DAR No. _____
Appeals Court No. 2026-P-1387

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

477 HARRISON AVE., LLC,
Respondent-Appellee,

v.

JACE BOSTON, LLC & ARTHUR LEON,

Petitioners–Appellants.

On Application for Direct Appellate Review of a Judgment of the Superior Court (Budreau, J.) (No. 1584cv00829)

APPLICATION FOR DIRECT APPELLATE REVIEW

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October 14, 2026

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Petitioner-Appellant JACE Boston, LLC states as follows:

1. JACE Boston, LLC does not have any parent corporations.

2. No publicly held corporation owns 10% or more of JACE Boston, LLC's stock.

Dated: October 14, 2026

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT 2

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 5

REQUEST FOR DIRECT APPELLATE REVIEW 8

PRIOR PROCEEDINGS 10

FACTS RELEVANT TO THE APPEAL 13

I. JACE's property and 477 Harrison are immediate neighbors. 13

II. JACE engages in petitioning to oppose 477 Harrison's zoning-noncompliant project abutting JACE's property 14

A. The City refuses 477 Harrison a permit. 14

B. The Zoning Board grants 477 Harrison a variance. 15

C. JACE challenges the Zoning Board's 2012 decision to grant a variance, resulting in an Agreement for Judgment ("2012 Zoning Appeal") 16

D. JACE appeals after 477 Harrison again pursues zoning-noncompliant plans ("2015 Zoning Appeal") 17

E. JACE files a successful declaratory judgment action confirming its easement (the "Wall Case"). 18

III. 477 Harrison files this lawsuit to deter JACE's petitioning. 19

A. The motion judge refuses to grant JACE's requests for dismissal under the anti-SLAPP Act even after *Bristol Asphalt*, despite the objective reasonableness of JACE's petitioning activity. 19

B. The trial judge rejects JACE's arguments that objectively reasonable petitioning is constitutionally protected. 21

i. The trial judge denies JACE's motion to preclude legitimate petitioning from serving as a basis for liability. 21

ii. The trial judge prohibits JACE from introducing evidence of the objective reasonableness of its petitioning. 23

iii. After the judge refuses to instruct the jury on objective reasonableness, the jury returns a verdict against JACE. 24

C. The trial judge finds against JACE on the Chapter 93A claim based in large part on the Zoning Appeals. 25

D. Judgment enters against JACE for more than $20 million based almost exclusively on its Zoning Appeals. 25

ISSUES PRESENTED 26

ARGUMENT ON THE ISSUES 27

I. The trial judge erred by denying any constitutional protection to JACE's objectively reasonable petitioning. 27

II. The motion judge erred in refusing to apply the simplified anti-SLAPP framework from *Bristol Asphalt* to—and dismiss—the abuse of process claim with respect to the Zoning Appeals. 32

REASONS TO GRANT DIRECT APPELLATE REVIEW 34

I. The trial judge's novel decision to deny constitutional protection to objectively reasonable petitioning departs from courts around the country and diminishes the guarantee of the right to petition. 34

II. The motion judge's ruling that the *Bristol Asphalt* standard did not govern even though final judgment had yet to enter is a novel question of law that is important to the public interest. 39

CONCLUSION 41

CERTIFICATE OF COMPLIANCE 42

APPENDIX 43

CERTIFICATE OF SERVICE 485

TABLE OF AUTHORITIES

Cases **Page(s)**

39 Joy St. Condo. Ass'n v. Bd. of Appeal of Bos.,
426 Mass. 485 (1998) 16

477 Harrison Ave., LLC v. JACE Bos., LLC,
477 Mass. 162 (2017) (*Harrison I*).....10, 20, 31, 32

477 Harrison Ave., LLC v. JACE Bos., LLC,
483 Mass. 514 (2019) (*Harrison II*) 10

BE & K Constr. Co. v. NLRB,
536 U.S. 516 (2002).....30

Bill Johnson Rests., Inc. v. NLRB,
461 U.S. 731 (1983).....30

Blanchard v. Steward Carney Hosp., Inc.,
477 Mass. 141 (2017) 20

Bristol Asphalt Co., Inc. v. Rochester Bituminous Prods., Inc.,
493 Mass. 539 (2024) 9, 20, 21, 38

Cheminor Drugs, Ltd. v. Ethyl Corp.,
168 F.3d 119 (3d Cir. 1999) 35

Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., Inc.,
858 S.E.2d 795 (N.C. 2021).....36

Coll v. First Am. Title Ins. Co.,
642 F.3d 876 (10th Cir. 2011) 37

Columbia Plaza Assocs. v. Ne. Univ.,
493 Mass. 570 (2024) 33, 39, 40

Cove Rd. Dev. v. W. Cranston Indus. Park Assocs.,
674 A.2d 1234 (R.I. 1996).....30, 36

E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961).....28

FTC v. Super. Ct. Trial Lawyers Ass'n,
493 U.S. 411 (1990).....29

Harrah's Vicksburg Corp. v. Pennebaker,
812 So. 2d 163 (Miss. 2001).....30

Hidalgo v. Watch City Constr. Corp.,
105 Mass. App. Ct. 148 (2024).....31

IGEN Int'l, Inc. v. Roche Diagnostics GmbH,
335 F.3d 303 (4th Cir. 2003) 35

Kane v. Bd. of Appeals,
273 Mass. 97 (1930) 39

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982).....30

Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.,
508 U.S. 49 (1993).....28, 29, 32

Protect Our Mountain Env't, Inc. v. Dist. Ct.,
677 P.2d 1361 (Colo. 1984) (en banc).....37

Sahli v. Bull HN Info. Sys., Inc.,
437 Mass. 696 (2002) 10, 28

Salem Grain Co., Inc. v. Consol. Grain & Barge Co.,
900 N.W. 2d 909 (Neb. 2017) 37

Scott v. Hern,
216 F.3d 897 (10th Cir. 2000) 35

Sheppard v. Zoning Bd. of Bos.,
81 Mass. App. Ct. 394 (2012).....16

Tammaro v. Rauseo,
105 Mass. App. Ct. 1140, 2025 WL 2101780 (July 28, 2025) 33

Titan Am., LLC v. Riverton Inv. Corp.,
569 S.E.2d 57 (Va. 2002) 30, 36

United Mine Workers of Am. v. Pennington,
381 U.S. 657 (1965).....28

United Mine Workers v. Ill. State Bar Ass'n,
389 U.S. 217 (1967).....38

Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.,
858 F.2d 1075 (5th Cir. 1988).....36

Zeller v. Consolini,
758 A.2d 376 (Conn. App. Ct. 2000).....37

Statutes

Bos. St. 1956, c. 665 § 9.....15

Mass. G.L. c. 93A.....*passim*

Mass. G.L., c. 231, § 59H.....32

Rules

Mass. R. App. P. 11(a).....34

Federal Constitution

U.S. Const. amend. I.....8, 27

REQUEST FOR DIRECT APPELLATE REVIEW

This case squarely presents a critical constitutional question: Can a court impose state-law liability on someone for filing an objectively reasonable petition to the government? The Constitution says no. The trial judge said yes. The judge thus allowed the plaintiff, 477 Harrison Ave, LLC, to proceed with abuse of process and Chapter 93A claims against its immediate neighbor, Arthur Leon, and his company, JACE Boston, LLC (collectively, "JACE"), based on two objectively reasonable lawsuits JACE had filed to challenge variances the Boston Zoning Board of Appeals granted to 477 Harrison. The end result was that after 477 Harrison built its luxury condo complex next door to JACE, it then obtained a judgment against JACE of *more than $20 million* because JACE had objected to 477 Harrison's variances.

That should not have happened. As a matter of federal law, objectively reasonable petitioning is immune from liability. That immunity (sometimes called *Noerr-Pennington* immunity) was first recognized by the U.S. Supreme Court in antitrust cases, but it is rooted in the First Amendment's guarantee of the right "to petition the Government for a redress of grievances." U.S. Const. amend. I. Courts across the country have held that the Petition Clause protects legitimate petitioning from civil liability, including in abuse of process and unfair trade practices cases.

The proceedings below cleanly teed up this issue. At stage after stage, JACE argued that the First Amendment's Petition Clause protects it from liability for

reasonable petitioning. In response, 477 Harrison did not even dispute that JACE's Zoning Appeals had an objectively reasonable basis, but instead argued that it could establish liability merely by showing that JACE had an improper subjective motive for maintaining its suits. 477 Harrison thus insisted that the objective reasonableness of JACE's prior litigation was entirely *irrelevant*, and the trial court agreed.

That logic lost sight of the Constitution. Two years ago, this Court identified this issue in *Bristol Asphalt Co. v. Rochester Bituminous Products, Inc.*, 493 Mass. 539 (2024). There, it explained that even if a claim based on petitioning could survive a motion under the state anti-SLAPP Act, a party's "petitioning may still be entitled to protection from liability under the State and Federal Constitutions as the case proceeds according to the ordinary litigation process." *Id.* at 556.

That protection is precisely what JACE invoked as this case proceeded, but the trial judge resolved the issue against JACE. Holding that the petition-based immunity recognized in *Noerr-Pennington* does not apply "to anything beyond the context of an antitrust case," the trial judge predicted that this Court does not "intend to" apply the immunity to common-law torts. App.139(17:11-16).

That was legal error. The Petition Clause's protections for objectively reasonable petitioning are not limited to antitrust cases. The trial judge's refusal to recognize those protections allowed JACE's constitutionally-protected petitioning to serve as the basis for liability and tens of millions in damages. This Court's

immediate intervention is necessary not only to reverse an injustice against JACE, but also to avoid the deep chilling effect the $20 million judgment in this case may have against other petitioners who engage in objectively reasonable petitioning.

This Court and the Supreme Court have long recognized "the right to petition the government, including the courts, as one of 'the most precious of the liberties safeguarded by the Bill of Rights,' implied by the 'very idea of a government, republican in form.'" *Sahli v. Bull HN Info. Sys., Inc.*, 437 Mass. 696, 702 (2002) (quoting *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) and *United States v. Cruikshank*, 92 U.S. 542, 552 (1875)). The judgment below is a direct threat to that right, and it will remain so until this Court reverses it.

For these reasons, and the others discussed below, the Court should accept direct appellate review.

PRIOR PROCEEDINGS

This case has a long history. It includes two prior trips to this Court on direct appellate review—each requested by a different side of the "v." *See 477 Harrison Ave., LLC v. JACE Bos., LLC*, 477 Mass. 162 (2017) (*Harrison I*); *477 Harrison Ave., LLC v. JACE Bos., LLC*, 483 Mass. 514 (2019) (*Harrison II*). Those prior appeals addressed Massachusetts anti-SLAPP Act issues exclusively, and did not address the Petition Clause protections at issue in this appeal.

The proceedings most relevant to this appeal are as follows. In 2015, 477

Harrison sued JACE, alleging (1) a common-law abuse of process claim and (2) a claim under G.L. c. 93A, § 11. 477 Harrison based both of these claims on JACE's petitioning activity.[1] JACE argued that the Constitution did not permit 477 Harrison to use JACE's objectively reasonable petitioning as a basis for civil liability and damages. JACE raised these challenges throughout the litigation, beginning with its answer and at multiple stages thereafter, including in pre-trial filings, a motion in limine, proposed jury instructions, and multiple post-trial motions.

The trial judge rejected JACE's constitutional argument. The judge noted in a ruling from the bench, shortly before trial began, that JACE had "preserved" this issue but rejected JACE's argument on the merits, holding that the immunity recognized in the *Noerr-Pennington* doctrine does not apply "to anything beyond the context of an antitrust case." App.139(17:7-14). The judge further predicted that this Court does not "intend to" apply that immunity to common-law torts. App.139(17:13-15). On that ground, the court denied JACE's request to preclude 477 Harrison from introducing evidence of or relying on JACE's legitimate petitioning in support of its claims.

[1] 477 Harrison's Chapter 93A claim was based predominantly on petitioning activity, but also complained about insurance claims JACE had made reporting structural damage to its building from 477 Harrison's construction. The trial judge found that there were no "sufficiently quantifiable" damages resulting from the insurance claims. App.359 n.4.

Trial proceeded solely on whether JACE filed process "with an ulterior or illegitimate purpose" and caused "any damages as a result." App.368-70. 477 Harrison alleged four separate "abuses" of process: (1) a 2012 Zoning Appeal, challenging the Boston Zoning Board of Appeals' ("ZBA") allowance of, *inter alia*, height and density variances; (2) a 2015 Zoning Appeal, challenging a second ZBA decision that allowed the height and density variances; (3) a 2013 declaratory judgment action (the "Wall Case"), which resolved in JACE's favor the parties' respective rights in a wall that JACE's building shared with 477 Harrison's property; and (4) an application for criminal complaint relating to trespass by 477 Harrison contractors on JACE's property. According to 477 Harrison, JACE's "ulterior or illegitimate purpose" in this petitioning, among other things, was to prevent 477 Harrison from developing residential units on its property.

The jury returned a verdict finding that JACE did not have an "ulterior or illegitimate purpose" for the Wall Case, but finding that it did have such a motive for the two Zoning Appeals and the application for criminal complaint. App.368-70.

The Chapter 93A claim was reserved for the Court. After the parties filed written requests for findings and rulings, the trial judge found for 477 Harrison on the Chapter 93A claim and found that the jury's award of damages on the abuse of process claim was also appropriate for the Chapter 93A claim. The judge then

doubled those damages, finding "willful and knowing" conduct under Chapter 93A. App.359-60.

In total—including damages, interest, costs, and fees—the judgment awarded $20,121,850 to 477 Harrison. App.371. JACE timely noticed an appeal, App.372-74, and now submits this application for direct appellate review.

FACTS RELEVANT TO THE APPEAL

I. JACE's property and 477 Harrison are immediate neighbors.

Arthur Leon is the sole owner of JACE. App.172(83:19-21), 175(86:11-13). JACE owns and leases 1234 Washington Street in Boston's South End. App.172(83:16-18). Leon and his father bought 1234 Washington in 1975, and it has remained in the Leon family ever since. App.175(86:3-16). Today, it houses Leon's machine shop and his two businesses—a small crane equipment manufacturer and an electrical contracting service. App.472.

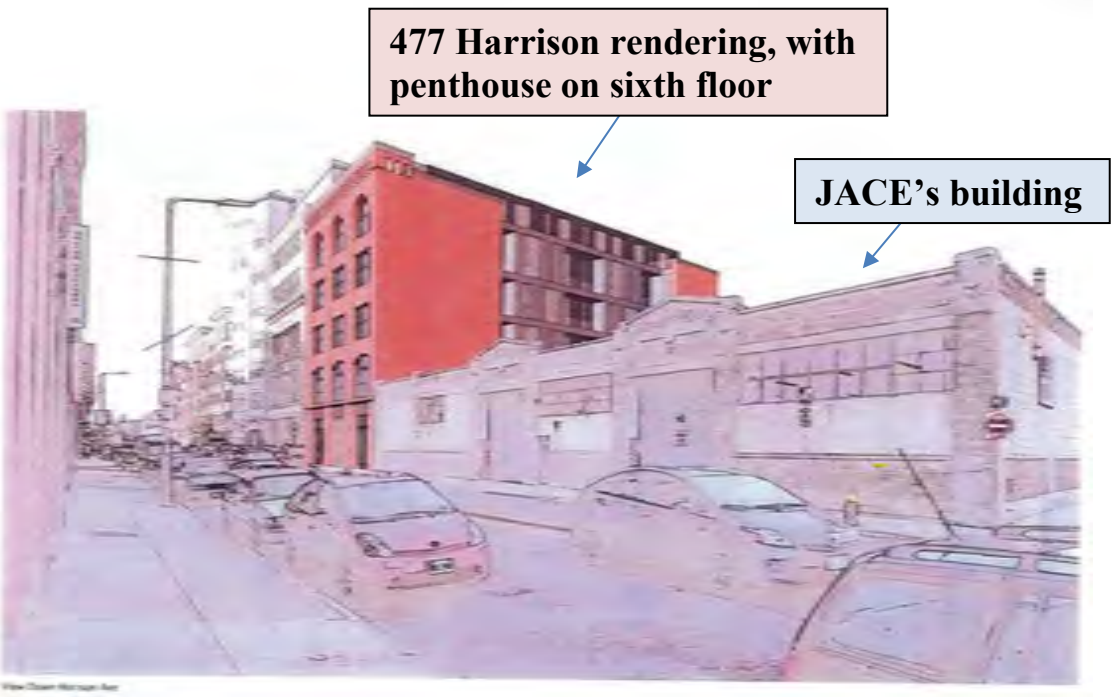
1234 Washington abuts 477 Harrison, and the two properties even share a structural support wall. App.433-37. When the 1234 Washington building was built a century ago, it was discovered that the foundation of the northwesterly wall of 477 Harrison was partially located on 1234 Washington's lot. Thus, the building at 1234 Washington had to be constructed without its own wall in that area, instead tying into 477 Harrison's wall for support. JACE has an easement protecting its right to use 477 Harrison's wall for that purpose. App.444.

II. JACE engages in petitioning to oppose 477 Harrison's zoning-noncompliant project abutting JACE's property.

A. The City refuses 477 Harrison a permit.

477 Harrison purchased the 477 Harrison property in 2012 and sought to convert it from an industrial warehouse into a luxury building. Its plans included redeveloping the five-story building into 18 residential condominium units and two commercial spaces. App.481. It also sought to add a penthouse floor. App.481. Notably, the plan included knocking down part of the wall in which JACE held a support easement. App.152-153(109:23-110:6).

The image below shows 477 Harrison's rendering for the proposed project:



App.392 (descriptions and arrows added for this brief).

When 477 Harrison applied to the City for a building permit, the Boston

Inspectional Services Department denied the application, finding that the proposed project violated numerous Boston Zoning Code provisions, including those relating to building height and density, as well as roof structure and groundwater conservation. App.375. In all capital letters, the letter instructed 477 Harrison to "take the necessary steps to ensure any required community participation in the Board of Appeal process for your application." App.375.

B. The Zoning Board grants 477 Harrison a variance.

After its permit request was refused, 477 Harrison turned to the ZBA for relief. App.481. 477 Harrison urged the ZBA, among other things, to grant 477 Harrison multiple variances from the zoning code. App.481.

As the applicant for the variance, 477 Harrison bore a heavy burden. Section 9 of Boston's Zoning Act states that the ZBA may only grant a variance where:

> owing to conditions especially affecting such parcel or such building, but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of such zoning regulation would involve substantial hardship to the appellant, and where desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent and purpose of such zoning regulation, **but not otherwise**.

St. 1956, c. 665 § 9 (emphasis added).

The ZBA held a public hearing on 477 Harrison's appeal. App.400. As an abutter of 477 Harrison and a South End community member, Leon asked the Board

to deny the requested variances. Leon argued that 477 Harrison had not satisfied the "substantial hardship" standard for a variance and that the development would interfere with Leon's ability to use his own property and negatively impact "the overall welfare of the South End neighborhood." App.376.

Nonetheless, the ZBA granted 477 Harrison's requested variances and special permits. App.399. The ZBA noted that it had considered the views of multiple local officials who spoke in favor of the proposal, including the Mayor's Office. App.402. The ZBA also claimed to have taken into account the effects of the proposed project on "adjoining lots and those in the neighborhood." App.403.

C. JACE challenges the Zoning Board's 2012 decision to grant a variance, resulting in an Agreement for Judgment ("2012 Zoning Appeal").

JACE appealed the ZBA's 2012 decision to the Superior Court. It named the ZBA and 477 Harrison as defendants. App.406. JACE argued, among other things, that 477 Harrison had failed to satisfy the requirements for the variances and permits that the ZBA had issued. App.407.

