

00:25:36 1 development application be filed since an appeal was
00:25:40 2 withdrawn and new plans were submitted. I requested
00:25:44 3 complete site plans, floor plans and elevation drawings
00:25:46 4 for the revised project.

00:25:48 5 On June 21st I received a letter from Mr.
00:25:52 6 Peck dated June 18th disagreeing that a new development
00:25:54 7 application should be provided since there was nothing
00:25:58 8 new about the application other than the revisions of
00:26:00 9 the three sheets. He resubmitted the sheets with his
00:26:04 10 letter.

00:26:06 11 On June 27th I sent a letter to Mr. Peck
00:26:08 12 stating that the decision remains that the application
00:26:12 13 remains with the jurisdiction of the zoning board for a
00:26:14 14 use not permitted in the zone. I stated that I did not
00:26:18 15 agree that a one-inch wall separation and relocation of
00:26:22 16 the parking structure constituted a creation of five
00:26:24 17 separate buildings. I requested complete floor plans,
00:26:28 18 that parking structure and foundation and/or the
00:26:32 19 basement and advised him that plans are accepted as
00:26:34 20 revision to DPA number 8255 and noted that an appeal
00:26:40 21 could be filed within 20 days.

00:26:44 22 On July 2nd I received a letter from Mr.
00:26:46 23 Peck dated June 28th requesting which of the three uses
00:26:50 24 is not permitted. He inquired as to how much separation
00:26:54 25 is required between buildings. On July 2nd an appeal

00:28:40 1 FAR of 1.39.

00:28:42 2 On July 17th I received revised plans again
00:28:46 3 from Cranmer Engineering, 15 sheets revised July 12th.

00:28:52 4 The letter states plans were revised to indicate the
00:28:54 5 separate buildings on various sheets to clarify separate
00:28:58 6 buildings. Revised architectural plans are now
00:29:02 7 submitted. Also section of the ordinance 25-10.3(a)
00:29:10 8 states any use not specifically listed as a permitted
00:29:12 9 use and accessory use or conditional use shall be deemed
00:29:16 10 a prohibited use. This prohibition shall be liberally
00:29:20 11 construed as protective of the zoning scheme and any
00:29:24 12 doubt should be resolved in determining the doubtful use
00:29:26 13 as prohibited. I have doubt that this is five buildings
00:29:32 14 and I have doubt that this is the intent of the
00:29:36 15 ordinance. So where there's doubt, I deny it.

00:29:42 16 MR. PECK: Is there a section of the
00:29:44 17 ordinance that defines these as not being buildings?

00:29:52 18 MS. BARR: There's a section of the
00:29:52 19 ordinance that defines building.

00:29:54 20 MR. PECK: And it mirrors the Municipal Land
00:29:56 21 Use Law.

00:29:58 22 MS. BARR: Yes.

00:29:58 23 MR. PECK: And it says that they have to be
00:30:00 24 -- I believe the Municipal Land Use Law defines building
00:30:02 25 to mean a combination of materials to form a

1 00:30:54 referring to, the plans that just came in two days ago?

2 00:30:58 MR. PECK: The ones that you marked.

3 00:30:58 MR. KENNEDY: A-2?

4 00:31:00 MR. PECK: Yes.

5 00:31:02 MR. KENNEDY: Prepared by Cranmer

6 00:31:02 Engineering.

7 00:31:04 MR. PECK: We're not asking for any approval

8 00:31:06 of that plan.

9 00:31:06 MR. KENNEDY: Okay.

10 00:31:08 MR. PECK: You may need to open it, sorry.

11 00:31:10 I didn't make myself clear. If you turn to sheet three

12 00:31:20 I think it shows the site plan in the buildings if I

13 00:31:24 remember the number right. Can you tell me how many

14 00:31:30 roofs are shown on that plan?

15 00:31:32 MS. BARR: How many roofs are showing? I

16 00:31:34 don't see it.

17 00:31:40 MR. PECK: Can you tell me how many boxes

18 00:31:42 are shown on that plan?

19 00:31:46 MS. BARR: I see five boxes.

20 00:31:48 MR. PECK: Okay. So if each of those boxes

21 00:31:50 has a separate roof and it is occupied and it's a

22 00:31:56 combination forming a structure, would that make five

23 00:31:58 buildings?

24 00:32:06 MS. BARR: I would refer that to the zoning

25 00:32:08 board for their interpretation of the ordinance.

1 00:32:10 MR. PECK: Well, I believe you have to make
2 00:32:10 the first determination. I'm not asking about the
3 00:32:12 ordinance, I'm asking about the plan that you said
4 00:32:18 requires a D variance of some sort.

