hadley, 12 Mass. App. Ct. 710, 715 (1981) ("At its root is concern that the grant of a variance be based only upon circumstances which directly affect the real estate and not upon circumstances which cause personal hardship to the owner.").

To establish a substantial financial hardship, YEM would have to prove and the Board must specifically find, in detail, that the Property has unique soil, shape, or topography that makes **all** uses that comply with the zoning ordinances economically impractical or unfeasible. *Guiragossian v. Board of Appeals of Watertown*, 21 Mass. App. Ct. 111, 118 (1985) ("substantial hardship" only exists "when a landowner cannot reasonably make use of his property for the purposes, or in the manner, allowed by the zoning ordinance" which "can be made out 'by [a] showing that utilization of [the] land for a [permitted industrial use] would be economically unfeasible.'" quoting *Kirkwood v. Board of Appeals of Rockport*, 17 Mass. App. Ct. 423, 429 (1984). In fact, because variances must be the minimum which grant relief, YEM must prove and the Board must specifically find in detail that the Property's unique soil, shape, or topography makes **all** other uses with anything less than a six (6) story, 64' high building and a 44% reduction in the parking requirements economically unfeasible.

There is nothing about the Property which makes it financially impractical to develop under the existing zoning ordinances. And, of course, there is nothing about the Property which makes it financially impractical to develop with a building less than six (6) stories and 64' high and a 44%

reduction in the on-site parking requirements. That "[t]he economics of a quality hotel for a location like this require certain minimum criteria of at least 160 rooms to have a viable project," OA Decision, pp. 9-10, is not a substantial financial hardship under G.L. c. 40A, § 10. A variance is not a vehicle for providing owners with the opportunity for developing or using their properties as they prefer. A substantial financial hardship arises only when the unique conditions of the property prevent **any** economically feasible use of the property under the existing zoning ordinances, not the owner's preferred use. *Abbott, supra.*, 355 Mass. at 221. There are no soil conditions, shape, or topography of the Property that are unique in the BA and RB zoning districts which prevent any or all economically feasible uses of the Property under the existing zoning ordinances. There are obviously many economically feasible uses that can be made of the Property which comply with the zoning ordinances. There is nothing unique about the Property which prohibits YEM from building a four story, 50 foot building for any number of economically viable uses. A development that is six (6) stories and 64' high and has a 44% reduction in the parking requirements is obviously not necessary for the economically feasible use of the Property. It is clear that the soil conditions, shape, or topography of the Property are not unique or cause any hardship under G.L. c. 40A, § 10, financial or otherwise.

That the hotel may be consistent with Somervision does not make it consistent with the community's values. Those values are embodied in and protected by the zoning ordinances. The hotel is not consistent with the

community's values because it does not comply with the zoning ordinances. YEM cannot prove that the only economically feasible use of the Property requires a building which is six (6) stories and 64' high and has a 44% reduction in the parking requirements because of the soil conditions, shape, or topography of the Property. In fact, YEM cannot prove that no reasonable, economically feasible use of the Property can be made without variances. That the variances are needed for the hotel YEM would prefer to build is irrelevant. YEM's inability to build the hotel it wants to build under the zoning ordinances is not a hardship. As a matter of law, the hotel violates the zoning ordinances, is not entitled to any variances from the ordinances, and, therefore, must be taken down.

3. Conclusion

The BP Plans contain substantive changes from the OA Plans and, therefore, are subject to *de novo* review and approval by the Board for a special permit with site plan review and variances from the height, story, and parking requirements of the Ordinances. The BP Plans are not entitled to a special permit with site plan review approval because YEM can not meet the criteria for the reduction of on-site parking it seeks. The hotel is not entitled to variances because the soil conditions, shape, or topography of the Property are not unique and do not make the Property economically unfeasible. Despite Murrow's timely appeal of the RA Decision to the Land Court and her timely appeal of the building permits to the Board, YEM has proceeded with construction of the hotel. It did so at risk and unlawfully. G.L.

c. 40A, §§ 9, 10, and 11. Therefore, YEM must be ordered to cease construction, the building permits must be annulled, the building removed from the Property, and the Property returned to its pre-construction state.