The merits of JACE's appeal rested on settled law that "no person has a legal right to a variance and they are to be granted sparingly." *39 Joy St. Condo. Ass'n v. Bd. of Appeal of Bos.*, 426 Mass. 485, 489 (1998). Notably, as "the party who had sought the variances," 477 Harrison "bore the burden at trial of proving [its] entitlement to them." *Sheppard v. Zoning Bd. of Bos.*, 81 Mass. App. Ct. 394, 398

(2012). As an abutter, JACE was presumed to have standing to challenge the zoning relief granted to 477 Harrison. It is abundantly clear that JACE's challenge to the variance grant was objectively reasonable, and at trial 477 Harrison never argued that it was not.

Indeed, the 2012 Zoning Appeal was resolved through an Agreement for Judgment, pursuant to which 477 Harrison withdrew its variance request and agreed that the 2012 ZBA decision granting the variance "is hereby vacated and is and shall be of no force or effect." App.429.

D. JACE appeals after 477 Harrison again pursues zoning-noncompliant plans ("2015 Zoning Appeal").

Less than two years after withdrawing its variance request, 477 Harrison again sought a building permit based upon its earlier penthouse design that required multiple zoning code variances. App.390. Once again, the Boston Inspectional Services Department issued a refusal letter, App.390, 477 Harrison appealed the permit refusal to the ZBA, Leon urged the ZBA not to grant the variances, and the ZBA ultimately issued the variances. App.390; App.445-51.

As it had done in 2012, JACE appealed the ZBA's decision to the Superior Court, naming the ZBA and 477 Harrison as defendants. App.452. JACE made effectively the same arguments that it had made in 2012, including that 477 Harrison had not satisfied the requirements for its requested variances. App.463-70.

This time, the Superior Court granted summary judgment to 477 Harrison and

the ZBA, ruling that JACE lacked "standing" under the Zoning Act. The motion judge recognized that JACE, as an abutter, was "entitled to a rebuttable presumption" that it was a "person aggrieved" who is statutorily entitled to appeal a ZBA decision to the Superior Court. App.474-75 (quoting *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 700 (2012) and St. 1956, c. 665, § 11). Acknowledging that "there is no case directly on point," the court nonetheless held that JACE's "evidence of potential structural harm to its own property" was "a building code matter to be addressed by the City of Boston's Inspectional Services Department, not a zoning matter." App.476-77. The court recognized that JACE had offered testimony that the project would cause density-related harms for JACE and the neighborhood in the form of traffic, parking, and noise problems, but found that 477 Harrison had "successfully rebutted" this evidence of harm. App.478.

E. JACE files a successful declaratory judgment action confirming its easement (the "Wall Case").

In addition to the Zoning Appeals, there is another lawsuit that JACE instituted that 477 Harrison claimed to be an abuse of process. In 2013, JACE filed a declaratory judgment action because 477 Harrison's plans threatened to demolish the wall in which JACE possessed a support easement. App.381. After a bench trial in 2014, the trial judge confirmed JACE's continued right to use and tie into the shared wall and prohibited 477 Harrison from taking "any action to demolish" the portion of the wall in which JACE has an easement. App.433. 477 Harrison

appealed the decision, but the Appeals Court affirmed. As the Appeals Court put it, 477 Harrison "asks us to rewrite the easement." App.483. Unsurprisingly, the court said no. *Id.*[2]

III. 477 Harrison files this lawsuit to deter JACE's petitioning.

477 Harrison sued JACE and Leon in 2015, claiming that the 2012 and 2015 Zoning Appeals, the Wall Case, and the application for criminal complaint each constituted (1) an abuse of process; and (2) a violation of Chapter 93A, § 11.

A. The motion judge refuses to grant JACE's requests for dismissal under the anti-SLAPP Act even after *Bristol Asphalt*, despite the objective reasonableness of JACE's petitioning activity.

Early in the case, JACE invoked its protections under the Massachusetts anti-SLAPP Act. Notably, these protections are statutory protections, separate from the constitutional Petition Clause immunity that is the principal focus of this appeal. The anti-SLAPP history is nevertheless relevant, as it provides a separate basis for JACE to prevail, and a separate basis for direct appellate review.

In 2015, JACE filed a special motion to dismiss the abuse of process claim under the anti-SLAPP Act. After the motion judge denied the motion, this Court vacated the denial as to the abuse of process claim, holding that 477 Harrison had

[2] In 2014, Leon reported to the Boston Police Department that 477 Harrison's contractors were using the roof of JACE's building to work on the 477 Harrison project. BPD advised Leon that he could apply for a trespass order in the Boston Municipal Court, which Leon did. The Municipal Court denied Leon's application.

failed to show that the 2012 Zoning Appeal, the 2015 Zoning Appeal—and all other alleged uses of process by JACE *other than* the application for criminal complaint—lacked "a reasonable basis in fact or law." *Harrison I*, 477 Mass. at 174-76.

Today, that conclusion would require a court to dismiss 477 Harrison's abuse of process claim under the anti-SLAPP Act, insofar as it was based on the Zoning Appeals and the Wall Case. That was also the rule *until* the day *Harrison I* issued. But that day, the Court issued its since-overruled decision in *Blanchard v. Steward Carney Hospital, Inc.*, 477 Mass. 141 (2017). As relevant here, *Blanchard* allowed a plaintiff to overcome an anti-SLAPP motion *even* where its claim attacked the defendant's objectively reasonable petitioning activity, so long as the plaintiff showed that its claim on the whole "was not primarily brought to chill the defendant's legitimate petitioning activity." *Harrison I*, 477 Mass. at 164.

Accordingly, rather than dismissing 477 Harrison's abuse of process claim with respect to the Zoning Appeals, this Court remanded with instructions to apply *Blanchard*. *See Harrison I*, 477 Mass. at 175-76. On remand, the motion judge applied the new *Blanchard* standard, and denied JACE's motion. App.72-77.

Blanchard lasted just seven years. In *Bristol Asphalt*, this Court overruled *Blanchard* and observed that *Blanchard*'s "second path"—that is, the basis of the denial of JACE's motion here—was plagued by "numerous problems." 493 Mass. at 553. *Bristol Asphalt* thus eliminated the additional analysis from *Blanchard* and

returned to the "simplified anti-SLAPP framework" that had governed for "nearly twenty years" before *Blanchard*. *Bristol Asphalt*, 493 Mass. at 541-42.

After *Bristol Asphalt* came down in 2024, JACE filed a motion for reconsideration of the denial of its anti-SLAPP motion. JACE argued that the judge should apply the simplified anti-SLAPP framework to which *Bristol Asphalt* had returned, and then dismiss 477 Harrison's abuse of process claim to the extent it was based on legitimate petitioning—including the Zoning Appeals. App.78-85.

The motion judge denied the motion, holding that *Bristol Asphalt* did not apply "retroactively" to JACE's case. The court reasoned that *Bristol Asphalt* applied only to cases in which an "anti-SLAPP motion or appeal remains pending" as of the issuance of *Bristol Asphalt*. App.64. It concluded that this condition was not satisfied here.

B. The trial judge rejects JACE's arguments that objectively reasonable petitioning is constitutionally protected.

Separate from its anti-SLAPP motion, JACE argued that the United States Constitution protected its petitioning activities, including the Zoning Appeals, from serving as a basis for liability or damages in this case.

i. The trial judge denies JACE's motion to preclude legitimate petitioning from serving as a basis for liability.

Prior to trial, JACE filed a motion in limine which argued that due to JACE's Petition Clause immunity, 477 Harrison must be precluded from offering evidence

based upon the Zoning Appeals and the Wall Case. App.94. As JACE argued, those three challenges were a "legitimate exercise of [JACE's] constitutionally protected right to petition the government." App.94. Thus, JACE urged, it was immunized from liability for those litigations as a matter of law—including under the First Amendment's Petition Clause. App.94.

477 Harrison responded to JACE's constitutional objections by mocking them as "ludicrous," "shocking," and "fantasy." App.111-12. 477 Harrison insisted (incorrectly) that this Court had confined the immunity recognized by *Noerr-Pennington* to antitrust cases. App.110. It argued that under Massachusetts law, the *only* issue for its abuse of process and Chapter 93A claims was whether JACE had an "ulterior or illegitimate purpose" for its petitioning, and it insisted that the objective reasonableness of JACE's lawsuits was irrelevant. App.113.

The trial judge embraced 477 Harrison's arguments in full, denying JACE's motion "for the reasons stated by the Plaintiff." App.139(17:10-11). Beyond incorporating 477 Harrison's arguments, the trial judge offered only a few additional sentences. In them, he said that this Court had not extended the immunity from *Noerr-Pennington* "to common law torts[,] nor does it intend to." App.139(17:11-16); App.68 (May 8, 2025 entry denying motion for reasons stated on record).

Based on that conclusion, the trial judge denied JACE's motion and allowed 477 Harrison to use objectively reasonable petitioning—the two Zoning Appeals and

the Wall Case—as a basis for liability and damages on each of its claims.

ii. The trial judge prohibits JACE from introducing evidence of the objective reasonableness of its petitioning.

Beyond denying JACE's motion to preclude 477 Harrison from relying on JACE's objectively reasonable petitioning as a basis for liability, the trial judge also excluded evidence JACE offered to show the objective reasonableness of its actions.

In particular, JACE had designated a zoning law expert, attorney Martin Healy, to discuss the two Zoning Appeals and to help the finders of fact understand why those Zoning Appeals had objectively reasonable bases. 477 Harrison moved to exclude that testimony, arguing it was irrelevant. App.120(59:18-25). The trial judge excluded Healy's testimony on this question, relying on its prior ruling denying JACE's constitutional defense. App.143(43:6-12).

During the colloquy over the expert evidence, the trial judge confirmed with 477 Harrison that it was *not* arguing that JACE lacked an objectively reasonable basis for its Zoning Appeals. App.119-20(58:18-59:11). The judge asked counsel for 477 Harrison: "Are you arguing that he didn't have a basis to appeal?" App.119(58:18-19). 477 Harrison's counsel responded: "No. We're going to argue it was brought for ulterior motives." App.120(59:8-11).

iii. After the judge refuses to instruct the jury on objective reasonableness, the jury returns a verdict against JACE.

In addition to the motion *in limine*, JACE preserved its constitutional

argument in other ways—including in multiple proposed jury instructions regarding the constitutional protections for objectively reasonable petitioning, and in motions seeking judgment as a matter of law (1) at the close of 477 Harrison's case, (2) at the close of all the evidence, and (3) after the jury verdict. App.181-85; App.155-68; App.208-209; App.305-20; App.321-42. The trial judge denied each of these requests; where he explained his reasons, the judge referred back to his denial of JACE's motion *in limine*. App.213(38:16-20); App.67; App.70; App.362-67.[3]

When the case was submitted to the jury, the jury was asked to decide—as to each of the four alleged "abuses" of process—only whether JACE filed process "with an ulterior or illegitimate purpose" and caused "any damages as a result." App.368-70. The jury found that JACE did not act with an "ulterior or illegitimate purpose" when it filed the Wall Case. App.368. But the jury found that JACE did act with an ulterior motive when it filed the 2012 Zoning Appeal, the 2015 Zoning Appeal, and the application for criminal complaint. App.368-69. The jury awarded $5,801,550 in damages on this claim.

C. The trial judge finds against JACE on the Chapter 93A claim based in large part on the Zoning Appeals.

The Chapter 93A claim was reserved for the court's determination. Both sides

[3] The trial judge made clear that he was denying all arguments JACE made regarding the First Amendment protection for objectively reasonable petitioning: "For all purposes on the record, objectiveness I'm denying." App.215(42:5-6).

submitted written requests for findings and rulings on the claim. 477 Harrison argued that JACE's motive in filing both the Zoning Appeals was "to derail 477 Harrison's project and exert maximum financial pressure" on its competitor, 477 Harrison. App.238. JACE again argued that its objectively reasonable petitioning was immunized from liability under the Petition Clause. App.271-29.

The trial judge found in 477 Harrison's favor on the Chapter 93A claim. The judge's order never addressed JACE's constitutional argument—or the objective reasonableness of JACE's petitioning activity. The judge found that JACE engaged in a "campaign" of petitioning "in an effort to redesign, delay, financially destabilize and interfere with the completion of the 477 Harrison development." App.358. On that ground, he awarded double damages and attorneys' fees. App.359-60.

D. Judgment enters against JACE for more than $20 million based almost exclusively on its Zoning Appeals.

The court entered judgment on July 13, 2026. App.371.

Damages were $5,800,000 relating to the two Zoning Appeals and $1,550 relating to the application for criminal complaint. App.353. The $5,801,550 was doubled based on the Chapter 93A findings. App.360.

With attorneys' fees, costs, and interest added, the total amount awarded to 477 Harrison pursuant to the judgment was $20,121,850. App.371.

ISSUES PRESENTED

While JACE may raise other issues in its appeal, JACE believes that at least the following issues warrant direct appellate review by this Court:

1. Whether the trial judge committed legal error by denying constitutional protection to objectively reasonable petitioning?

JACE raised and preserved this issue in, *e.g.*, its motion in limine raising constitutional issues, its motions for directed verdict and judgment notwithstanding the verdict, its proposed findings of fact and conclusions of law, its proposed jury instructions, and elsewhere. *See, e.g.*, App.94-104; App.155-68; App.181-85; App.208-09; App.305-20; App.321-42; *see also* pp. 21-25, *supra*.

2. Whether the motion judge committed legal error by refusing to dismiss 477 Harrison's claims with respect to the Zoning Appeals based on the simplified anti-SLAPP framework from *Bristol Asphalt*?

JACE raised and preserved this issue in, *e.g.*, its motion for reconsideration of its special motion to dismiss. *See, e.g.*, App.78-85; App.64; *see also* pp. 19-21, *supra*.[4]

[4] JACE may raise other issues on appeal, raised and preserved below, including the trial judge's failure to give instructions and rulings relating to damages and the Agreement for Judgment, and the admission and exclusion of evidence.

ARGUMENT ON THE ISSUES

I. The trial judge erred by denying any constitutional protection to JACE's objectively reasonable petitioning.

The trial judge committed legal error by denying First Amendment protection to JACE's objectively reasonable petitioning activity.

To start, JACE's objectively reasonable petitioning never should have gone to the jury at all. JACE correctly argued prior to trial that the Zoning Appeals and the Wall Case "are immunized from liability" by JACE's "right to petition the government for redress." App.94. The court should have precluded 477 Harrison from claiming that the Zoning Appeals or the Wall Case were in any way wrongful, and the abuse of process claim and the Chapter 93A claim should have been tried only to the extent they were based on matters other than protected petitioning.

Making matters worse, the trial judge not only refused to dismiss the claims based upon legitimate petitioning, but then prevented JACE from putting on *any* constitutional defense at trial. By barring JACE from presenting evidence of objective reasonableness and then refusing to instruct the jury on objective reasonableness, the trial judge kicked the Constitution out of the case.

The First Amendment's Petition Clause guarantees the right of the people "to petition the Government for a redress of grievances." U.S. Const. amend. I. That guarantee forbids the imposition of civil liability—like the tens of millions of dollars in damages here—on a person for exercising their protected right to petition.

The Supreme Court has long recognized this Petition Clause immunity, primarily but not exclusively in the area of antitrust—in the so-called *Noerr-Pennington* doctrine. *Noerr* held that a petitioning campaign designed to influence government action could not be grounds for civil antitrust liability *even if* the campaign's "sole purpose" was to disadvantage competitors. *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). As the Court reasoned, "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id.* at 137. Since the "right of petition is one of the freedoms protected by the Bill of Rights," the Court refused to "impute to Congress an intent to invade these freedoms" in the antitrust laws. *Id.* at 138. So long as a "campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." *Id.* at 140; *see also United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (reiterating that *Noerr*'s immunity applies to petitioning "regardless of intent or purpose").

This immunity also applies to the filing of lawsuits. *See Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). As this Court has stated, the pursuit of a lawsuit constitutes petitioning activity protected by the federal and Massachusetts Constitutions. *See Sahli*, 437 Mass. at 700-01.

That petitioning activity—the pursuit of a lawsuit—may not be the basis for

civil liability, unless a plaintiff carries its burden to show the defendant's underlying lawsuit was a "sham." *Pro. Real Est. Invs.*, 508 U.S. at 56. Satisfying that burden is not an easy task. *Id.* at 60-61. First, the plaintiff must prove that the underlying litigation was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at 60. "Only if challenged litigation is objectively meritless may a court" turn to step two, which examines the "litigant's subjective motivation." *Id.* At bottom, "an objectively reasonable effort to litigate cannot be sham *regardless of subjective intent*." *Id.* at 57 (emphasis added).

The trial judge's treatment of JACE's constitutional objections ran directly counter to the Petition Clause protections recognized by the Supreme Court in *Noerr-Pennington*, and thereafter by courts around the country applying that protection to state-law claims. The trial judge held that JACE's motive is all that mattered, such that the objective reasonableness of JACE's efforts to obtain relief was irrelevant. *See* pp. 21-25, *supra*. That is the very opposite of what *Professional Real Estate Investors* says.

The trial judge concluded that protection for legitimate petitioning applies only to antitrust cases. It does not. The Supreme Court has explicitly recognized that its *Noerr-Pennington* doctrine interprets the antitrust statutes "in the light of the First Amendment's Petition Clause." *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990). And it has relied on the doctrine outside the antitrust context

to confirm that "the right of the people to petition their representatives in government 'cannot properly be made to depend on their intent in doing so.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (malicious interference with business claim) (quoting *Noerr*, 365 U.S. at 139-40); *see also Bill Johnson Rests., Inc. v. NLRB*, 461 U.S. 731, 742-43 (1983) (unfair labor practice claim under federal law); *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 530 (2002) (same). Whether a plaintiff seeks to hold another liable for legitimate petitioning as a matter of antitrust, abuse of process, or some other statutory or common-law cause of action, the Petition Clause protection stays the same.

Numerous state high courts have recognized that *Noerr-Pennington* immunity extends just as much to state-law claims as to federal antitrust claims. *See, e.g.*, *Titan Am., LLC v. Riverton Inv. Corp.*, 569 S.E.2d 57, 62 (Va. 2002) ("The *Noerr-Pennington* doctrine arises from rights afforded by the First Amendment and does not limit protection of those rights to causes of action involving antitrust matters."); *Harrah's Vicksburg Corp. v. Pennebaker*, 812 So. 2d 163, 171 (Miss. 2001) ("The *Noerr-Pennington* doctrine applies in state court and to state law claims because it is grounded on First Amendment rights to petition the government."); *Cove Rd. Dev. v. W. Cranston Indus. Park Assocs.*, 674 A.2d 1234, 1237 (R.I. 1996) (holding *Noerr-Pennington* "is based upon the First Amendment," and "the constitutional protection of the right to petition is no less compelling in the context of common-

law tort claims than in the framework of federal antitrust legislation").

This approach comports with how Massachusetts courts have interpreted the Petition Clause. Citing the "constitutional right to petition the government for redress of grievances" in an anti-SLAPP case, the Appeals Court has held that a party "cannot be subjected to State sanction" for filing a lawsuit "unless—and this is the important caveat—unless his lawsuit was without reasonable basis in fact or law." *Hidalgo v. Watch City Constr. Corp.*, 105 Mass. App. Ct. 148, 152 (2024).