5 00:32:20 MS. BARR: I have doubt about these plans so
6 00:32:22 I've denied it.

7 00:32:24 MR. PECK: Okay, can you tell me what doubt
8 00:32:26 you have?

9 00:32:28 MS. BARR: I have doubt that we're talking
10 00:32:30 about five buildings.

11 00:32:30 MR. PECK: Based upon what?

12 00:32:32 MS. BARR: Based upon the plans.

13 00:32:36 MR. PECK: Okay. I have no further
14 00:32:36 questions of this witness.

15 00:32:38 MR. KENNEDY: Can I just ask a question?
16 00:32:42 Donna, it appears based on what you're saying and I'd
17 00:32:46 like to if we -- I know you've asked for architectural
18 00:32:48 elevations, do you have any architectural elevations?
19 00:32:52 Is the question that it's coming down to is it five
20 00:32:56 buildings or is it two separate -- I'm sorry, is it one
21 00:33:00 group of three buildings and another group of two
22 00:33:06 buildings or is it two separate buildings, is that what
23 00:33:08 the issue is?

24 00:33:10 MS. BARR: The zoning permits four
25 00:33:10 apartments per building.

00:33:14 1 MR. KENNEDY: Do you have any architectural
00:33:14 2 renderings? Just maybe we could show the board.

00:33:18 3 MR. PECK: Yes, I do. I was going to bring
00:33:20 4 Mr. Ercolino back up, but Donna was testifying.

00:33:24 5 MR. KENNEDY: I'm sorry.

00:33:26 6 MR. PECK: Would you like to see that now?
00:33:30 7 CHAIRMAN WILLIAMS: I'd like Kos to comment
00:33:30 8 on this.

00:33:36 9 MR. KOSENSKI: There's an issue both ways.
00:33:38 10 If the jurisdiction is improperly determined no matter
00:33:42 11 what board hears this there's the possibility of an
00:33:48 12 objection being filed as to the proper board having
00:33:54 13 jurisdiction.

00:33:54 14 MR. KENNEDY: And let me interject one
00:33:56 15 thing. As Mr. Peck indicated we as a board tonight are
00:34:00 16 not voting this application, we are just voting
00:34:02 17 basically on Donna's decision and the jurisdiction as to
00:34:06 18 whether this goes to the zoning board or planning board.
00:34:08 19 I'm sorry, Kos.

00:34:08 20 MR. KOSENSKI: So the application shows five
00:34:16 21 structures, five buildings as defined by the building
00:34:22 22 code. This board is not required, nor does it use the
00:34:28 23 building code as the basis for its determination. In
00:34:32 24 fact, those five buildings as defined by the building
00:34:38 25 code act and look like two buildings. They are so close

1 as to be almost indiscernible that they're five
2 structures. In fact, the ordinance calls for a maximum
3 density in any zone including this zone for a single use
4 facility that being garden apartments of 14 units per
5 acre. This proposed multi-use facility office, retail
6 and residential comes in at 16 units per acre. Because
7 the applicant has chosen to purposefully make a building
8 design that has an imperceptible space of one inch
9 between the buildings and is apparently trying to gain
10 determination to go to a board that I think is an
11 improper board and will expose the Borough to a
12 potential lawsuit --

13 MR. PECK: I'm going to object unless we
14 have the witness qualified as an attorney.

15 MR. KENNEDY: Just --

16 MR. KOSENSKI: So the issue here is the
17 intent of the ordinance. When this ordinance was
18 developed I was present. I was part of it. I mentioned
19 this to Bryan Louma in our meeting of March 20th. The
20 ordinance was developed to deal with the existing
21 structures essentially on Broad Street and in some
22 sections of the BR-1 zone that were built probably in
23 the 1800s that have no separation where the building
24 essentially fills the entire lot and the Borough was
25 experiencing problems with too many residential units

1 00:36:34 being proposed of a small size on top of the retail.
2 00:36:38 They developed this to limit in a sense four units per
3 00:36:46 building, but in fact it was per site because every
4 00:36:50 building occupied the full extent of the property. This
5 00:36:54 applicant has apparently decided that it's important to
6 00:36:58 be before the planning board for some reason -- I don't
7 00:37:02 know why -- and has I think interpreted the ordinance in
8 00:37:12 a way that I think is inappropriate. It's not the
9 00:37:14 intent of what the zoning ordinance was defined and it's
10 00:37:20 going to result in a density that is greater than any
11 00:37:22 density in any zone.

12 00:37:28 MS. LEE: Kos, could I just ask a question
13 00:37:30 on that? Apart from the density question which
14 00:37:34 certainly you know is a legitimate one, who makes the
15 00:37:40 determination as to how close each building can be one
16 00:37:46 to the other?