There is no dispute that the Wall Case and the Zoning Appeals were objectively reasonable. JACE *won* the Wall Case. And in *Harrison I*, this Court held that 477 Harrison "failed to show" that the 2012 and 2015 Zoning Appeals lacked a "reasonable basis in law or fact." 477 Mass. at 175. In the nine years since *Harrison I*, 477 Harrison has offered *nothing* more to meet its burden—instead disavowing any attempt to argue the Zoning Appeals were objectively baseless. *See* p. 23, *supra*. Beyond that, the record confirms that the Zoning Appeals were objectively reasonable. As described pp. 16-18, *supra*, JACE had objectively reasonable bases to object to 477 Harrison's non-conforming development and variances—especially since, as explained p. 15, *supra*, it was 477 Harrison's burden to prove the variance was justified. The decision resolving the 2015 Zoning Appeal confirmed that JACE had presumptive standing as an abutter and that there was "no case directly on point" rejecting JACE's theory of standing. *See* p. 18, *supra*. Surely

neither appeal was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Pro. Real Est. Invs.*, 508 U.S. at 60.

Because the Zoning Appeals were reasonable as a matter of law, the trial judge erred as a matter of law in allowing them to serve as the basis for liability.

II. The motion judge erred in refusing to apply the simplified anti-SLAPP framework from *Bristol Asphalt* to—and dismiss—the abuse of process claim with respect to the Zoning Appeals.

Even putting the constitutional arguments aside, the Zoning Appeals (and the Wall Case) never should have gone to the jury. The motion judge also erred as a matter of law in refusing to dismiss 477 Harrison's abuse of process claim under the anti-SLAPP Act, c. 231, § 59H, to the extent its claim was based on those appeals.

There is no dispute about what the result would be if the *Bristol Asphalt* standard were applied to JACE's anti-SLAPP motion, because this Court already did that analysis in *Harrison I*. Since 477 Harrison failed to meet its burden to show that JACE's three lawsuits lacked an objective basis, JACE's special motion to dismiss should have been granted to the extent the abuse of process claim was based on those "protected petitioning activities," with "an appropriate award of attorney's fees and costs made" to JACE. *Harrison I*, 477 Mass. at 175-76. That is, if the simplified anti-SLAPP framework were applied here, *all but $1,550* of the $5,801,550 awarded on the abuse of process claim would be reversed, and it would be 477 Harrison paying *JACE's* attorney's fees, rather than the other way around.

The motion judge's sole reason for declining to reconsider JACE's anti-SLAPP arguments in light of *Bristol Asphalt* was its conclusion that this Court's "decision in *Bristol Asphalt* is not applicable to this case because no 'anti-SLAPP motion or appeal remains pending' in this proceeding." App.64 (citing *Columbia Plaza Assocs. v. Ne. Univ.*, 493 Mass. 570, 578 (2024)).

That was error. *Columbia Plaza* confirms that *Bristol Asphalt* applies *at minimum* to cases where anti-SLAPP motions or appeals were pending as of *Bristol Asphalt*, but it does not foreclose *Bristol Asphalt*'s application to cases like JACE's. To the contrary, *Columbia Plaza*'s reasons for applying *Bristol Asphalt* retroactively apply just as strongly here: *Bristol Asphalt* gave effect to the clear meaning of a statute which had "not changed," and it was a "return to the framework that governed special motions to dismiss for twenty years." *Columbia Plaza*, 493 Mass. at 578.

The simplified anti-SLAPP framework applies here, because it was binding law both at the beginning of this case, when JACE was sued for its petitioning and then moved to dismiss, and at the end, when JACE was subjected to liability and damages for its petitioning. Moreover, JACE retained the right to challenge the motion judge's post-remand denial of JACE's anti-SLAPP Act motion to dismiss *after* final judgment entered,[5] and to have the correct legal standard applied on

[5] *See, e.g.*, *Tammaro v. Rauseo*, 105 Mass. App. Ct. 1140, 2025 WL 2101780, at *3 (July 28, 2025) (Rule 23.0) (holding "the proponent of a special motion to dismiss who forgoes an interlocutory appeal from its denial retains the right to have such

appellate review. The Superior Court erred in refusing to dismiss the abuse of process claim under the anti-SLAPP Act as to the Zoning Appeals.

REASONS TO GRANT DIRECT APPELLATE REVIEW

The Court should grant direct appellate review because, under Massachusetts Rule of Appellate Procedure 11(a), this case presents "novel questions of law which should be submitted for final determination to the Supreme Judicial Court," "questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth," *and* "questions of such public interest that justice requires a final determination by the full Supreme Judicial Court." Under Rule 11(a), any of those bases can be sufficient on their own for direct appellate review. This case presents every single one of them.

I. The trial judge's novel decision to deny constitutional protection to objectively reasonable petitioning departs from courts around the country and diminishes the guarantee of the right to petition.

The trial judge concluded that the Petition Clause protects federal antitrust defendants—*but no one else*—from liability for engaging in objectively reasonable petitioning. That conclusion is wrong. It sharply departs from the conclusions of state and federal courts around the country. If allowed to stand, it will mean that citizens can face massive damages verdicts for daring to exercise their constitutional right to bring objectively reasonable petitions to the government for a redress of

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order reviewed on appeal from final judgment").

grievances, even if—as in the 2012 Zoning Appeal and the Wall Case—that petitioning activity *succeeds* in obtaining relief.

Whether objectively reasonable petitioning may form the basis for state-law civil liability and damages is an important question of constitutional law. Nearly every court to have addressed the question has affirmed the First Amendment's basic protection of the right of the people to engage in objectively reasonable petitioning free from all sorts of retaliatory litigation, not just antitrust lawsuits.

Why *would* the constitutional right to petition be different in antitrust than in an abuse of process claim? Federal courts of appeals have found no good reason to draw the arbitrary line the trial judge drew here. Articulating the problem, the Tenth Circuit has observed that imposing "tort liability for abuse of process" would "infringe or chill" a litigant's "First Amendment right to petition the courts for redress of grievances" just as much as antitrust liability would. *Scott v. Hern*, 216 F.3d 897, 914 (10th Cir. 2000). The Third Circuit could see "no persuasive reason" why state abuse of process claims based on reasonable petitioning "would not be barred by the *Noerr-Pennington* doctrine." *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128 (3d Cir.), *cert. denied*, 528 U.S. 871 (1999); *see also IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310 (4th Cir. 2003) (holding that *Noerr-Pennington* "originally developed in the antitrust context," but the constitutional protection it recognized "has now universally been applied to business

torts"). As the Fifth Circuit put it, "[t]here is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust." *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988).

State high courts across the country have confirmed that the Petition Clause protects objectively reasonable petitioning from civil liability—including in claims materially the same as those asserted here. Applying *Professional Real Estate Investors*, the Rhode Island Supreme Court has held that objectively reasonable petitioning may not form the basis of a state-law abuse of process claim. *See Cove Rd. Dev.*, 674 A.2d at 1237 ("We reiterate here that the constitutional protection of the right to petition is no less compelling in the context of common-law tort claims than in the framework of federal antitrust legislation."). So has the Supreme Court of Virginia in a tortious interference case. *See Titan Am.*, 569 S.E.2d at 62. The Supreme Court of North Carolina has held the same in a tortious interference claim based on a property owner's zoning-related challenges. *See Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., Inc.*, 858 S.E.2d 795, 799 (N.C. 2021) ("Although the holdings from *Noerr* and its progeny—the *Noerr-Pennington* doctrine—originated in the antitrust context, the First Amendment principles upon which the doctrine rests are foundational to our political system. Therefore, the protections afforded by the right to petition, recognized in the First Amendment, are

not limited to antitrust matters."). Even before *Professional Real Estate Investors*, Colorado's Supreme Court held that the Petition Clause protects petitioning from a claim for abuse of process, unless the petitioning was "devoid of reasonable factual support, or … lacked any cognizable basis in law." *Protect Our Mountain Env't, Inc. v. Dist. Ct.*, 677 P.2d 1361, 1364-70 (Colo. 1984) (en banc).

The list goes on. Over the years, numerous other state supreme and intermediate appellate courts have recognized that "the *Noerr-Pennington* doctrine applies in state court and to state-law claims because it is grounded on First Amendment rights to petition the government." *Salem Grain Co., Inc. v. Consol. Grain & Barge Co.*, 900 N.W. 2d 909, 919-20 & n.24 (Neb. 2017) (collecting cases); *see, e.g.*, *Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 895 n.18 (10th Cir. 2011) (collecting cases); *Zeller v. Consolini*, 758 A.2d 376, 382 (Conn. App. Ct. 2000) (applying "objectively baseless" standard to claims for tortious interference with business relationship and vexatious litigation based on zoning challenges).

Massachusetts should not become an island of one in confining the essential protections of the right to petition to the federal antitrust context. Below, the trial judge adopted 477 Harrison's argument that the Petition Clause's protection "has no application to 477 Harrison's abuse of process and 93A claims." App.113; App.139(17:10-11). That was simply wrong. This Court has *never* held that the Petition Clause provides no constitutional protection from civil liability for an abuse

of process claim, a Chapter 93A claim, or other state-law claims. Indeed, in *Bristol Asphalt*, this Court recognized that, even aside from the anti-SLAPP Act, "petitioning may still be entitled to protection from liability under the State and Federal Constitutions as the case proceeds according to the ordinary litigation process." 493 Mass. at 556. This appeal squarely presents the very question *Bristol Asphalt* left open: to what extent *do* the State and federal Constitutions protect objectively reasonable petitioning from civil liability in state-law claims?

That constitutional question is important to the public interest. Arthur Leon was made to stand trial for filing three objectively reasonable lawsuits, one of which he won and another of which led to an Agreement for Judgment in which 477 Harrison abandoned the 2012 variance. He is now being subjected to tens of millions of dollars in damages for filing the two Zoning Appeals, with no showing they were objectively unreasonable. That result is sure to chill others' exercise of their right to petition government for a redress of grievances, reducing one of "the most precious of the liberties safeguarded by the Bill of Rights" to little more than a "hollow promise." *Ill. State Bar Ass'n*, 389 U.S. at 222.

The public interest in this case is heightened by the fact that the petitioning forming the grounds for massive damages took place in the local zoning process. Massachusetts zoning law is built on public participation, including participation from abutters, neighbors, and other stakeholders. The zoning system is *designed to*

encourage neighbors to petition the government. *Kane v. Bd. of Appeals*, 273 Mass. 97, 104 (1930) (holding zoning system is designed to limit neighborhood changes until those interested have had the "opportunity to protest"). The judgment here tells neighbors that if they do not stay quiet, they will pay.

By taking this case now, this Court can reaffirm the Petition Clause's essential protections and guide lower courts in applying those protections, so that the errors that led to this judgment do not prevent future citizens from speaking up.

II. The motion judge's ruling that the *Bristol Asphalt* standard did not govern even though final judgment had yet to enter is a novel question of law that is important to the public interest.

Even apart from the key constitutional question presented in this appeal, the motion judge's refusal to apply the governing anti-SLAPP Act standard to this case following the *Bristol Asphalt* decision warrants direct appellate review. The motion judge's decision creates harmful confusion regarding when lower courts are required to apply new decisions from this Court to the cases pending before them.

In *Columbia Plaza*, this Court went to great lengths to explain why *Bristol Asphalt* should apply retroactively. It explained, for instance, that *Bristol Asphalt* was a statutory interpretation case. *Columbia Plaza*, 493 Mass. at 577-78. When this Court interprets a statute, it is not announcing *new* law, but instead giving "'effect to the clear meaning of a statute,' a meaning that has not changed for these purposes since its original enactment." *Id.* at 578 (quoting *Dellorusso v. PNC Bank,*

N.A., 98 Mass. App. Ct. 84, 87 (2020)). *Columbia Plaza* explained that retroactive application was even *more* warranted for *Bristol Asphalt* than in the typical statutory interpretation case, because *Bristol Asphalt* was a "return to the framework that governed special motions to dismiss for twenty years." *Id*.

Those same reasons show why *Bristol Asphalt* applies here. This case has been pending since 2015, and the rule *Bristol Asphalt* announced was the governing law at nearly every relevant stage—when 477 Harrison sued JACE, when JACE filed its special motion to dismiss under the anti-SLAPP Act, when the case went to trial, and when judgment entered. *Bristol Asphalt* will be the governing standard while this appeal proceeds. Yet through the bizarre fluke that Massachusetts law changed (incorrectly, it turns out) just as JACE's motion was first being decided, JACE has never benefited from the correct reading of the anti-SLAPP Act.

* * *

Arthur Leon had a reasonable basis in fact and law to challenge the ZBA's decision to greenlight a zoning-noncompliant, penthouse-topped redevelopment project on the other side of a shared wall from his machine shop. He should not be paying more than $20 million to the developer for exercising his constitutional right to petition his government for a redress of grievances.

CONCLUSION

For the foregoing reasons, the Court should grant this application for direct appellate review and correct the error below.

October 14, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, the undersigned counsel states that this application complies with the rules of court that pertain to its filing, including but not limited to Mass. R. App. P. 11(b).

This application was prepared using Microsoft Word in 14-point Times New Roman, a proportionally-spaced typeface, and its argument section contains 1,821 words.

Dated: October 14, 2026

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DAR No. _____
Appeals Court No. 2026-P-1387

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

477 HARRISON AVE., LLC,
Respondent-Appellee,

v.

JACE BOSTON, LLC & ARTHUR LEON,

Petitioners–Appellants.

On Application for Direct Appellate Review of a Judgment of the Superior Court (Budreau, J.) (No. 1584cv00829)

APPENDIX TO APPLICATION FOR DIRECT APPELLATE REVIEW

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October 14, 2026

TABLE OF CONTENTS

Docket Entries, *477 Harrison Ave., LLC v. JACE Boston, LLC and Arthur Leon*, Civil Action No. 1584CV00829-B (Mass. Super. Ct.) App.48

Memorandum and Order on Defendants' Special Motion to Dismiss Pursuant to G.L. c. 231, § 59H Upon Remand from the Supreme Judicial Court (Dkt. No. 68), dated December 19, 2017.....App.72

JACE Boston, LLC and Arthur Leon's (together, "JACE") Motion for Reconsideration (Dkt. No. 101), filed April 19, 2024 .....App.78

Endorsement of JACE's Motion for Reconsideration, dated April 23, 2024.....App.86

JACE's Motion in Limine Regarding 447 Harrison Ave., LLC's ("477 Harrison") Claim for Damages from JACE Filing the Wall Case and Request for a Hearing (Dkt. No. 110), filed April 2, 2025 .....App.88

JACE's *Motion in Limine* Regarding Constitutional Defenses (Dkt. No. 131), filed April 2, 2025 .....App.94

477 Harrison's Opposition to JACE's Motion in *Limine* Regarding Constitutional Defenses (Dkt. No. 133), filed April 2, 2025.....App.105

Excerpt from Transcript of Final Pre-Trial Conference, dated April 16, 2025.....App.116

Excerpts from Transcript of Final Pre-Trial Conference, dated April 18, 2025.....App.124

Excerpt from Transcript of Final Pre-Trial Conference, dated April 23, 2025.....App.148

JACE's Motion for Directed Verdict at Close of Plaintiff's Case with Endorsement (Dkt. No. 150), filed April 30, 2025 .....App.155

Excerpt from Transcript of Trial Proceedings, dated April 30, 2025.....App.169

Endorsement regarding JACE's Motion for Directed Verdict at
Close of Plaintiff's Case, docketed May 5, 2025 .....App.177

JACE's Proposed Revised Jury Instructions
(Dkt. No. 153), filed May 5, 2025 .....App.179

Endorsement regarding JACE's Motion for Directed Verdict at
Close of All Evidence (Dkt. No. 156), dated May 5, 2025 .....App.208

Excerpts from Transcript of Trial Proceedings,
dated May 5, 2025.....App.210

477 Harrison's Proposed Findings of Facts and Rulings of Law
on Its G.L. c. 93A, §11 Claim against JACE (Dkt. No. 160),
filed May 30, 2025.....App.217

JACE's Proposed Findings of Facts and Conclusions of Law with
Respect to 477 Harrison's Claim under Mass. Gen. Laws Ch. 93A, §11
(Dkt. No. 161), filed May 30, 2025 .....App.245

JACE's Motion for Judgment Notwithstanding the Verdict
(Dkt. No. 167), filed October 1, 2025.....App.305

JACE's Motion for a New Trial and Request for Hearing
(Dkt. No. 171), filed October 1, 2025.....App.321

Findings of Fact, Rulings of Law, and Order for Judgment
on 477 Harrison's Ch. 93A Claim (Dkt. No. 175),
dated January 13, 2026 .....App.343

Endorsement on Motion for Judgment Notwithstanding the Verdict,
dated January 20, 2026 .....App.361

Memorandum of Decision and Order on JACE's Motion
for a New Trial (Dkt. No. 177), dated January 30, 2026.....App.362

Special Verdict Form dated May 6, 2025 (Dkt. No. 181),
docketed July 14, 2026 .....App.368

Judgment on Jury Verdict (Dkt. No. 182),
docketed July 14, 2026 .....App.371

JACE's Notice of Appeal (Dkt. No. 183),
filed August 11, 2026.....App.372

Trial Exhibit 18, Boston Inspectional Services Department
Denial Letter, dated March 9, 2012 .....App.375

Trial Exhibit 31, Letter from E.G. Leon & Co, Inc. to Boston
Board of Appeal, dated May 17, 2012.....App.376

Trial Exhibit 50, Complaint, *JACE Boston, LLC v. Holland Development, LLC, et al.*, Civil Action No. 2013-2167-H (Mass. Superior Court),
dated June 13, 2013.....App.381

Trial Exhibit 82, Boston Inspectional Services Department Zoning
Code Refusal, dated December 16, 2014.....App.390

Trial Exhibit 117, Renderings for 477 Harrison Development,
undated App.391

Trial Exhibit 129, Decision of Boston Zoning Board of Appeal,
entered by Boston Inspectional Services Department
on August 14, 2012 .....App.399

Trial Exhibit 130, Complaint, *JACE Boston, LLC v. Board of Appeal of the City of Boston, et al.*, Civil Action No. 2012-3241-C
(Mass. Superior Court), dated August 29, 2012 .....App.406

Trial Exhibit 134, Agreement for Judgment, *JACE Boston, LLC v. Board of Appeal of the City of Boston, et al.,* Civil Action No. 2012-3241-C
(Mass. Superior Court), dated November 8, 2013.....App.429

Trial Exhibit 135, Judgment on Findings of the Court, *JACE Boston, LLC v. Holland Development, LLC, et al.*, Civil Action No. 2013-2167-H
(Mass. Superior Court), dated September 10, 2014.....App.433

Trial Exhibit 136, Boston Zoning Board of Appeal Decision, entered by
Boston Inspectional Services Department on May 12, 2015.....App.445

Trial Exhibit 137, Complaint, *JACE Boston, LLC v. Board of Appeal of the City of Boston, et al*., Civil Action No. 2015-1585-H (Mass. Superior Court), dated May 28, 2015 .....App.452

Trial Exhibit 138, Memorandum of Decision and Order on Defendants' Motion for Summary Judgment, *JACE Boston, LLC v. Board of Appeal of the City of Boston, et al.*, Civil Action No. 2015-1585-H (Mass. Superior Court), dated February 2, 2017 .....App.471

Trial Exhibit 140, 477 Harrison's Appeal to the Boston Zoning Board of Appeal, dated March 16, 2012.....App.481

Trial Exhibit 145, Memorandum and Order, *JACE Boston, LLC v. Holland Development, LLC, et al.*, Civil Action No. 2015-P-388, 2016 Mass. App. LEXIS 183 (Mass. App. February 24, 2016) App.482

1584CV00829 477 Harrison Ave LLC vs. Jace Boston LLC et al

- Case Type:
- Torts
- Case Status:
- Open
- File Date
- 03/23/2015
- DCM Track:
- F - Fast Track
- Initiating Action:
- Other Tortious Action
- Status Date:
- 03/23/2015
- Case Judge:
-
- Next Event:
-

All Information | Party | Judgment | Subsequent Action/Subject | Event | Tickler | Docket | Disposition

Party Information

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- Plaintiff

Alias

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More Party Information

Jace Boston LLC
- Defendant

Alias

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Leon, Arthur
- Defendant

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More Party Information

Judgments

Date	Type	Method	For	Against
07/13/2026	Judgment on Jury Verdict	After Jury Verdict	477 Harrison Ave LLC	Leon, Arthur

Subsequent Action/Subject

Status	Description	SA/Subject #	Status Date	Responding Party	*Judgments*	Pleading Party
Filed	Counterclaim	1	03/20/2017	477 Harrison Ave LLC	0	Leon, Arthur

Events

Date	Session	Location	Type	Event Judge	Result
09/10/2015 02:00 PM	Civil B		Rule 12 Hearing		Rescheduled
10/15/2015 02:00 PM	Civil B		Rule 12 Hearing		Rescheduled
12/10/2015 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Rule 12 Hearing	Ames, Hon. Mary K	Not Held
02/02/2016 02:00 PM	Civil H	BOS-13th FL, CR 1309 (SC)	Rule 12 Hearing	Curran, Hon. Dennis J	Held as Scheduled
02/03/2016 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Rule 12 Hearing	Ames, Hon. Mary K	Not Held
04/12/2016 02:00 PM	Civil G	BOS-10th FL, CR 1008 (SC)	Hearing on Preliminary Injunction	Ullmann, Hon. Robert L	Held as Scheduled
07/13/2016 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Pre-Trial Conference		Rescheduled
07/14/2016 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Rule 12 Hearing	Leighton, Hon. Joseph	Not Held
08/29/2016 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Rule 12 Hearing		Canceled
09/15/2016 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Pre-Trial Conference	Wilkins, Hon. Douglas H	Rescheduled
10/31/2016 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Motion Hearing	Leighton, Hon. Joseph	Rescheduled
11/02/2016 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Motion Hearing	Leighton, Hon. Joseph	Not Held
11/02/2016 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Motion Hearing	Wilkins, Hon. Douglas H	Held as Scheduled
11/30/2016 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Conference to Review Status		Held as Scheduled
02/28/2017 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Rule 12 Hearing	Leighton, Hon. Joseph	Held as Scheduled
06/07/2017 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Rule 12 Hearing		Not Held
06/21/2017 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Litigation Control Conference	Campo, Hon. Anthony M.	Held as Scheduled
07/18/2017 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Conference to Review Status	Campo, Hon. Anthony M.	Held as Scheduled
09/13/2017 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Pre-Trial Conference		Not Held
10/04/2017 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Rule 12 Hearing	Campo, Hon. Anthony M.	Not Held
10/18/2017 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Motion Hearing	Leighton, Hon. Joseph	Held - Under advisement

Date	Session	Location	Type	Event Judge	Result
10/18/2017 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Motion Hearing	Leighton, Hon. Joseph	Held as Scheduled
11/29/2017 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Rule 56 Hearing	Fahey, Hon. Elizabeth M	Canceled
01/04/2018 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Pre-Trial Conference	Fahey, Hon. Elizabeth M	Rescheduled
08/14/2018 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Pre-Trial Conference	Leighton, Hon. Joseph	Not Held
09/06/2018 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Pre-Trial Conference	Leighton, Hon. Joseph	Rescheduled
11/15/2018 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Pre-Trial Conference	Leighton, Hon. Joseph	Not Held
02/13/2019 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Pre-Trial Conference	Leighton, Hon. Joseph	Not Held
02/27/2019 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Motion Hearing	Gildea, Hon. Mark	Held as Scheduled
06/26/2019 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Pre-Trial Conference	Gildea, Hon. Mark	Not Held
11/21/2019 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Pre-Trial Conference	Gildea, Hon. Mark	Not Held
03/24/2020 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Motion Hearing to Assess Attorney's Fees	Ullmann, Hon. Robert L	Rescheduled-Covid-19 emergency
10/29/2020 10:00 AM	Civil B	BOS-3rd FL, CR 306 (SC)	Rule 56 Hearing	Leighton, Hon. Joseph	Held via Video/Phone
11/17/2021 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Pre-Trial Conference	Leighton, Hon. Joseph	Not Held
12/08/2021 11:00 AM	Civil B	BOS-3rd FL, CR 304 (SC)	Final Pre-Trial Conference	Leighton, Hon. Joseph	Not Held
12/08/2021 02:30 PM	Civil B	BOS-3rd FL, CR 304 (SC)	Final Pre-Trial Conference	Leighton, Hon. Joseph	Rescheduled
12/14/2021 11:15 AM	Civil B	BOS-3rd FL, CR 304 (SC)	Final Pre-Trial Conference	Leighton, Hon. Joseph	Held via Video/Phone
02/15/2023 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Trial Assignment Conference	Roach, Christine M	Held via Video/Phone
06/21/2023 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Trial Conference	Leighton, Hon. Joseph	Rescheduled
07/10/2023 09:00 AM	Civil B	BOS-3rd FL, CR 306 (SC)	Jury Trial	Leighton, Hon. Joseph	Rescheduled
04/09/2025 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Trial Conference	Budreau, Hon. James	Held as Scheduled
04/16/2025 02:30 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Trial Conference	Budreau, Hon. James	Held as Scheduled
04/18/2025 02:00 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Final Trial Conference	Budreau, Hon. James	Held as Scheduled
04/22/2025 09:00 AM	Civil B	BOS-3rd FL, CR 306 (SC)	Jury Trial	Budreau, Hon. James	Held as Scheduled
04/23/2025 09:00 AM	Civil B	BOS-3rd FL, CR 306 (SC)	Jury Trial	Budreau, Hon. James	Held as Scheduled
04/24/2025 09:00 AM	Civil B	BOS-3rd FL, CR 306 (SC)	Jury Trial	Budreau, Hon. James	Held as Scheduled
04/29/2025 09:00 AM	Civil B	BOS-3rd FL, CR 306 (SC)	Jury Trial	Budreau, Hon. James	Held as Scheduled
04/30/2025 09:00 AM	Civil B	BOS-3rd FL, CR 306 (SC)	Jury Trial	Budreau, Hon. James	Held as Scheduled
05/01/2025 09:00 AM	Civil B	BOS-3rd FL, CR 306 (SC)	Jury Trial	Budreau, Hon. James	Held as Scheduled
05/02/2025 09:00 AM	Civil B	BOS-3rd FL, CR 306 (SC)	Jury Trial	Budreau, Hon. James	Held as Scheduled

Date	Session	Location	Type	Event Judge	Result
05/05/2025 09:00 AM	Civil B	BOS-3rd FL, CR 306 (SC)	Jury Trial	Budreau, Hon. James	Held as Scheduled
05/06/2025 09:00 AM	Civil B	BOS-3rd FL, CR 306 (SC)	Jury Trial	Budreau, Hon. James	Held as Scheduled
06/05/2025 02:30 PM	Civil B	BOS-3rd FL, CR 306 (SC)	Motion Hearing	Budreau, Hon. James	Held as Scheduled

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Service	03/23/2015	06/21/2015	90	
Answer	03/23/2015	07/21/2015	120	
Rule 12/19/20 Served By	03/23/2015	07/21/2015	120	08/24/2015
Rule 12/19/20 Filed By	03/23/2015	08/20/2015	150	08/24/2015
Rule 12/19/20 Heard By	03/23/2015	09/19/2015	180	08/24/2015
Rule 15 Served By	03/23/2015	07/21/2015	120	08/24/2015
Rule 15 Filed By	03/23/2015	08/20/2015	150	08/24/2015
Rule 15 Heard By	03/23/2015	09/19/2015	180	08/24/2015
Discovery	03/23/2015	02/28/2019	1438	08/24/2015
Rule 56 Served By	03/23/2015	03/06/2020	1810	08/24/2015
Rule 56 Filed By	03/23/2015	03/27/2020	1831	08/24/2015
Final Pre-Trial Conference	03/23/2015	07/28/2020	1954	08/24/2015
Judgment	03/23/2015	01/11/2017	660	08/24/2015
Under Advisement	10/18/2017	11/17/2017	30	12/19/2017