17 00:37:46 MR. KOSENSKI: We do. There is an ordinance
18 00:37:48 guideline and it's referenced in one of the applicant's
19 00:37:52 letters. There's a guidance in the multi-family
20 00:37:56 dwellings for building spacing. So for instance in an
21 00:38:00 instance where there's no windows on the adjoining or
22 00:38:04 the adjacent walls the spacing would be a minimum of
23 00:38:08 15 feet between buildings. If there were windows the
24 00:38:10 spacing is greater. I don't recall if it was 20 or
25 00:38:14 25 feet, but it's in our ordinance under the

00:39:40 1 MR. KOSENSKI: And in addition there's the
00:39:42 2 bulk requirements for side yard, front yard setback, you
00:39:48 3 know, minimum lot area, parking, all that other stuff.
00:39:52 4 But as it relates to the buildings, the multi-family
00:39:56 5 says a minimum of 15 feet -- it's referenced in one of
00:39:58 6 your letters -- is required between these buildings.

00:40:04 7 MR. PECK: The application that's beer.
00:40:06 8 marked as B-1 requests a variance for distance between
00:40:10 9 buildings.

00:40:10 10 MR. KOSENSKI: So the issue then would be if
00:40:12 11 the applicant complied with that you probably have less
00:40:16 12 units, you would probably not exceed the maximum density
00:40:22 13 and he would probably be correct that this in fact would
00:40:24 14 be a planning board application. But now with the mix
00:40:30 15 that's proposed the result is there's a density that's
00:40:34 16 of a number that's greater than anything permitted in
00:40:38 17 the Borough so that this presents an anomaly. So, okay,
00:40:44 18 is this clear in the ordinance? I mean, I suppose you
00:40:46 19 could look at this and say well, the way he interprets
00:40:50 20 this is correct. Well then why don't we make more one
00:40:54 21 inch separations? Instead of having 5 units, let's have
00:40:58 22 10 units and 40 which would mean instead of 16 I'd have
00:41:04 23 32 units per acre. So what I'm saying is logically
00:41:08 24 speaking this one inch separation isn't what's in the
00:41:12 25 best interest and the intent of the zoning. We're not

1 00:42:32 yard variance and request for a variance for distance
2 00:42:34 between buildings. That's in A-1.

3 00:42:38 MR. KOSENSKI: The issue I think is --

4 00:42:40 MR. PECK: Excuse me, Bl, I apologize.

5 00:42:48 MR. KOSENSKI: The issue is the focus, I'd
6 00:42:56 call it the fixation of the applicant to get this before
7 00:43:00 the planning board.

8 00:43:00 MR. PECK: I'm going to object. This
9 00:43:04 gentleman has no idea what fixation or motivation might
10 00:43:08 exist by the applicant. I've already stated on the
11 00:43:10 record --

12 00:43:10 MR. KOSENSKI: That's not true. I've talked
13 00:43:12 to the applicant.

14 00:43:12 MR. PECK: I've already stated on the record
15 00:43:14 that the reason we are concerned about this is purely
16 00:43:16 legal. I need to be before the right board. I have no
17 00:43:20 problem with coming before this board other than the
18 00:43:24 fact that you don't have jurisdiction.

19 00:43:26 MR. KENNEDY: Let me just state one thing
20 00:43:28 because you've said that and that's correct and the
21 00:43:32 board engineer has said that's correct and I will say
22 00:43:34 it. We're not doing anyone any favor if we send you to
23 00:43:38 the wrong board. If you get an approval from the wrong
24 00:43:42 board and is subject to challenge as you said there's
25 00:43:44 nowhere to hide on any jurisdictional issue.

1 00:45:00 However, we run into the problem that while we all talk
2 00:45:04 about buildings in the context of zoning and planning,
3 00:45:08 building separations, building heights, all kind of
4 00:45:12 things there's no real definition in there that tells us
5 00:45:16 what constitutes a building. There was a gray area and
6 00:45:22 after long hours of consultation with my client I
7 00:45:24 advised him that based on Donna's interpretation and
8 00:45:28 this gray area she might well be right and whichever
9 00:45:32 board we ended up in front of we faced the potential
10 00:45:36 that if it went to court a judge would disagree and that
11 00:45:40 we should not expose ourselves to that. Okay? That's
12 00:45:44 when we came back and said, let's get rid of the
13 00:45:46 foundation. Let's put the buildings on the ground just
14 00:45:50 like any building that we're all used to. We have five
15 00:45:54 buildings. Nobody disputes that. We haven't been told
16 00:46:00 they're not buildings. We're told maybe they don't meet
17 00:46:02 the intent of the ordinance. Well, with all due respect
18 00:46:04 the intent of the ordinance is 100 percent irrelevant to
19 00:46:10 the determination of jurisdiction. When we go before
20 00:46:14 either this board or the planning board and we request
21 00:46:18 our variance to allow these buildings to be one inch
22 00:46:22 apart, yes, the question of the intent of the ordinance
23 00:46:24 becomes 100 percent relevant and if let's say we go to
24 00:46:28 the planning board and the planning board says we don't
25 00:46:32 want you to have these buildings one inch apart, we're