Docket Information

Docket Date	*Docket Text*	File Ref Nbr.	*Image Avail.*
03/23/2015	Complaint (Business) & jury demand	1	
03/23/2015	Origin 1, Type BH2, Track B.		
03/23/2015	Civil action cover sheet filed (n/a)	2	
03/25/2015	NOTICE OF DENIAL OF ACCEPTANCE INTO THE BUSINESS LITIGATION SESSION: (Christine M. Roach, Justice) Dated: March 25, 2015 Notice sent 3/25/15	3	
03/25/2015	Civil action cover sheet mailed re: complaint		
04/02/2015	Civil action cover sheet returned: complaint ($12,750,000+)	4	
04/02/2015	Track changed to F, Origin 1, Type B99.		
04/13/2015	Stipulation Regarding Service and Response Date: Plaintiff 477 Harrison Ave., LLC ("Plaintiff") and Defendants JACE Boston, LLC and Arthur Leon (together, "Defendants") hreby stipulate and agree as follows: 1. Defendants agree to accept service of the complaint and summons as of April 8, 2015, and waive any requirement of service of process pursuant to Mass. R. Civ. P. 4. 2. Plaintiff and Defendants agree that the time in which Defendants may respond to the complaint is enlarged to, and including, May 29, 2015.	5	
06/01/2015	Notice of defts JACE Boston LLC & Arthur Leon Motion to Dismiss		
06/10/2015	Amended complaint of plff & jury demand (all issues)	6	
06/24/2015	JOINT Motion of parties to extend response date and set briefing schedule	7	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
07/02/2015	Motion (P#7) ALLOWED as proposed herein. (Shannon Frison, Justice) Notices mailed 7/1/2015 (entered 6/29/15)		
07/08/2015	Case status changed to 'Needs review for answers' at service deadline review		
07/14/2015	Notice of Motion to Dismiss	6	
08/24/2015	Case status changed to 'Needs status review' at answer deadline review		
08/28/2015	Defendants' Special MOTION to Dismiss Amended Complaint Pursuant to Mass. Gen. Laws ch 231, sec 59H (with opposition)	8	
08/28/2015	Affidavit of Arthur Leon in Support of Defendants' Special Motion to Dismiss Amended Complaint	9	
08/28/2015	Affidavit of Evan L Hankin P.E. in Support of Defendants' Special Motion to Dismiss Amended Complaint	10	
08/28/2015	Affidavit of Norton S Remmer P.E. in Support of Defendants' Special Motion to Dismiss Amended Complaint	11	
08/28/2015	Request for hearing filed on Defendants' Special Motion to Dismiss	12	
08/28/2015	Affidavit of John Holland in Support of 477 Harrison Ave LLC's Opposition to Defendants' Special Motion to Dismiss	13	
08/28/2015	Affidavit of Richard J Leon	14	
08/28/2015	Reply in Support of Defendants' Special Motion to Dismiss Amended Complaint	15	
08/28/2015	Second Affidavit of Arthur Leon in Support of Defendants' Special Moiton to Dismiss Amended Complaint	16	
10/15/2015	Event Result: The following event: Rule 12 Hearing scheduled for 10/15/2015 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date		
10/27/2015	The following form was generated: Notice to Appear Sent On: 10/27/2015 15:03:08		
11/30/2015	Plaintiff 477 Harrison Ave LLC's Assented to Motion to continue Hearing on Defendants' Special Motion to Dismiss Pursuant to G.L.c.231 ss59H Scheduled for December 10, 2015	17	
12/04/2015	Event Result: The following event: Rule 12 Hearing scheduled for 12/10/2015 02:00 PM has been resulted as follows: Result: Not Held Reason: Request of Plaintiff		
12/04/2015	The following form was generated: Notice to Appear Sent On: 12/04/2015 15:12:22		
12/07/2015	Endorsement on Motion to continue / reschedule an event (#17.0): hearing on special motion to dismiss ALLOWED (entered 12/3/15) notices mailed 12/7/15		
12/07/2015	Plaintiff 477 Harrison Ave LLC's Assented to Motion to continue / reschedule an event	18	
01/07/2016	Event Result: The following event: Rule 12 Hearing scheduled for 02/03/2016 02:00 PM has been resulted as follows: Result: Not Held Reason: Transferred to another session		
01/07/2016	The following form was generated: Notice to Appear Sent On: 01/07/2016 10:23:02		
01/22/2016	Plaintiff 477 Harrison Ave LLC's Notice of Supplemental Authority	19	
02/02/2016	Event Result: The following event: Rule 12 Hearing scheduled for 02/02/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
02/02/2016	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 02/02/2016 15:06:16		
03/30/2016	MEMORANDUM & ORDER: on the Defenants' Special Motion to Dismiss: The defendants cannot meet their burden under GLc.231 sec 59H to establish that the plaintiff's suit is solely based on their petitioning activity and has no other substantial basis. Therefore, their special motion to dismiss is DENIED (dated 3/29/16) notice sent 3/30/16 (see P#20 for complete decision)	20	Image
04/07/2016	Defendant Jace Boston LLC's Motion for short order of notice	21	
04/07/2016	Defendant Jace Boston LLC's EMERGENCY Motion to stay	22	
04/07/2016	Notice of appeal filed Applies To: Jace Boston LLC (Defendant); Leon, Arthur (Defendant)	24	
04/08/2016	General correspondence regarding Notice of service of the filing of Notice of Appeal to: Ronald W Dunbar, Esquire, Dunbar Law PC; Andrew E. Goloboy, Esquire; Mark S. Furman, Esquire, Tarlow, Breed, Hart & Rodgers, P.C.; John D Stuebing, Esquire; Emily Clair Shanahan, Esquire		
04/12/2016	Event Result: The following event: Hearing on Preliminary Injunction scheduled for 04/12/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled		
04/14/2016	Defendant Jace Boston LLC, Arthur Leon's EMERGENCY Motion to Stay: DENIED after hearing. Judge Curran's thorough and well reasoned decision is likely to be upheld on appeal, and discovery has been stayed for over 7 months while the special motion to dismiss was pending. Therefore, the equities favor denial of a stay (dated 4/13/16) notice sent 4/14/16	25	
04/14/2016	Letter received from Defendants Attorney John D. Stuebing this letter follows up my telephone call to you today and certifies that JACE Boston LLC and Arthur Leon, the defendants-appellants in the above captioned action, have not ordered and do not intend to order the transcript or any portion thereof in the above-referenced case. This certification is submitted in accordance with Mass. R. App. P. 9(c)(2). Dated 04/13/16	26	
04/15/2016	Defendant's Notice of intent to file motion Notice of Motion to Dismiss Applies To: Jace Boston LLC (Defendant); Leon, Arthur (Defendant)	27	
04/19/2016	Court received letter from Plaintiff Attorney Andrew E. Goloboy pursuant to Mass R App 8, I am writing to inform you that on April 15, 2016, I submitted a transcript order form to obtain a transcript of the February 2, 2016 special motion to dismiss hearing to be prepared for purposes of the appeal and inclusion in the record on appeal. related to appeal	28	
04/27/2016	Plaintiff, Defendant 477 Harrison Ave LLC, Jace Boston LLC, Arthur Leon's Joint Motion to extend tracking deadline(s)	29	
05/02/2016	Event Result: The following event: Final Pre-Trial Conference scheduled for 07/13/2016 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties		
05/02/2016	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 05/02/2016 15:14:40		
05/03/2016	Endorsement on Motion to Extend the Tracking Order Deadlines (#29.0): ALLOWED by agreement. New deadlines are: Discovery January 13, 2017; Rule 56 served by March 15, 2017, filed by May 15, 2017. Final Pre trial Sept. 15, 2017 (dated 4/28/16) notice sent 5/3/16		
05/13/2016	Defendant Jace Boston LLC, Arthur Leon's Motion to dismiss all counts pursuant to MRCP 12(b) of the Amended Complaint (w/opposition)	30	
05/25/2016	1 CD received from Christine Fiore Approved Court Transcriber for February 2, 2016	31	
06/01/2016	The following form was generated: Notice to Appear Sent On: 06/01/2016 10:12:09		
06/14/2016	Notice of assembly of record on appeal.		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
06/27/2016	Notice of docket entry received from Appeals Court Notice of entry (2016-P-0882) In accordance with Massachusetts Rule of Appellate Procedure 10 (a) (3), please note that the above-referenced case was entered in this Court on June 22, 2016.	32	Image
07/11/2016	Event Result: The following event: Rule 12 Hearing scheduled for 07/14/2016 02:00 PM has been resulted as follows: Result: Not Held Reason: By Court prior to date		
07/13/2016	Event Result: The following event: Final Pre-Trial Conference scheduled for 09/15/2016 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties		
07/13/2016	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 07/13/2016 11:45:23		
07/13/2016	The following form was generated: Notice to Appear Sent On: 07/13/2016 11:46:18		
08/02/2016	Notice of docket entry received from Appeals Court The Supreme Judicial Court has ALLOWED an Application for Direct Appellate Review of the above-referenced matter. Case 2016-P-0882 Transferred to Supreme Judicial Court	33	Image
08/08/2016	Notice of docket entry received from Supreme Judicial Court Pursuant to Mass R. A .P. 10 (a) (3), you are hereby notified that, on August 4, 2016, the above-referenced case was entered on the docket of this Court.	34	Image
08/29/2016	Event Result: The following event: Rule 12 Hearing scheduled for 08/29/2016 02:00 PM has been resulted as follows: Result: Canceled Reason: Court Order		
09/02/2016	ORDER: AGREED CONFIDENTIALITY ORDER (entered 9/1/16) notices mailed 9/2/16	35	Image
10/19/2016	The following form was generated: Notice to Appear Sent On: 10/19/2016 12:24:21		
10/26/2016	Renewed Motion: Defendants' Renewed Motion to Stay, or in the Alternative, Request for Hearing on Defendants' Motion to Dismiss the Amended Complaint Pursuant to Mass. R. Civ. P. 12(b)(6) and Extension of Scheduling Order (w/opposition) Applies To: Jace Boston LLC (Defendant); Leon, Arthur (Defendant)	36	
10/31/2016	Event Result: The following event: Motion Hearing scheduled for 10/31/2016 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date		
11/02/2016	Event Result: The following event: Motion Hearing scheduled for 11/02/2016 02:00 PM has been resulted as follows: Result: Not Held Reason: Transferred to another session		
11/02/2016	Event Result: The following event: Motion Hearing scheduled for 11/02/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled		
11/04/2016	Endorsement on Motion to stay of in the alternative request for hearing on Defendants' motion to dismiss the amended complaint pursuant to Mass. R. Civ. P. 12(b)(6) and extension of scheduling order (#36.0): DENIED After review denied. The delay in bringing this motion under cuts claims of irreparable harm. The grant of DAR shows the importance of issues on appeal but does not materially change assessment of likelihood of success on appeal. Dated: 11/3/16 Notice sent 11/3/16		
11/30/2016	Event Result: The following event: Conference to Review Status scheduled for 11/30/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
11/30/2016	The following form was generated: Notice to Appear Sent On: 11/30/2016 14:20:29		
02/28/2017	Event Result: The following event: Rule 12 Hearing scheduled for 02/28/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled		
03/01/2017	Event Result: The following event: Final Pre-Trial Conference scheduled for 09/13/2017 02:00 PM has been resulted as follows: Result: Not Held Reason: By Court prior to date		
03/01/2017	The following form was generated: Notice to Appear Sent On: 03/01/2017 11:36:34		
03/01/2017	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 03/01/2017 12:14:11		
03/03/2017	Endorsement on Motion to dismiss all counts (#30.0): amended complaint DENIED after review and hearing. Given the standard of review of motions to dismiss, This Court is satisfied this complaint has at least sufficient "heft" to understand deftd's motion. See generally Iannacchino v. Ford Motor Co., 451 Mass 623 (2008). As plff's memo states at P. 14 "in light of the higher standards imposed on the plff under the anti-slap provision, and in light of (Curran J's) conclusion that those standards have been met. The deft's motion to dismiss for failure to state a claim in which relief can be granted, must also fail", citing Salvo v. Ottoway Inc 1998newspapers, WL340609404)Mass. Super. 1998) (entered 2/28/17) notices mailed 3/2/17		Image
03/03/2017	ORDER: SCHEDULING ORDER (entered 3/1/17) notices mailed 3/2/17	37	Image
03/03/2017	ORDER: ON DEFTS' MOTION TO DISMISS THE AMENDED COMPLAINT PURSUANT TO MRCP 12(B)(6) (entered 3/1/17) notices mailed 3/2/117	38	Image
03/20/2017	Received from Defendants Jace Boston LLC and Arthur Leon: Answer, Counterclaims to amended complaint and Jury demand (all issues)	39	
03/20/2017	Counterclaim filed.		
04/10/2017	Defendant in a Counterclaim's Notice of intent to file motion to dismiss counterclaim Applies To: 477 Harrison Ave LLC (Plaintiff)	40	
05/02/2017	Plaintiff 477 Harrison Ave LLC's Motion to dismiss all counterclaims pursuant to MRCP 12(B) (6) (w/opposition)	41	
05/04/2017	Plaintiff, Defendant in a Counterclaim's Notice of intent to file motion to dismiss pursuant to G.L. c.231, Sec.59H Applies To: 477 Harrison Ave LLC (Plaintiff)	42	
05/11/2017	Plaintiff, Defendant in a Counterclaim 477 Harrison Ave LLC's Joint Motion to extend Briefing Schedule and Filing Deadline in connection with 477 Harrison Ave., LLC's Special Motion to Dismiss Pursuant to G.L. c.231, Sec. 59H Applies To: 477 Harrison Ave LLC (Plaintiff); Jace Boston LLC (Defendant); Leon, Arthur (Defendant)	43	
05/15/2017	The following form was generated: Notice to Appear Sent On: 05/15/2017 11:38:15		
05/18/2017	Endorsement on Motion to Extend Briefing Schedule and Filing Deadline in Connection with 477 Harrison Ave LLC's Special Motion to Dismis (#43.0): ALLOWED The scheduling order proposed on Page 3 is SO ORDERED. This motion is ALLOWED (dated 5/16/17) notice sent 5/18/17		Image
06/05/2017	Amended Counterclaim filed.	44	
06/05/2017	Event Result: The following event: Rule 12 Hearing scheduled for 06/07/2017 02:00 PM has been resulted as follows: Result: Not Held Reason: By Court prior to date		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
06/06/2017	The following form was generated: Notice to Appear Sent On: 06/06/2017 09:31:46		
06/21/2017	Event Result: The following event: Litigation Control Conference scheduled for 06/21/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled		
06/21/2017	Event Result: The following event: Rule 56 Hearing scheduled for 11/29/2017 02:00 PM has been resulted as follows: Result: Canceled Reason: By Court prior to date		
06/22/2017	The following form was generated: Notice to Appear Sent On: 06/22/2017 15:45:36		
06/22/2017	The following form was generated: Notice to Appear Sent On: 06/22/2017 15:47:26		
06/28/2017	Plaintiff 477 Harrison Ave LLC's Joint Motion to Extend Tracking Order Dated March 23, 2017 Applies To: 477 Harrison Ave LLC (Plaintiff); Jace Boston LLC (Defendant); Leon, Arthur (Defendant)	45	
07/05/2017	Event Result: The following event: Final Pre-Trial Conference scheduled for 01/04/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties		
07/05/2017	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 07/05/2017 11:56:09		
07/06/2017	Endorsement on Motion to Extend Tracking Order Dated March 23, 2017 (#45.0): ALLOWED After review, the within motion is ALLOWED and the Court grants the relief set out on pp. 5 and 6, items a-j (dated 7/3/17) notice sent 7/6/17		Image
07/18/2017	Event Result: The following event: Conference to Review Status scheduled for 07/18/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled		
07/19/2017	Event Result: The following event: Rule 12 Hearing scheduled for 10/04/2017 02:00 PM has been resulted as follows: Result: Not Held Reason: By Court prior to date		
07/21/2017	Rescript received from Supreme Judicial Court; judgment AFFIRMED . The denial of the defendants' special motion to dismiss is AFFIRMED with respect to the plaintiff's claim under G. L. c. 93A, § 11, and VACATED with respect to its abuse of process claim. Given that the plaintiff has not demonstrated that the entirety of the defendants' petitioning activities lacks a reasonable basis in fact or law, it may attempt to make the showing outlined in Blanchard v. Steward Carney Hospital, Inc, 477 Mass. 141 (2017), upon remand. The matter is remanded to the Superior Court for further proceedings consistent with this opinion. (By the Court)	46	Image
07/25/2017	Plaintiff 477 Harrison Ave LLC's Joint Motion to extend tracking deadline(s) Applies To: 477 Harrison Ave LLC (Plaintiff); Jace Boston LLC (Defendant); Leon, Arthur (Defendant)	47	
07/27/2017	The following form was generated: Notice to Appear Sent On: 07/27/2017 09:44:49		
07/27/2017	Event Result: The following event: Final Pre-Trial Conference scheduled for 08/14/2018 02:00 PM has been resulted as follows: Result: Not Held Reason: Joint request of parties		
07/27/2017	The following form was generated:		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Notice to Appear for Final Pre-Trial Conference Sent On: 07/27/2017 09:55:18		
07/28/2017	Endorsement on Motion to Extend Tracking Order (#47.0): ALLOWED Deadlines are extended as set out on page 3 of this motion. The briefing schedule set out on page 2 is confirmed, as is the schedule for the October 18, 2017 hearing set out on pages 2 & 3 (dated 7/26/17) notice sent 7/27/17		Image
08/01/2017	Plaintiff 477 Harrison Ave LLC's Assented to Motion to extend briefing schedule and filing deadline in connection with 477 Harrison Ave LLC's special Motion to Dismiss pursuant to GL c 231 59H and its Motion to Dismiss pursuant to MRCP 12(B) (6)	48	
08/04/2017	Endorsement on Motion to Extend the Briefing Schedule and Filing Deadline (#48.0): ALLOWED (dated 8/3/17) notice sent 8/4/17		Image
09/22/2017	Plaintiff, Defendant in a Counterclaim 477 Harrison Ave LLC's Motion to dismiss Jace Boston, LLC's and Arthur Leon's Amended Counterclaims Pursuant to Mass. R. Civ. P. 12(B)(6)	49	
09/22/2017	Affidavit of John Holland in Support of 477 Harrison Ave., LLC's Special Motion to Dismiss Pursuant to G.L. c.231, Sec. 59H	53	
09/22/2017	Opposition to Plaintiff/Defendant-in-Counterclaim, 477 Harrison Ave., LLC's motion to dismiss all Amended Counterclaims Pursuant to Mass. R. Civ. P. 12(b)(6) filed by Jace Boston LLC, Arthur Leon	50	
09/22/2017	Plaintiff, Defendant in a Counterclaim 477 Harrison Ave LLC's Reply to Defendants' opposition to its motion to dismiss Pursuant to Mass. R. Civ. P. 12(B)(6)	51	
09/22/2017	Plaintiff, Plaintiff in a Counterclaim 477 Harrison Ave LLC's Motion for special motion to dismiss Jace Boston, LLC's and Arthur Leon's Amended Counterclaims Pursuant to G.L. c. 231, Sec. 59H	52	
09/22/2017	Affidavit of Andrew E. Goloboy, Esquire Authenticating Documents	54	
09/22/2017	Opposition to Plaintiff/Counterclaim Defendant's Special Motion to Dismiss Amended Counterclaims Pursuant to Mass. Gen. Laws Ch. 231, Sec. 59H filed by Jace Boston LLC, Arthur Leon	55	
09/22/2017	Affidavit of Arthur Leon	56	
09/22/2017	Affidavit of Mark S. Furman Esq	57	
09/22/2017	Affidavit of Eric Reenstierna	58	
09/22/2017	Plaintiff 477 Harrison Ave LLC's Reply to the Defendants' Opposition to 477 Harrison Ave., LLC's Special Motion to Dismiss the Amended Counterclaims	59	
09/25/2017	The following form was generated: Notice to Appear Sent On: 09/25/2017 10:03:46		
10/02/2017	The following form was generated: Notice to Appear Sent On: 10/02/2017 09:51:54		
10/02/2017	The following form was generated: Notice to Appear Sent On: 10/02/2017 10:01:42		
10/13/2017	Defendants Jace Boston LLC, Arthur Leon's Memorandum of Law following Remand in Support of their Special Motion to Dismiss Amended Complaint Pursuant to Mass. Gen. Laws Ch. 231, Sec. 59H (P#59)	60	
10/13/2017	Affidavit of Arthur Leon in support of Defendants' Special Motion to Dismiss Amended Complaint Pursuant to Mass. Gen. Laws Ch. 231, Sec. 59H following Remand	61	
10/13/2017	Affidavit of Mark S. Furman, Esq. in Support of Defendants' Special Motion to Dismiss the Amended Complaint Pursuant to Mass. Gen. Laws Ch. 231, Sec. 59H following Remand	62	
10/13/2017	Plaintiff 477 Harrison Ave LLC's Supplemental, Memorandum of Law in Opposition to Jace Boston, LLC's and Arthur Leon's Special Motion to Dismiss Pursuant to G.L. Ch. 231, Sec. 59H	63	
10/13/2017	Affidavit of John Holland in Support of 477 Harrison's Memorandum of Law following Remand	64	
10/13/2017	Affidavit of Andrew E. Goloboy, Esquire Authenticating Documents	65	
10/13/2017	Defendants Jace Boston LLC, Arthur Leon's Reply in Following Remand in Support of their Special Motion to Dismiss Amended Complaint Pursuant to Mass. Gen. Laws Ch. 231, Sec. 59H	66	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/13/2017	Affidavit of Mark S. Furman, Esq. in Support of Defendants' Special Motion to Dismiss the Amended Complaint Pursuant to Mass. Gen. Laws Ch. 231, Sec. 59H following Remand Second Affidavit	67	
10/18/2017	Event Result: Judge: Leighton, Hon. Joseph The following event: Motion Hearing scheduled for 10/18/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled		
10/18/2017	Matter taken under advisement Judge: Leighton, Hon. Joseph The following event: Motion Hearing scheduled for 10/18/2017 02:00 PM has been resulted as follows: Result: Held - Under advisement		
12/20/2017	Endorsement on Motion to Dismiss Jace Boston LLC's and Arthur Leon's Amended Counterclaims (#49.0): DENIED After hearing and review of the entire motion package, the within motion is DENIED. Viewed in the light most favorable to the plaintiffs-in-counterclaim, the Amended Counterclaims sufficiently state claims upon which relief may be granted. The allegations plausibly suggest an entitlement to relief and of sufficient "heft", see Iannacchino v. Ford Motor Co, 451 Mass 623,636, (2008) (dated 12/19/17) notice sent 12/19/17 Judge: Leighton, Hon. Joseph		Image
12/20/2017	MEMORANDUM & ORDER: on Defendant's Special Motion to Dismiss Pursuant to GLc. 231 sec 59H upon Remand from the Supreme Judicial Court: Plaintiffs' Special Motion to Dismiss Pursuant to the Anti-Slapp Statute is DENIED on Remand from the Supreme Judicial Court Judge: Leighton, Hon. Joseph (see P#68 for complete decision) (dated 12/19/17) notice sent 12/20/17 Judge: Leighton, Hon. Joseph Judge: Leighton, Hon. Joseph	68	Image
12/21/2017	Plaintiff 477 Harrison Ave LLC's Joint Motion to extend tracking order	69	Image
12/21/2017	MEMORANDUM & ORDER: Notice Sent : 12/21/17 (12/21/2017) Defendant's Special Motion to Dismiss Pursuant to the Anti-SLAPP statute is DENIED on remand from the Supreme Judicial Court. Judge: Leighton, Hon. Joseph Judge: Leighton, Hon. Joseph	73	Image
12/27/2017	Event Result: Judge: Leighton, Hon. Joseph The following event: Final Pre-Trial Conference scheduled for 09/06/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties		
12/27/2017	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 12/27/2017 10:38:43		
12/28/2017	Plaintiff 477 Harrison Ave LLC's Assented to Motion to impound Exhibis 7-11 of affidavit of Mark S Furman Esq dated July 28, 2017 filed in support of the opposition of Jace Boston LIC & Arthur Leon to 477 Harrison LIC's special Motion to Dismiss pursuant to G L C 231 & 59H After hearing and without opposition Exhibits 7-11 to the affidavit of Attorney Furman dated 10/13/17 are impounded Notice Sent 12/21/17 (entered 12/19/17) Judge: Leighton, Hon. Joseph	70	Image
12/28/2017	Affidavit of Mark S Furman Esq (impounded)	71	
12/28/2017	Affidavit of Mark Furman Esq (second affidavit) (IMPOUNDED)	72	
12/28/2017	Endorsement on Motion to Extend Tracking Order (#69.0): ALLOWED The tracking order is extended as set out herein (dated 12/27/17) notice sent 12/27/17		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Judge: Leighton, Hon. Joseph		
01/18/2018	MEMORANDUM & ORDER: on plff/counterclaim deft's special motion to Dismiss pursuant to G L c 231 59H & Denied Notice sent 1/23/18 Judge: Leighton, Hon. Joseph Judge: Leighton, Hon. Joseph Judge: Leighton, Hon. Joseph Judge: Leighton, Hon. Joseph	73	Image
01/31/2018	Notice of docket entry received from Appeals Court Please take note that on January 29, 2018 the following entry was made on the docket of the above-referenced case: ORDER: The 477 Harrison Ave., LLC has filed a petition pursuant to G.L. c. 231, s. 118 (first par), seeking leave to file an interlocutory appeal from the 12/20/17 Suffolk Superior Court's (Leighton, J.) order denying their Rule 12(b)(6) motion to dismiss defendants/plaintiff-in-counterclaim amended counterclaims. A petition may seek leave for an interlocutory appeal from the denial of a motion to dismiss, but such relief is disfavored. See Foreign Auto Import, Inc. v Renault Northeast, Inc., 367 Mass. 464, 468-71 (1975); Kargman v. Superior Court, 371 Mass. 324, 330 (1976); Kobico, Inc. v. Pipe, 44 Mass. App. Ct. 103, 104-05 n.2 (1997). Allowance of such a request is discretionary with the single justice. Clerger v. Commerce Ins. Co., 46 Mass. App. Ct. 11, 13-14 (1998). This petition does not warrant such extraordinary relief. Accordingly, the petition is denied. (Kinder, J.). *Notice/attest/Leighton, J.	74	Image
02/07/2018	Notice of appeal filed. Notice sent 2/8/18 Applies To: 477 Harrison Ave LLC (Plaintiff)	75	Image
02/15/2018	General correspondence regarding Pursuant to M.R.A.P 8, 477 Harrison Ave LLC (the appellant) does not consider any portion of the transcript of the October 18, 2017 hearing on its Motion to Dismiss pursuant to G L c 231, 59H necessary for inclusion in the Record. Therefore, 477 Harrison does not intend to order the electronic recording of the October 18, 2018 hearing.	76	Image
03/02/2018	Received from Plaintiff 477 Harrison Ave LLC: Answer to the Counterclaim;	77	Image
07/02/2018	Plaintiff 477 Harrison Ave LLC's Joint Motion to Extend Tracking Order Applies To: 477 Harrison Ave LLC (Plaintiff); Jace Boston LLC (Defendant); Leon, Arthur (Defendant)	78	
07/05/2018	Event Result:: Final Pre-Trial Conference scheduled on: 11/15/2018 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. Joseph Leighton, Presiding Appeared: Staff: Christine M Hayes, Assistant Clerk		
07/05/2018	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 07/05/2018 10:07:58		
07/09/2018	Endorsement on Motion to extend tracking order (#78.0): ALLOWED Deadlines extended as set out on page 2 of this motion. Dated: 7/3/18 Notice sent 7/6/18 Judge: Leighton, Hon. Joseph		Image
07/25/2018	Appeal: notice of assembly of record sent to Counsel		
08/06/2018	Notice of docket entry received from Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10 (a) (3), please note that the above-referenced case (2018-P-1110) was entered in this Court on May 24, 2018.	79	Image
09/17/2018	Notice of docket entry received from Appeals Court The Supreme Judicial Court has ALLOWED an Application for Direct Appellate Review of the above-referenced matter. Case 2018-P-1110 Transferred to Supreme Judicial Court.	80	Image
09/19/2018	Notice of docket entry received from Supreme Judicial Court Notice of Entry Pursuant to Mass. R. A. P. 10 (a)(3), you are hereby notified that, on September 14, 2018 the above referenced case SJC - 12600 was entered on the docket of this court.	81	Image
10/11/2018	Plaintiff 477 Harrison Ave LLC's Joint Motion to Extend Tracking Order	82	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/16/2018	Endorsement on Motion to Extend Tracking Order (#82.0): ALLOWED Deadlines extended as set forth on page 2 (dated 10/15/18) notice sent 10/15/18 Judge: Leighton, Hon. Joseph		Image
02/06/2019	Event Result:: Final Pre-Trial Conference scheduled on: 02/13/2019 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. Joseph Leighton, Presiding Appeared: Staff: Christine M Hayes, Assistant Clerk		
02/06/2019	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 02/06/2019 12:01:21		
02/13/2019	Plaintiff in a 3rd Party Claim 477 Harrison Ave LLC's Joint Motion to extend tracking order	83	
02/21/2019	The following form was generated: Notice to Appear Sent On: 02/21/2019 10:14:54		
02/27/2019	Event Result:: Motion Hearing scheduled on: 02/27/2019 02:00 PM Has been: Held as Scheduled Hon. Mark Gildea, Presiding Appeared: Staff: Christine M Hayes, Assistant Clerk		
03/01/2019	Event Result:: Final Pre-Trial Conference scheduled on: 06/26/2019 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. Mark Gildea, Presiding Appeared: Staff: Christine M Hayes, Assistant Clerk		
03/01/2019	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 03/01/2019 09:19:20		
03/05/2019	Endorsement on Motion to extend tracking order; (#8.0): ALLOWED (dated 2/27/19) notice sent 3/4/19		Image
07/10/2019	Plaintiff in a Counterclaim 477 Harrison Ave LLC's Motion to extend tracking order	84	
07/23/2019	Endorsement on Motion to extend tracking order (#84.0): ALLOWED deadlines extended as set out on pages 2+3 herein; (dated 7/22/19) notice sent 7/23/19 Judge: Leighton, Hon. Joseph		Image
10/29/2019	Plaintiff, Defendant in a Counterclaim 477 Harrison Ave LLC's Joint Motion to Extend Summary Judgment Deadlines	85	Image
11/06/2019	Endorsement on Motion to (#85.0): ALLOWED extend Summary Judgment deadlines Notice sent 11/4/19		Image
11/14/2019	Event Result:: Final Pre-Trial Conference scheduled on: 11/21/2019 02:00 PM Has been: Not Held For the following reason: By Court prior to date Hon. Joseph Leighton, Presiding Staff: Christine M Hayes, Assistant Clerk		
12/10/2019	Rescript received from Supreme Judicial Court; judgment VACATED The order denying 477 Harrison Ave., LLC's special motion to dismiss is vacated, and the matter is remanded to the Superior Court for entry of an order allowing the motion.	86	Image
12/19/2019	Defendant Jace Boston LLC, Arthur Leon's Motion for reconsideration of (corrected) memorandum and order on deft's special Motion to Dismiss pursuant to G L c 231 & 59H upon remand from the Supreme Judicial Court dated December 21, 2017 (Honorable Joseph F Leighton Jr)	87	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	in light of Supreme Judicial Court's decision dated November 8, 2029 (w/opposition)		
01/15/2020	Plaintiff 477 Harrison Ave LLC's Joint Motion to Extend Deadlines for Service of Motions for Summary Judgment and Oppositions, but not Deadline to file 9A package: ALLOWED (dated 1/13/20) notice sent 1/15/20	88	Image
01/24/2020	Application for for the award of reasonable attorneys fees and costs pursuant to g l 231 & 59H (w/opposition) Applies To: 477 Harrison Ave LLC (Plaintiff)	89	Image
01/29/2020	The following form was generated: Notice to Appear Sent On: 01/29/2020 17:03:17		
01/30/2020	ORDER: Consistent with the Supreme Judicial court's decision in 477 Harrison Ave v Jace Boston LLC 483 Mass 514 (2019) the plff/counterclaim deft Motion to Dismiss pursuant to G L c 231 & 59H is Allowed Notice sent 2/4/20	90	Image
02/06/2020	MEMORANDUM & ORDER: on defts Motion for reconsideration Order Defts Motion for Reconsideration of (Corrected) Memorandum and order on deft's special Motion to dismiss pursuant to G P c 231. & 59H dated December 21, 2017 (Honorable Joseph F Leighton Jr) in light of Supreme Judicial Court's decision dated November 8, 2019 (Docket No 87) is Denied (entered 1/29/20) Judge: Leighton, Hon. Joseph Notice sent 2/4/20	91	Image
03/19/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Motion Hearing to Assess Attorney's Fees scheduled on: 03/24/2020 02:00 PM Has been: Rescheduled-Covid-19 emergency For the following reason: By Court due to Covid-19 Hon. Robert L Ullmann, Presiding Staff: Margaret M Buckley, Assistant Clerk Magistrate		
06/01/2020	Endorsement on Application for Award of Attorneys Fees and Costs (#89.0): Other action taken See Memorandum of Decision and Order (dated 5/26/20) notice sent 5/29/20		Image
06/01/2020	MEMORANDUM & ORDER: on Plaintiff's Petition for Attorneys Fees: the Court Awards plaintiff $50,000 in attorneys fees and costs Judge: Ullmann, Hon. Robert L (see P#92 for complete decision) (dated 5/26/20) notice sent 5/29/20	92	Image
07/01/2020	Plaintiff 477 Harrison Ave LLC, Jace Boston LLC, Arthur Leon's Motion to Coordinate Deadlines for Filing of Rule 9A Packages for Defendants' Motion for Summary Judgment and Defendants' Motion to Strike	93	Image
07/10/2020	Endorsement on Motion to Coordinate Deadlines for Filing of Rule 9A Packages for Defendants' Motion for Summary Judgment and Defendants' Motion to Strike (#93.0): ALLOWED (dated 7/7/20) Notice 7/8/20		Image
08/03/2020	Plaintiff 477 Harrison Ave LLC's Joint Motion to Extend and Coordinate Deadlines for Filing of Rule 9A Packages for Defendants' Motion for Summary Judgment and Cross Motions to Strike	94	Image
08/07/2020	Endorsement on Motion to Extend and Coordinate Deadlines for filed 9A packages for Summary Judgment (#94.0): ALLOWED The Rule 9A packages to be filed by 9/11/20. The court will schedule a single hearing on the motions thereafter (dated 8/4/20) notice sent 8/7/20		Image
09/09/2020	Defendant Jace Boston LLC, Arthur Leon's Motion for Summary Judgment (with opposition and reply)	95	Image
09/09/2020	Defendant Jace Boston LLC, Arthur Leon's Motion to Strike in Connection with Their Motion for Summary Judgment (with opposition and reply)	96	Image
09/09/2020	Opposition to to Defendants' Motion to Strike and Memorandum of Law in Support of CROSS MOTION to Strike Certain Materials from the Summary Judgment Record filed by 477 Harrison Ave LLC	97	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/09/2020	Plaintiff 477 Harrison Ave LLC's Cross Motion to Strike Certain Materials from the Summary Judgment Record (with opposition and reply)	98	Image
09/21/2020	The following form was generated: Notice to Appear Sent On: 09/21/2020 15:18:53 Notice Sent To: Ronald W Dunbar, Jr., Esq. Dunbar Law PC 197 Portland St 5th Floor, Boston, MA 02114 Notice Sent To: Andrew E Goloboy, Esq. Dunbar Goloboy 197 Portland St 5th Floor, Boston, MA 02114 Notice Sent To: Mark S Furman, Esq. Tarlow, Breed, Hart & Rodgers, P.C. 101 Huntington Ave Suite 500, Boston, MA 02199 Notice Sent To: Emily C Shanahan, Esq. Tarlow, Breed, Hart & Rodgers, P.C. 101 Huntington Ave Suite 500 Prudential Center, Boston, MA 02199 Notice Sent To: John D Stuebing, Esq. Tarlow, Breed, Hart & Rodgers, P.C. 101 Huntington Ave Suite 500, Boston, MA 02199		
09/21/2020	The following form was generated: Notice to Appear Sent On: 09/21/2020 15:21:14 Notice Sent To: Ronald W Dunbar, Jr., Esq. Dunbar Law PC 197 Portland St 5th Floor, Boston, MA 02114 Notice Sent To: Andrew E Goloboy, Esq. Dunbar Goloboy 197 Portland St 5th Floor, Boston, MA 02114 Notice Sent To: Mark S Furman, Esq. Tarlow, Breed, Hart & Rodgers, P.C. 101 Huntington Ave Suite 500, Boston, MA 02199 Notice Sent To: Emily C Shanahan, Esq. Tarlow, Breed, Hart & Rodgers, P.C. 101 Huntington Ave Suite 500 Prudential Center, Boston, MA 02199 Notice Sent To: John D Stuebing, Esq. Tarlow, Breed, Hart & Rodgers, P.C. 101 Huntington Ave Suite 500, Boston, MA 02199		
10/29/2020	Event Result:: Rule 56 Hearing scheduled on: 10/29/2020 10:00 AM Has been: Held via Video Conference Hon. Joseph Leighton, Presiding Staff: Christine M Hayes, Assistant Clerk		
01/05/2021	ORDER: decision and order on defendants' motion for summary judgment; motion is DENIED; (dated 12/29/20) notice sent 1/05/21	99	Image
09/15/2021	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 09/15/2021 09:43:44 Notice Sent To: Ronald W Dunbar, Jr., Esq. Dunbar Law PC 197 Portland St 5th Floor, Boston, MA 02114 Notice Sent To: Andrew E Goloboy, Esq. Dunbar Goloboy 197 Portland St 5th Floor, Boston, MA 02114 Notice Sent To: Mark S Furman, Esq. Tarlow, Breed, Hart and Rodgers, P.C. 101 Huntington Ave Suite 500, Boston, MA 02199 Notice Sent To: Emily C Shanahan, Esq. Tarlow, Breed, Hart and Rodgers, P.C. 101 Huntington Ave Suite 500 Prudential Center, Boston, MA 02199 Notice Sent To: John D Stuebing, Esq. Tarlow, Breed, Hart and Rodgers, P.C. 101 Huntington Ave Suite 500, Boston, MA 02199		
11/15/2021	Event Result:: Final Pre-Trial Conference scheduled on: 11/17/2021 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. Joseph Leighton, Presiding Staff: Christine M Hayes, Assistant Clerk		
11/15/2021	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 11/15/2021 09:45:24 Notice Sent To: Ronald W Dunbar, Jr., Esq. Dunbar Law PC 197 Portland St 5th Floor, Boston, MA 02114 Notice Sent To: Andrew E Goloboy, Esq. Dunbar Goloboy 197 Portland St 5th Floor, Boston, MA 02114 Notice Sent To: Mark S Furman, Esq. Tarlow, Breed, Hart and Rodgers, P.C. 101 Huntington Ave Suite 500, Boston, MA 02199 Notice Sent To: Emily C Shanahan, Esq. Tarlow, Breed, Hart and Rodgers, P.C. 101 Huntington Ave Suite 500 Prudential Center, Boston, MA 02199 Notice Sent To: John D Stuebing, Esq. Tarlow, Breed, Hart and Rodgers, P.C. 101 Huntington Ave Suite 500, Boston, MA 02199		
12/02/2021	Event Result:: Final Pre-Trial Conference scheduled on: 12/08/2021 02:30 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Joseph Leighton, Presiding		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Staff: Christine M Hayes, Assistant Clerk		
12/02/2021	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 12/02/2021 08:50:51 Notice Sent To: Ronald W Dunbar, Jr., Esq. Dunbar Law PC 197 Portland St 5th Floor, Boston, MA 02114 Notice Sent To: Andrew E Goloboy, Esq. Dunbar Goloboy 197 Portland St 5th Floor, Boston, MA 02114 Notice Sent To: Mark S Furman, Esq. Tarlow, Breed, Hart and Rodgers, P.C. 101 Huntington Ave Suite 500, Boston, MA 02199 Notice Sent To: Emily C Shanahan, Esq. Tarlow, Breed, Hart and Rodgers, P.C. 101 Huntington Ave Suite 500 Prudential Center, Boston, MA 02199 Notice Sent To: John D Stuebing, Esq. Tarlow, Breed, Hart and Rodgers, P.C. 101 Huntington Ave Suite 500, Boston, MA 02199		
12/03/2021	Joint Pre-Trial Memorandum filed: Applies To: 477 Harrison Ave LLC (Plaintiff); Jace Boston LLC (Defendant); Leon, Arthur (Defendant)	100	Image
12/08/2021	Event Result:: Final Pre-Trial Conference scheduled on: 12/08/2021 11:00 AM Has been: Not Held For the following reason: By Court prior to date Hon. Joseph Leighton, Presiding Staff: Christine M Hayes, Assistant Clerk		
12/14/2021	Event Result:: Final Pre-Trial Conference scheduled on: 12/14/2021 11:15 AM Has been: Held via Video/Teleconference Hon. Joseph Leighton, Presiding Staff: Christine M Hayes, Assistant Clerk		
11/18/2022	Event Result:: Jury Trial scheduled on: 07/10/2023 09:00 AM Has been: Rescheduled For the following reason: By Court prior to date Christine M Roach, Presiding		
11/18/2022	Event Result:: Final Trial Conference scheduled on: 06/21/2023 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Christine M Roach, Presiding		
11/18/2022	The following form was generated: Notice to Appear Sent On: 11/18/2022 11:49:31		
02/15/2023	Event Result:: Trial Assignment Conference scheduled on: 02/15/2023 02:00 PM Has been: Held via Video/Teleconference Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		
03/27/2024	Defendants Jace Boston LLC, Arthur Leon's Motion for Reconsideration	101	Image
04/12/2024	Opposition to Defendants' Motion to Reconsider filed by 477 Harrison Ave LLC	102	Image
04/19/2024	Notice of Filing Regarding Jace Boston, LLC and Arthur Leon's Motion for Reconsideration		Image
04/23/2024	Endorsement on Motion for reconsideration (#101.0): DENIED Denied. No hearing is necessary. The SJC's decision in Bristol Asphalt is not applicable to this case because no "anti-SLAPP motion or appeal remains pending" in this proceeding. See Columbia Plaza Assoc. v. Northeastern Univ,493 Mass. 570, 578 (2024). (Dated 4/23/24) Notice sent 4/24/24		Image
09/10/2024	Attorney appearance electronically filed.		Image
02/20/2025	Attorney appearance electronically filed.		Image
03/21/2025	Plaintiff, Defendant 477 Harrison Ave LLC, Jace Boston LLC, Arthur Leon's Joint Motion to Enlarge the time to submit Exhibits Lists	103	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
03/26/2025	Endorsement on Motion to Enlarge the time to submit Exhibits Lists (#103.0): ALLOWED (dated 3/25/25) Notice sent 3/26/25		Image
03/31/2025	Plaintiff, Defendants 477 Harrison Ave LLC, Jace Boston LLC, Arthur Leon's Joint Motion to Enlarge The Time To Submit Witness List, Any Proposed Jury Instructions, Precharge To The Jury And Deposition Excerpts	104	Image
04/01/2025	Notice of Filing Rule 9A Package RE: Defendants' Motion For Site View	105	Image
04/01/2025	Defendants Jace Boston LLC, Arthur Leon's Motion for Requesting A Jury View Of The Subject Properties	106	Image
04/01/2025	Notice of Filing Rule 9A Package RE: Defendants' Motion For Jury Voir Dire (Unopposed)	107	Image
04/01/2025	Defendants Jace Boston LLC, Arthur Leon's Motion for Voir Dire Questions	108	Image
04/02/2025	Defendants' Notice of Filing Rule 9A Package	109	Image
04/02/2025	Defendant Jace Boston LLC, Arthur Leon's Motion in limine regarding 447 Harrison's claim for damages from Jace filing the wall case and request for a hearing	110	Image
04/02/2025	Opposition to Defendants' Motion in limine to preclude evidence of damages from the wall case filed by 477 Harrison Ave LLC	111	Image
04/02/2025	Plaintiff 477 Harrison Ave LLC's Motion to preclude and/or limit the testimony of Martin R. Healy, Esquire and Peter Gilman, CPA and request for a Daubert/Lanigan hearing	112	Image
04/02/2025	Opposition to 477 Harrison Ave., LLC's Daubert/Lanigan Motion as to Martin R. Healy, Esq. and Peter Gilman, CPA filed by Jace Boston LLC, Arthur Leon	113	Image
04/02/2025	Reply/Sur-reply Reply in Support of its Daubert/Lanigan Motion to preclude Martin Healy, Esquire and Peter Gilman, CPA	114	Image
04/02/2025	Plaintiff 477 Harrison Ave LLC's Motion to preclude and/or limit the testimony of Kathleen O'Donnell, Esquire, Evan Hankin PE, and Norton Remmer PE and request for a Daubert/Lanigan hearing	115	Image
04/02/2025	Opposition to 477 Harrison Ave., LLC's Daubert/Lanigan Motion as to Kathleen O'Donnell, Esq., Evan Jankin, PE, and Norton Remmer, PE filed by Jace Boston LLC, Arthur Leon	116	Image
04/02/2025	Reply/Sur-reply	117	Image
04/02/2025	Defendants' Notice of Filing Rule 9A Package	118	Image
04/02/2025	Defendant Jace Boston LLC, Arthur Leon's Motion in limine to exclude evidence of prior litigation involving the Defendant and request for a hearing	119	Image
04/02/2025	Opposition to Defendants' motion in limine to preclude evidence of the Defendants' litigation history filed by 477 Harrison Ave LLC	120	Image
04/02/2025	Defendants' Notice of Filing Rule 9A Package	121	Image
04/02/2025	Defendant Jace Boston LLC, Arthur Leon's Motion to exclude testimony by Joseph DeAngelo	122	Image
04/02/2025	Opposition to Defendants' motion in limine to preclude testimony of Joseph DeAngelo filed by 477 Harrison Ave LLC	123	Image
04/02/2025	Defendants' Notice of Filing Rule 9A Package	124	Image
04/02/2025	Defendant Jace Boston LLC, Arthur Leon's Motion in limine to preclude any attempt by 447 Harrison Ave, LLC to relitigate facts and issues determined by the Court in the "wall case"	125	Image
04/02/2025	Opposition to Defendants' motion in limine to preclude them from re-litigating the wall case filed by 477 Harrison Ave LLC	126	Image
04/02/2025	Stipulated Facts to be Read to the Jury	127	Image
04/02/2025	Agreed Suggested Description of the Case to be Read to the Jury During Empanelment	128	Image
04/02/2025	Proposed Filings/Orders Plaintiff 477 Harrison Ave., LLC's Requested Jury Voir Dire Questions	129	Image
04/02/2025	Defendants' Notice of Filing Rule 9A Package	130	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/02/2025	Defendant Jace Boston LLC, Arthur Leon's Motion in limine regarding constitutional defenses	131	Image
04/02/2025	Exhibits/Appendix Appendix of Documents Relating to Jace Parties' Motion in limine regarding constitutional defenses	132	Image
04/02/2025	Opposition to Defendants' Motion in limine regarding constitutional defenses filed by 477 Harrison Ave LLC	133	Image
04/02/2025	Reply/Sur-reply Reply in Support of Jace Parties' Motion in limine regarding constitutional defenses	134	Image
04/02/2025	Defendants' Notice of Filing Rule 9A Package	135	Image
04/02/2025	Defendant Jace Boston LLC, Arthur Leon's Motion in limine to preclude any testimony of Richard Leon and request for a Hearing	136	Image
04/02/2025	Opposition to Defendants' motion in limine to preclude and/or limit the testimony of Richard Leon filed by 477 Harrison Ave LLC	137	Image
04/02/2025	Reply/Sur-reply Reply of Jace Boston, LLC and Arthur Leon to 477 Harrison Ave., LLC's Opposition to Defendants' Motion in limine to preclude and/or limit the testimony of Richard Leon	138	Image
04/02/2025	Defendants' Notice of Filing Rule 9A Package	139	Image
04/02/2025	Defendant Jace Boston LLC, Arthur Leon's Motion in limine to preclude 477 Harrison Ave., LLC from offering John Holland's opinions of value	140	Image
04/02/2025	Opposition to Defendants' Motion in limine to preclude John Holland from offering an opinion of value filed by 477 Harrison Ave LLC	141	Image
04/04/2025	Endorsement on Motion to Enlarge The Time To Submit Witness List, Any Proposed Jury Instructions, Precharge To The Jury And Deposition Excerpts (#104.0): ALLOWED, DENIED Allowed in part and denied in part. Parties may have until no later than 12:00 noon on 4/7/ to both electronically file and tot send to clerk Christine Hayes all of these filings. The judge needs an adequate opportunity to review these before hearing. dated (4/1/25) Notice sent 04/07/2025.		Image
04/08/2025	Plaintiff 477 Harrison Ave LLC's Request for Jury Instructions	142	Image
04/08/2025	Proposed Excerpts of the Deposition Testimony of Vic Leon Now Deceased to the Offered in Evidence at Trial with Plaintiff's Objections and Defendant's Responses Thereto	143	Image
04/08/2025	Joint Witness List/Names of People to be Read to the Jury Applies To: 477 Harrison Ave LLC (Plaintiff); Jace Boston LLC (Defendant); Leon, Arthur (Defendant)	144	Image
04/08/2025	Defendants' Proposed Jury Instructions Applies To: Jace Boston LLC (Defendant); Leon, Arthur (Defendant)	145	Image
04/08/2025	Plaintiff, Defendants 477 Harrison Ave LLC, Jace Boston LLC, Arthur Leon's Submission of Preliminary List of Uncontested Exhibits for April 9, 2025 Final Trial Conference and Preliminary List of Contested Exhibits	146	Image
04/09/2025	Event Result:: Final Trial Conference scheduled on: 04/09/2025 02:00 PM Has been: Held as Scheduled Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		
04/16/2025	Event Result:: Final Trial Conference scheduled on: 04/16/2025 02:30 PM Has been: Held as Scheduled Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		
04/18/2025	Event Result:: Final Trial Conference scheduled on: 04/18/2025 02:00 PM Has been: Held as Scheduled Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/21/2025	Attorney appearance electronically filed.		Image
04/22/2025	Event Result:: Jury Trial scheduled on: 04/22/2025 09:00 AM Has been: Held as Scheduled Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		
04/23/2025	Event Result:: Jury Trial scheduled on: 04/23/2025 09:00 AM Has been: Held as Scheduled Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		
04/24/2025	Event Result:: Jury Trial scheduled on: 04/24/2025 09:00 AM Has been: Held as Scheduled Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		
04/25/2025	Defendants Jace Boston LLC, Arthur Leon's Motion to Admit Portions Of Supreme Judicial Court's Decision In 477 Harrison I	147	Image
04/28/2025	Opposition to Motion to Admit Certain Portions Of Supreme Judicial Court's Decision In 477 Harrison Ave., Jace Boston, LLC, And Arthur Leon filed by 477 Harrison Ave LLC	148	Image
04/29/2025	Event Result:: Jury Trial scheduled on: 04/29/2025 09:00 AM Has been: Held as Scheduled Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		
04/29/2025	Plaintiff 477 Harrison Ave LLC's Motion in limine to Preclude the admission of Contested Exhibits JJJJ-TTTT (Contested Tabs 88-98), ant references to these documents, Rick Leon's Missed 2018 Deposition, his signed and unfiled affidavits and/or 477 Harrison's privilege logs	149	Image
04/30/2025	Event Result:: Jury Trial scheduled on: 04/30/2025 09:00 AM Has been: Held as Scheduled Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		
04/30/2025	Defendants Jace Boston LLC, Arthur Leon's Motion for Directed Verdict at Close of Plaintiff's Case	150	Image
04/30/2025	Opposition to Defendants' Motion for a Directed Verdict filed by 477 Harrison Ave LLC	151	Image
04/30/2025	Defendants Jace Boston LLC, Arthur Leon's Motion for Involuntary Dismissal at Close of Plaintiff's Case	152	Image
05/01/2025	Event Result:: Jury Trial scheduled on: 05/01/2025 09:00 AM Has been: Held as Scheduled Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		
05/02/2025	Event Result:: Jury Trial scheduled on: 05/02/2025 09:00 AM Has been: Held as Scheduled Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		
05/05/2025	Endorsement on Motion for Directed Verdict at Close of Plaintiff's Case (#150.0): DENIED Based upon the evidence viewed in the light most favorable to Plaintiff, sufficient evidence has been prosecuted for a reasonable jury to find by a preponderance of the evidence that Plaintiffs claim of abuse of process has been proved. (dated 4/30/2025)		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/05/2025	Endorsement on Motion for Involuntary Dismissal at Close of Plaintiff's Case (#152.0): DENIED Based upon the totality of evidence produced, viewed in the light most favorable to Plaintiff, a reasonable jury could find that Plaintiff has proven its claim for 93A violations and sales like all elements of that claim. (dated 4/30/2025)		Image
05/05/2025	Proposed Filings/Orders Defendants' Revised Proposed Jury Instructions	153	Image
05/05/2025	Plaintiff 477 Harrison Ave LLC's Supplemental, Request for Jury Instructions	154	Image
05/05/2025	Event Result:: Jury Trial scheduled on: 05/05/2025 09:00 AM Has been: Held as Scheduled Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		
05/06/2025	Defendants Jace Boston LLC, Arthur Leon's Motion for Involuntary Dismissal At Close Of All Evidence Endorsement: Motion is denied. dated (5/5/25) Notice sent 5/08/2025.	155	Image
05/06/2025	Event Result:: Jury Trial scheduled on: 05/06/2025 09:00 AM Has been: Held as Scheduled Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		
05/08/2025	Endorsement on Motion for Requesting a Jury View of the Subject Properties (#106.0): Other action taken Moot as parties have withdrawn request for a view. Dated: 4/16/25 Notice Sent 5/12/25		Image
05/08/2025	Endorsement on Motion in limine (#110.0): Regarding 447 Harrison's Claim for Damages from JACE filing the Wall Case and Request for a Hearing DENIED See Judge Leighton's decision on Summary Judgment Motion in this case as grounds. Dated: 4/16/25 Notice Sent 5/12/25		Image
05/08/2025	Endorsement on Motion in limine to preclude (#125.0): any attempt by 447 Harrison Ave., LLC relitigate facts and issues determined by the court in the "Wall Case" ALLOWED Motion is allowed by agreement. Dated: 4/16/25 Notice Sent 5/12/25		Image
05/08/2025	Endorsement on Motion in limine to preclude (#136.0): any testimony of Richard Leon and Request for Hearing DENIED Motion is Denied except as to relevancy which will be addressed at trial. The parties will conduct a 3 hour maximum deposition of Mr. Leon at Atty. Furman's office on April 28, 2025. Dated: 4/16/25 Notice Sent 5/12/25		Image
05/08/2025	Endorsement on Motion to preclude (#140.0): 477 Harrison Ave., LLC from offering John Holland's opinions of value DENIED Motion is Denied as stated on the record. The expectation is that Mr. Holland will testify as to market value at specific periods f time. Motion is Denied. Dated: 4/16/25 Notice Sent 5/12/25		Image
05/08/2025	Endorsement on Motion in limine to exclude (#119.0): evidence of prior litigation involving the Defendants and Request for a Hearing ALLOWED Motion is allowed except that statement by Mr. Leon demonstrating he had previously sought to develop the property may be admissible. Dated: 4/18/25 Notice Sent 5/12/25		Image
05/08/2025	Endorsement on Motion to exclude (#122.0): testimony by Joseph DeAngelo DENIED Denied for reasons stated on the record. Dated:4/18/25 Notice Sent 5/12/25		Image
05/08/2025	Endorsement on Motion in limine (#131.0): regarding constitutional defenses DENIED Motion is Denied for reasons stated on the record after hearing. Dated: 4/18/25 Notice Sent 5/12/25		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/08/2025	Endorsement on Motion to (#147.0): admit portions of Supreme Judicial Court's Decision in 477 Harrison I DENIED Denied for reasons sated on record. Dated: 4/29/25 Notice Sent 5/12/25		Image
05/09/2025	Defendants Jace Boston LLC, Arthur Leon's Motion for Directed Verdict At Close Of All Evidence Endorsement: Motion is denied. When the evidence is viewed in the light most favorable to nonmovant a reasonable jury could find all elements of the abuse of process have been satisfied. dated (5/5/25) Notice Sent 5/12/25	156	Image
05/27/2025	Plaintiff 477 Harrison Ave LLC's Motion for Post-Trial Approval Of Real Estate Attachment	157	Image
05/27/2025	Affidavit Of 477 Harrison Ave LLC's Motion for Post-Trial Approval Of Real Estate Attachment	158	Image
05/27/2025	Defendants Jace Boston LLC, Arthur Leon's Response to Plaintiff's Motion for Post-Trial Approval Of Real Estate Attachment	159	Image
05/30/2025	Endorsement on Motion for Post-Trial Approval Of Real Estate Attachment (#157.0): Other action taken Motion is allowed inn the amount of 5,801,550.00 without prejudice. dated (5/29/25) Notice sent 06/03/25		Image
05/30/2025	Proposed Filings/Orders Plaintiff, 477 Harrison Ave., LLC's, Proposed Findings of Fact and Rulings of Law on its G.L. C. 93A, §11 Claim Against Jace Boston, LLC and Arthur Leon	160	Image
05/30/2025	Proposed Filings/Orders Defendants' Proposed Findings of Fact and Conclusions of Law with Respect to Plaintiff's Claim Under Mass. Gen. Laws Ch. 93A, § 11	161	Image
05/30/2025	Exhibits/Appendix Appendix to Defendants' Proposed Findings of Fact and Conclusions of Law with Respect to Plaintiff's Claim Under Chapter 93A	162	Image
06/05/2025	Event Result:: Motion Hearing scheduled on: 06/05/2025 02:30 PM Has been: Held as Scheduled Hon. James Budreau, Presiding Staff: Christine M Hayes, Assistant Clerk		
06/20/2025	Service Returned for Writ of Attachment Applies To: Jace Boston LLC (Defendant)	163	Image
08/22/2025	Defendants Jace Boston LLC, Arthur Leon's Notice of Motion for New Trial and Request for Hearing	164	Image
08/22/2025	Defendants Jace Boston LLC, Arthur Leon's Notice of Motion for Judgment Notwithstanding the Verdict	165	Image
10/01/2025	Notice Of Filing Rule 9A Package RE: Defendants' Motion For Judgment Notwithstanding The Verdict	166	Image
10/01/2025	Defendants Jace Boston LLC, Arthur Leon's Motion for Judgment Notwithstanding The Verdict	167	Image
10/01/2025	Opposition to Motion for a Judgment Notwithstanding The Verdict filed by 477 Harrison Ave LLC	168	Image
10/01/2025	Superior Court Rule 9C Certificate RE: Defendants' Motion for judgment Notwithstanding The Verdict	169	Image
10/01/2025	Notice of Filing Rule 9A Package Re: Defendants' Motion for New Trial	170	Image
10/01/2025	Defendants Jace Boston LLC, Arthur Leon's Motion for New Trial and Request for Hearing	171	Image
10/01/2025	Opposition to Motion for New Trial filed by 477 Harrison Ave LLC	172	Image
10/01/2025	Reply/Sur-reply Reply Brief In Support Of Defendants' Motion for New Trial	173	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/01/2025	Superior Court Rule 9C Certificate Re: Defendants' Motion for New Trial	174	Image
01/16/2026	ORDER: Findings of Fact, Rulings of Law, and Order for Judgment on Plaintiff's Chapter 93A Claim For the foregoing reasons, it is hereby Ordered that judgment shall enter on the plaintiff's G. L. c. 93A claim in favor of the plaintiff, and defendants shall pay jointly and severally $11,603,100.00 in damages plus statutory interest and attorneys' fees. If the plaintiff is seeking attorneys' fees, filings should comply with the procedures set out in Superior Court Rule 9A. (dated 1/13/2026) Notice Sent 1/14/2026	175	Image
01/20/2026	Endorsement on Motion for Judgment Notwithstanding the Verdict (#167.0): DENIED After review, motion is denied. Dated: 1/20/26 Notice sent 2/11/26		
01/28/2026	Plaintiff 477 Harrison Ave LLC's Notice of Service of Motion for Award of Attorneys' Fees and Costs and Motion for Increased Real Estate Attachment and Equitable Attachment Following the Court's 93A Finding	176	Image
01/30/2026	MEMORANDUM & ORDER: OF DECISION ON DEFENDANTS' MOTON FOR A NEW TRIAL: ORDER - Wherefore, it is hereby ORDERED that Defendants' Motion for a New Trial s DENIED for the reasons stated above. Dated: 1/30/26 (See P#177 for complete decision) Judge: Budreau, Hon. James Notice sent 2/11/26	177	Image
03/16/2026	Proposed Filings/Orders Stipulation and Proposed Order Concerning Plaintiff's Attorneys' Fees and Costs Pursuant to the Court's Chapter 93A Order		Image
03/16/2026	Proposed Filings/Orders Stipulation and Proposed Order Concerning Post-Judgment Security		Image
03/16/2026	Defendants Jace Boston LLC, Arthur Leon's Certificate of Service	178	Image
07/13/2026	ORDER: Stipulation and Order Concerning Plaintiff's Attorneys' Fees and Costs Pursuant to the Court's Chapter 93A Order See Paper #179 for Complete Order (Dated: 7/13/26) Notice sent 7/14/26	179	Image
07/13/2026	ORDER: Stipulation and Order Concerning Post-Judgment Security See Paper #180 for Complete Order (Dated: 7/13/26) Notice sent 7/14/26	180	Image
07/14/2026	Verdict of jury for party (Dated 5/6/25)	181	Image
07/14/2026	JUDGMENT entered on this date.: Judgment on Jury Verdict After Jury Verdict Presiding: Hon. James Budreau Judgment For: 477 Harrison Ave LLC Judgment Against: Jace Boston LLC Arthur Leon Terms of Judgment: Interest Begins: 03/23/2015 Jdgmnt Date: 07/13/2026 Interest Rate: .12 Daily Interest Rate: .000329 Damages: Damage Amt: 5801550.00 Costs Pd to Court: 37675.15 Punitive Damages: 5801550.00 Crt Ord Atty Fee: 598103.50 Judgment Total: 20,121,850.74 Entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d)	182	Image
08/11/2026	Defendant Jace Boston LLC, Arthur Leon's Notice of Appeal	183	Image
08/11/2026	Notice of appeal filed. (See p#183) Notice sent 8/12/26 Applies To: Jace Boston LLC (Defendant); Leon, Arthur (Defendant)		
08/17/2026	Transcript of 4/9/25 4/16/25 4/18/25 4/22/25 4/23/25 4/24/25 4/29/25 4/30/25 5/1/25 5/2/25 5/5/25 5/26/25 and 6/5/25 received from transcriber Carolyn Sproul (via email)		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
08/20/2026	Revised Transcript of 5/1/25 received from transcriber Carolyn Sproul (via email) correction of date on transcript cover page		
08/24/2026	Defendants Jace Boston LLC, Arthur Leon's Submission of Certification Regarding Transcripts for Appeal	184	Image
09/10/2026	Appeal: Statement of the Case on Appeal (Cover Sheet).		Image
09/10/2026	Notice of assembly of record sent to Counsel		Image
09/10/2026	Notice to Clerk of the Appeals Court of Assembly of Record		Image
09/24/2026	Notice of Entry of appeal received from the Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case (2026-P-1387) was entered in this Court on September 23, 2026.	185	Image