1 00:46:34 not going to grant you the variance for 15 feet, then we
2 00:46:38 will have to make our buildings 15 feet apart. But to
3 00:46:42 answer your question, I will represent to you on the
4 00:46:46 record that if these buildings are 15 feet apart there
5 00:46:50 will be 20 residential units in the 5 buildings. That
6 00:46:54 will not change. The size of the units may change, but
7 00:46:58 the number of units will not change. So that's why I
8 00:47:02 raise the question in all seriousness in the letter if
9 00:47:06 one inch doesn't make them buildings, how many inches do
10 00:47:10 I need to make a building? It can't be 15 feet because
11 00:47:14 I'm allowed to ask for a variance like that. So tell me
12 00:47:18 how much, how many inches make a building or how many
13 00:47:22 inches of separation make separate buildings? And my
14 00:47:26 position is and I believe it's 100 percent correct
15 00:47:30 legally and that if you send us to the planning board I
16 00:47:34 have no concerns about the jurisdictional issue that
17 00:47:36 that one inch makes them separate buildings. Whether we
18 00:47:40 can build at an inch is something that one of you two
19 00:47:44 boards will have to decide based on our presentation as
20 00:47:48 to our justification for the variance. But it doesn't
21 00:47:52 change the density, it doesn't change whether these
22 00:47:56 buildings, these uses are permitted. It doesn't change
23 00:48:00 anything. The question is are these separate
24 00:48:02 structures? And I have an architect, I have an engineer
25 00:48:06 and I have a planner each one of which is prepared to

1 address those questions with you if that's what you
2 would like to hear. But it seems to me from looking at
3 this picture these are clearly five separate buildings
4 and the distance that's going to be between them will be
5 decided in the normal process of seeking a site plan
6 application that includes bulk variances. And if all we
7 have are bulk variances then with all due respect you're
8 the wrong board.

9 CHAIRMAN WILLIAMS: Well, why don't you
10 proceed with your experts.

11 MR. PECK: Let me bring you the architect
12 that made me understand and I asked him to make copies
13 and I'd like to introduce those.

14 CONTINUED DIRECT EXAMINATION BY MR. PECK:

15 Q. Mr. Ercolino, you're already under oath. You
16 remember that?

17 A. Yes.

18 Q. It's been like ten minutes. Thank you.

19 MR. KENNEDY: Donna, would you be able to
20 stay here? Thanks.

21 MR. PECK: If I may approach? This is drawn
22 by Mr. Ercolino. I will qualify it. I would like to
23 mark this as A next.

24 MR. KENNEDY: I think we're up to -- A-4 and
25 A-5 five were Donna, so this we're going to mark as A-6.

00:52:00 1 buildings on either side?

00:52:02 2 A. It would have no effect.

00:52:04 3 Q. So these are separate blocks, separate buildings,
00:52:06 4 separate roofs, separate everything?

00:52:10 5 A. Completely separate.

00:52:10 6 Q. Thank you. But they're close together?

00:52:14 7 A. They are close together.

00:52:18 8 MR. MASS: Excuse me, do these buildings
00:52:20 9 have flats roofs on them?

00:52:22 10 MR. ERCOLINO: They will each have a parapet
00:52:24 11 and flat roof on them, yes.

00:52:28 12 MR. PECK: I do have an elevation if you'd
00:52:30 13 like to see that, but I don't have the floor plans.
00:52:34 14 Frankly it's very early in the process to have those
00:52:36 15 since we don't know what our buildings are yet because
00:52:40 16 it's been through many iterations as a result of these
00:52:42 17 definitional problems.

00:52:48 18 MS. HORGAN: Do you have a sketch of what
00:52:48 19 the roof or roofs are going to look like?

00:52:52 20 MR. PECK: Why don't you go around and
00:52:52 21 explain it to them. Like if you looked at the top it
00:52:56 22 looks like that.

00:52:58 23 MR. ERCOLINO: It looks a lot like that.

00:53:00 24 MR. PECK: Why don't you show --

00:53:00 25 MR. ERCOLINO: She wants to see the roof.