Case Disposition

Disposition	Date	Case Judge
Judgment after Jury Verdict	08/24/2015	

NOTIFY

12/19
68

COMMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

477 HARRISON AVE., LLC Plaintiff/Defendant-in-Counterclaim, **vs.** **JACE BOSTON, LLC and ARTHUR LEON** Defendants/Plaintiffs-in-Counterclaim	**CIVIL ACTION NO. 2015-0829-B**

MEMORANDUM AND ORDER ON DEFENDANT'S SPECIAL MOTION TO DISMISS PURSUANT TO G. L. c. 231, § 59H UPON REMAND FROM THE SUPREME JUDICIAL COURT

notice sent 12:20 ECS MSF TDS ECS TBH/HK AEG D.G RWD DLPA MD

This case is before the court on remand from the Supreme Judicial Court for a determination of whether the plaintiff's abuse of process claim against the defendants is a legitimate law suit filed to recover damages for harm suffered as a result of allegedly tortious conduct, or a so-called SLAPP suit designed to chill the defendants' legitimate petitioning activity. The SJC recently reviewed a decision of this court (Curran, J) denying defendants' Special Motion to Dismiss the claim at issue pursuant to G. L. c. 231, § 59H, the Massachusetts anti-SLAPP Statute (the "Statute"). See *477 Harrison Ave., LLC v. Jace Boston, LLC & another, 477 Mass. 162 (2017).* In a holding relevant to the instant motion, the SJC remanded the matter for consideration under a new framework for the resolution of Special Motions to Dismiss under the Statute announced the same day in *Blanchard* v. *Steward Carney Hosp.*, 477

Mass. 141 (2017). Applying the new standard to the totality of the circumstances in the record before the court, I find that the plaintiffs have met their burden to establish that their abuse of process claim is not a SLAPP suit because it was filed primarily to seek redress for the harm alleged, not to interfere with the defendants' right to petition. For this reason, as explained below, the defendants' motion is DENIED.

BACKGROUND

The plaintiff owns a building and a parcel of property at 477 Harrison Avenue in Boston, which it intends to redevelop. The defendants own an abutting building and parcel. Since approximately 2011, the defendants have opposed the plaintiff's redevelopment plans by filing various objections in legal and administrative venues. The parties have made moves and countermoves in this regard. The plaintiff filed the instant action, raising claims of abuse of process and violation of G.L. c. 93A, §11. The defendants filed a Special Motion to Dismiss pursuant to G.L.c. 231, 59H. This court denied the motion, the defendants appealed and the Supreme Judicial Court allowed defendants' application for direct appellate review. The SJC concluded that the motion was properly denied as to the G.L.c. 93A claim because that claim was not based solely on the defendants' petitioning activity. However, finding that the abuse of process claim was based solely upon petitioning activity, the court vacated the dismissal of that claim and remanded the matter for consideration under the new augmented framework announced in *Blanchard*.

ANALYSIS

The anti-SLAPP statute, G. L. c. 231, § 59H, "was enacted by the Legislature to provide a quick remedy for those citizens targeted by frivolous lawsuits based on their government petitioning activities." *Kobrin* v. *Gastfriend*, 443 Mass. 327, 331 (2005). In *Kobrin*, the

Supreme Judicial Court noted that the anti-SLAPP statute "had its genesis as a legislative attempt to protect private citizens when exercising their constitutional right to speak out against development projects or other matters of concern to them and their communities and to seek government relief." *Korbin*, 443 Mass. at 337. The SJC has also noted that "SLAPP suits [are] generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them from doing so." *Duracraft* v. *Holmes Prods. Corp.*, 427 Mass. 156, 161 (1998). The Court has also recognized that the language of the statute supports its application to cases beyond the basic example described in *Duracraft*. See *Baker* v. *Parsons*, 434 Mass. 543, 549 (2001) (stating that the legislative history indicates that the anti-SLAPP statute was intended to go beyond the "typical" case).

By its decision in the *Blanchard* case, however, the SJC has limited the application of the statute to cases primarily motivated by an intent to interfere with petitioning activity. The augmented framework announced in *Blanchard* adds an additional test to apply when evaluating an anti-SLAPP motion, so as "to distinguish between meritless claims targeting legitimate petitioning activity and meritorious claims with no such goal." *Blanchard*, 447 Mass. at 157.

The now augmented framework for analyzing an anti-SLAPP statute is as follows. First, the moving party must make a threshold showing through the pleadings and affidavits that the claims against it are "based on" the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." *Duracraft*, 427 Mass. at 167–168. If such a showing is made by the moving party, the burden shifts to the non-moving party to show "(1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party." G. L. c. 231, § 59H. The *Blanchard* case adds an additional element to the

analytical framework. The non-moving party may now defeat an anti-SLAPP motion to dismiss by demonstrating to the court with "fair assurance" *477 Harrison*, 477 Mass. 175, that the claim in question "was not 'brought primarily to chill' the special movant's legitimate exercise of its right to petition." *Blanchard*, 477 Mass. at 159, quoting *Duracraft*, 427 Mass. at 161. The non-moving party must persuade the court that its "primary motivating goal in bringing its claim, viewed in its entirety, was 'not to interfere with and burden [the moving party's] . . . petition rights, but to seek damages for the personal harm to [it] from [the moving party's] alleged . . . [legally transgressive] acts." *Blanchard*, 447 Mass. at 160 (internal quotation and citation omitted).

The parties have filed extensive affidavits and counter-affidavits, supplemented by voluminous exhibits, to support their arguments about the plaintiff's primary motivation for filing its abuse of process claim. The sheer weight of the papers filed in this regard undermines the notion that the anti-Slapp statute is being used in this instance as a quick remedy to frivolous litigation. After review of the voluminous filings, and after hearing, I apply the augmented framework as instructed by the SJC:

> [T]he motion judge, in the exercise of sound discretion, is to assess the totality of the circumstances pertinent to the nonmoving party's asserted primary purpose in bringing its claim. The course and manner of proceedings, the pleadings filed, and affidavits 'stating the facts upon which the liability or defense is based,' . . . may all be considered in evaluating whether the claim is a 'SLAPP' suit. A necessary but not sufficient factor in this analysis will be whether the nonmoving party's claim at issue is 'colorable or . . . worthy of being presented to and considered by the court' . . . i.e., whether it 'offers some reasonable possibility' of a decision in the party's favor.

Id. at 160–161 (citations omitted).

Starting with the "necessary but not sufficient factor," I find that the plaintiffs' abuse of process claim is colorable. The tort of abuse of process is comprised of the following elements:

1) the use of process; 2) for an ulterior or illegitimate purpose; 3) resulting in damage. *Keystone Freight Corp. v. Bartlett Consolidated, Inc.*, 77 Mass. App. Ct. 304, 312-313 (2010). While, as might be expected, the allegedly ulterior purpose for process employed by the defendants is vehemently denied in this case, the allegations regarding the defendants' actions, particularly the defendant Leon's application for a criminal complaint against a representative of the plaintiff, are plausibly supported by record evidence. Moreover, the plaintiff plausibly alleges damages as a result of the alleged abuse of process. Thus, if plaintiff's Special Motion were to be allowed in this case, it would prohibit a colorable claim.

In addition, I find that plaintiffs' primary purpose in asserting the claim for abuse of process was to recover for the harm allegedly caused by the defendants' allegedly tortious conduct. There is no doubt that this case is marked by animosity between the parties, and, after review of the entire record, I doubt that either party would be saddened to learn that its litigation strategy frustrated and interfered with the business of the other, but the presence of hard feelings cannot mean that every allegation is a SLAPP suit. I find that the abuse of process claim is not the type of meritless action that should be dismissed under the anti-SLAPP statute as interpreted by the SJC in *Blanchard* and the instant case. I have considered the entire record and taken note of the parties' arguments as to whether, and to what extent, the abuse of process claim was motivated by a desire to address a tortious wrong. I have taken into account the actions of both parties in opposing the moves of each other. Based on all of the above, I find that the plaintiffs' petition for damages as a result of alleged abuse of process is legitimate and should be allowed to proceed. I find that this claim is not a so-called SLAPP suit because I find, with fair assurance, that the plaintiffs' primary motivation in bringing it was to seek relief from allegedly tortious harm, not to interfere with the defendants' petition rights.

CONCLUSION

Plaintiffs' Special Motion to Dismiss Pursuant to the Anti-SLAPP Statute is **DENIED** on remand from the Supreme Judicial Court.

By the Court,

Date: December 19, 2017

Joseph F. Leighton, Jr.
Associate Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 15-0829-B

477 HARRISON AVE., LLC
Plaintiff

v.

JACE BOSTON, LLC
and ARTHUR LEON,
Defendants.

JACE BOSTON, LLC AND ARTHUR LEON'S MOTION FOR RECONSIDERATION

Pursuant to Superior Court Rule 9D, Defendants JACE Boston, LLC and Arthur Leon (together, the "JACE Parties") respectfully request that the Court reconsider its denial of the JACE Parties' special motion to dismiss pursuant to Mass. Gen. Laws ch. 231, § 59H (the "anti-SLAPP statute") with respect to Plaintiff 477 Harrison Ave., LLC's ("477 Harrison") abuse of process claim. The changed circumstances warranting the Court's reconsideration of its denial of the JACE Parties' special motion to dismiss is "a development of relevant law." *See Audubon Hill South Condo. Ass'n v. Cmty. Ass'n Underwriters of Am., Inc.*, 82 Mass. App. Ct. 461, 470 (2012). In particular, on February 29, 2024, the Supreme Judicial Court ("SJC") eliminated the augmented *Duracraft* standard adopted in *Blanchard v. Steward Carney Hospital, Inc.*, 477 Mass. 141 (2017). *See Bristol Asphalt, Co., Inc. v. Rochester Bituminous Prods., Inc.*, -- Mass. --, 227 N.E.3d 1019 (2024). Under the test adopted by the SJC in *Bristol Asphalt*, which the SJC acknowledged was the applicable test prior to its decision in *Blanchard*, and which also was the test at all relevant times in this case, 477 Harrison's abuse of process claims should be dismissed with respect to all but one invocation of process upon which the claim is based.

Procedural History

In its First Amended Complaint, 477 Harrison asserts against the JACE Parties claims for abuse of process (Count I) and violation of Mass. Gen. Laws ch. 93A (Count II). On or about August 28, 2015, the JACE Parties filed a special motion to dismiss 477 Harrison's First Amended Complaint pursuant to Mass. Gen. Laws ch. 231, § 59H. In a decision dated March 29, 2016 [Dkt. #20], this Court denied the JACE Parties' special motion to dismiss, holding that they had failed to carry their burden at the first stage of the anti-SLAPP analysis to show that 477 Harrison's claims were based solely on the JACE Parties' petitioning activity. The JACE Parties filed an interlocutory appeal from the denial of their special motion to dismiss and sought direct appellate review, which the SJC granted.

On May 23, 2017, the SJC issued its decision in *Blanchard v. Steward Carney Hospital, Inc.*, 477 Mass. 141 (2017), announcing the augmented *Duracraft* standard. In *Blanchard*, the SJC noted that "[u]nder *current law*, there are only two ways for a nonmoving party . . . to resist the early dismissal of their claim as a 'SLAPP' suit. One way is to argue that the special movant has not met its threshold burden. Failing that, the other way is to argue that the special movant's petitioning activity was not legitimate but instead a sham, i.e., lacking any reasonable basis in fact or law." *Blanchard*, 477 Mass. at 156 (emphasis added). In *Blanchard*, the SJC created an alternative path for a non-moving party to defeat a special motion to dismiss, *i.e.*, the augmented *Duracraft* standard, namely, "by demonstrating in the alternative that each challenged claim does not give rise to a 'SLAPP' suit." *Id.* at 160.

On the same day it issued its decision in *Blanchard*, the SJC issued its decision on the JACE Parties' appeal from the denial of their special motion to dismiss. *See 477 Harrison Ave., LLC v. JACE Boston, LLC*, 477 Mass. 162 (2017). The SJC concluded that the JACE Parties carried their initial stage burden to show that 477 Harrison's abuse of process claim was based

solely on their petitioning activity. *Id.* at 171. The SJC further found that the burden shifted to 477 Harrison to show that the JACE Parties engaged in sham petitioning activity. The SJC held that except for Arthur Leon's application for a criminal complaint, 477 Harrison failed to carry its burden. *Id.* at 173. As a result, the SJC vacated the denial of the JACE Parties' special motion to dismiss with respect to 477 Harrison's abuse of process claim. Nonetheless, the SJC, "[i]n light of [its] decision in *Blanchard*," remanded the special motion to dismiss to permit 477 Harrison to seek to defeat the motion under the newly announced augmented *Duracraft* standard. *Id.* at 176.

On remand, this Court, in a (corrected) decision dated December 21, 2017 [Dkt. #73], determined that 477 Harrison Ave. carried its burden under the augmented *Duracraft* standard and denied the special motion to dismiss with respect to the abuse of process claim. The trial in this matter is scheduled to begin on April 22, 2025.

Basis for Reconsideration – A Development in the Relevant Law

On February 29, 2024, the SJC abandoned the augmented *Duracraft* standard it had adopted in *Blanchard*. The SJC explained:

> Recognizing that our existing framework for analyzing special motions to dismiss under § 59H has not provided an efficient or practical solution to the problem it was designed to address, we thus conclude that a simplification of our existing anti-SLAPP framework, and one that hews to the statutory language, is necessary to ensure that the legislative intent behind the statute is not undermined by its misapplication. Toward the end, we set for a revised anti-SLAPP framework in the instant opinion.

Bristol Asphalt, Co. Inc. v. Rochester Bituminous Prods., Inc., -- Mass. --, 227 N.E.3d 1019, 1027 (2024). "Under this simplified anti-SLAPP framework, we eliminate the additional analysis set forth in *Blanchard I* and *Blanchard II* and return to the traditional approach set out in *Duracraft*." *Id.* The JACE Parties respectfully submit that reconsideration of the Court's denial

of their special motion to dismiss is warranted in light of the return to the anti-SLAPP framework that was in effect at the time (a) the JACE Parties engaged in the petitioning activity at issue in this case; (b) the JACE Parties brought their special motion to dismiss; (c) the Court originally denied the JACE Parties' special motion to dismiss; (d) the JACE Parties filed their interlocutory appeal from the denial of their special motion to dismiss; (e) the SJC granted direct appellate review; and (f) the JACE Parties and 477 Harrison filed with the SJC their briefs regarding the denial of the JACE Parties' special motion dismiss.

Indeed, the SJC has already determined that under the pre-*Blanchard* standard, the JACE Parties' special motion to dismiss as to 477 Harrison's abuse of process claim should be granted with respect to all petitioning activity other than Arthur Leon's application for criminal complaint. In *477 Harrison Ave., LLC v. JACE Boston, LLC*, 477 Mass. 162 (2017), the SJC determined that the JACE Parties carried their burden at the first stage of the anti-SLAPP analysis of showing that 477 Harrison's abuse of process claim was based solely on the JACE Parties' petitioning activity. *477 Harrison Ave., LLC*, 477 Mass. at 170-71. As a result, under the *Duracraft* standard, the burden shifted to 477 Harrison Ave. to show that the JACE Parties engaged in sham petitioning activity; that is, the JACE Parties' petitioning activity did not have a reasonable basis in fact or law. The SJC held that "[t]o defeat the special motion to dismiss, the plaintiff must show that each such instance [of process] lacked a reasonable basis in law or fact. Save for Leon's application for a criminal complaint against Holland, the plaintiff has not carried its burden." *Id.* at 173. As a result, the only process on which 477 Harrison should be permitted to base its abuse of process claim at trial is Arthur Leon's application for criminal complaint.

Applicability of *Bristol Asphalt*

The same day the SJC issued its decision in *Bristol Asphalt*, the SJC also decided *Columbia Plaza Associates v. Northeastern University*, -- Mass. ---, 227 N.E.3d 999 (2024), in

which it applied the simplified anti-SLAPP analysis to Northeastern's special motion to dismiss. The SJC expressly addressed the propriety of applying the analytical framework articulated in *Bristol Asphalt* in reviewing the special motion to dismiss in *Columbia Plaza*. The SJC wrote:

> Our holding today is intended to give effect to the clear meaning of a statute, a meaning that has not changed for these purposes since its original enactment. This purpose is best accomplished through retroactive application. In today's decision, we also return to the framework that governed special motions to dismiss for twenty years, until our holding in *Blanchard I*. Thus we are returning to an earlier interpretation, rather than developing a brand new one, limiting any possible disruptive effect of imposing the change at issue. Accordingly, the simplifications to our existing anti-SLAPP framework, set forth in *Bristol Asphalt*, 493 Mass. at --, 227 N.E.3d 1019, also issued today, are applicable to cases in which an anti-SLAPP motion or appeal remains pending as of this court's issuance of the rescript in *Bristol Asphalt*.

Columbia Plaza Assocs. v. Northeastern Univ., --Mass -- , 227 N.E.3d 999, 1010 (2024) (internal quotation marks and citations omitted). Read as a whole, this discussion means that the standard adopted in *Bristol Asphalt* is to be given retroactive effect; the SJC did not exercise its discretion to give only prospective effect to the standard.[1] In this context, the SJC's specific reference to "cases in which an anti-SLAPP motion or appeal remains pending as of this court's issuance of the rescript in *Bristol Asphalt*" should be interpreted as examples of, not a limitation on, the types of cases to which *Bristol Asphalt* should be applied.

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[1] Among the factors a court considers in deciding whether to depart from the "general rule that decisions interpreting statutes are fully retroactive," to give only prospective effect to a decision is whether the decision announces a novel interpretation of a statute. *See Commonwealth v. Bastos*, 103 Mass. App. Ct. 376, 381 (2023) (giving retroactive effect to interpretation of statute announced after defendant's conviction and sentence became final). Here, the SJC expressly found that the simplified anti-SLAPP framework was far from novel; rather, it had been the law for approximately 20 years before the augmented *Duracraft* standard was adopted in *Blanchard I*. Furthermore, retroactive application does not cause any harm or inequity to 477 Harrison because the analysis in effect at the time 477 Harrison opposed the JACE Parties' special motion to dismiss was the same as the *Bristol Asphalt* framework. *Id.*

In the event this Court interprets the language of *Columbia Plaza* more narrowly, the JACE Parties nonetheless should benefit from the return to the pre-*Blanchard* standard for three reasons. First, the period in which to appeal a final judgment in this case has not begun to run. The JACE Parties retain the right to seek review of the denial of their special motion to dismiss applying the augmented *Duracraft* framework after entry of final judgment. *See Passatempo v. McMenimen*, 458 Mass. 1007, 1009-10 (2010) (holding that defendant was permitted to "pursue the immunity issues as a matter of right in his direct appeal" from the final judgment). Second, the present motion should be treated as falling within the ambit of "an anti-SLAPP motion . . . pending as of the [SJC's] issuance of the rescript in *Bristol Asphalt*." Third, as of the date of service of this motion, the rescript in *Bristol Asphalt* has not been issued to the Superior Court.

Final judgment has not been entered in this case. The Court "retains discretion to reconsider prior rulings and correct errors at any time until a final judgment is entered, regardless of whether there has been a change in fact or law." *Kauders v. Uber Techs., Inc.*, 486 Mass. 557, 569 (2021). Here, the equities militate in favor of the Court reconsidering its denial of the JACE Parties' special motion to dismiss 477 Harrison's abuse of process claim.[2] By virtue of having their appeal from the denial of their special motion to dismiss decided the same day as *Blanchard I*, the JACE Parties experienced the "disruptive effect" of the change in what had been the interpretation of the anti-SLAPP statute for the prior twenty years. Given the trial in this matter is not scheduled to begin for more than a year from now, the JACE Parties still have the opportunity to benefit in a meaningful way from the procedural protections afforded by the anti-

[2] Applying *Bristol Asphalt* in the present case will not open the floodgates to requests for reconsideration of denials of special motions to dismiss in other cases given the unique factual and procedural history of this case.

SLAPP statute, namely, by not having to try 477 Harrison's abuse of process claim to the extent it is based on legitimate petitioning activity.

WHEREFORE, the JACE Parties respectfully request that (1) the Court exercise its discretion to reconsider its denial of the JACE Parties' special motion to dismiss at to 477 Harrison's abuse of process claim and (2) grant their special motion to dismiss the abuse of process claim to the extent it is based on process other than Arthur Leon's application for criminal complaint.

Request for Hearing

While the JACE Parties recognize they do not have a right to a hearing, they further request that the Court hold a hearing on this motion for reconsideration.

Respectfully submitted,
JACE BOSTON, LLC AND ARTHUR LEON
by their attorneys,

/s/ Mark S. Furman
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Dated: March 27, 2024

CERTIFICATION PURSUANT TO SUPERIOR COURT RULE 9C

Counsel for Defendants JACE Boston, LLC and Arthur Leon hereby certifies that late in the afternoon on March 19, 2024, Mark S. Furman, on behalf of Defendants JACE Boston, LLC and Arthur Leon, conferred with Andrew E. Goloboy, counsel for Plaintiff 477 Harrison Ave., LLC, by telephone in good faith to narrow the areas of disagreement between the parties. The parties were not able to resolve their differences.

/s/ Mark S. Furman
Mark S. Furman (BBO# 181680)

CERTIFICATE OF SERVICE

I, Mark S. Furman, hereby certify that on March 27, 2024, I caused a copy of the foregoing document to be served by email and first-class mail, postage pre-paid, on

Andrew E. Goloboy, Esq.
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Counsel for Plaintiff 477 Harrison Ave., LLC

/s/ Mark S. Furman
Mark S. Furman (BBO# 181680)

Date Filed 4/19/2024 9:31 AM
Superior Court - Suffolk
Docket Number 1584CV00829
MS

4/23

NOTIFY

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 15-0829-B

477 HARRISON AVE., LLC
Plaintiff

v.

JACE BOSTON, LLC
and ARTHUR LEON,
Defendants.

JACE BOSTON, LLC AND ARTHUR LEON'S MOTION FOR RECONSIDERATION

Pursuant to Superior Court Rule 9D, Defendants JACE Boston, LLC and Arthur Leon (together, the "JACE Parties") respectfully request that the Court reconsider its denial of the JACE Parties' special motion to dismiss pursuant to Mass. Gen. Laws ch. 231, § 59H (the "anti-SLAPP statute") with respect to Plaintiff 477 Harrison Ave., LLC's ("477 Harrison") abuse of process claim. The changed circumstances warranting the Court's reconsideration of its denial of the JACE Parties' special motion to dismiss is "a development of relevant law." *See Audubon Hill South Condo. Ass'n v. Cmty. Ass'n Underwriters of Am., Inc.*, 82 Mass. App. Ct. 461, 470 (2012). In particular, on February 29, 2024, the Supreme Judicial Court ("SJC") eliminated the augmented *Duracraft* standard adopted in *Blanchard v. Steward Carney Hospital, Inc.*, 477 Mass. 141 (2017). *See Bristol Asphalt. Co., Inc. v. Rochester Bituminous Prods., Inc.*, -- Mass. --, 227 N.E.3d 1019 (2024). Under the test adopted by the SJC in *Bristol Asphalt*, which the SJC acknowledged was the applicable test prior to its decision in *Blanchard*, and which also was the test at all relevant times in this case, 477 Harrison's abuse of process claims should be dismissed with respect to all but one invocation of process upon which the claim is based.

4/23/24 Denied. No hearing is necessary. The ANTI-SLAPP is not applicable to this case because no anti-SLAPP motion or appeal remains pending in this proceeding. See Columbia Plaze Assoc. v. Northeastern Univ., 495 Mass. 570, 578 (2024).

04/23/2024	Endorsement on Motion for reconsideration (#101.0): DENIED Denied. No hearing is necessary. The SJC's decision in Bristol Asphalt is not applicable to this case because no "anti-SLAPP motion or appeal remains pending" in this proceeding. See Columbia Plaza Assoc. v. Northeastern Univ, 493 Mass. 570, 578 (2024). (Dated 4/23/24) Notice sent 4/24/24

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 15-0829-B

477 HARRISON AVE., LLC
Plaintiff,

v.

JACE BOSTON, LLC
and ARTHUR LEON,
Defendants.

DEFENDANTS' MOTION IN LIMINE REGARDING 447 HARRISON'S CLAIM FOR DAMAGES FROM JACE FILING THE WALL CASE AND REQUEST FOR A HEARING

Defendants JACE Boston, LLC ("JACE") and Arthur Leon ("Mr. Leon," and together with JACE, the "JACE Parties") hereby request that the Court enter an order precluding Plaintiff 477 Harrison Ave., LLC ("477 Harrison") from presenting evidence regarding 477 Harrison's claim for $6 million dollars in damages for loss of value to the second floor of its property due to its inability to tear down a brick wall at the second floor level of 477 Harrison Avenue, Boston, MA.[1] 477 Harrison claims these damages result from JACE's declaratory judgment action in *JACE Boston, LLC, v. Holland Development LLC and 477 Harrison Avenue, LLC,* Docket No. SUCV2013-02167 (Suffolk Superior Court) (the "Wall Case"). In the Wall Case, the Superior Court entered Judgment confirming JACE's easement rights in the wall of 477 Harrison's building and enjoining 477 Harrison from tearing down the brick wall at the second-floor level.

[1] 477 Harrison was permitted to, and did, tear down the solid brick wall at third, fourth and fifth levels and converted those floors to luxury residential condominiums.

A copy of the "Judgment on Finding of the Court" is attached as **Exhibit A**. The Appeals Court affirmed the Judgment. *JACE Boston, LLC v. Holland Development, LLC,* 89 Mass. App. Ct. 1108 (2016). A copy of the Appeals Court's decision is attached as **Exhibit B**.

FACTUAL BACKGROUND

The Wall Case

477 Harrison and JACE are abutting property owners. For nearly one hundred years JACE's building has been tied into and shared a wall of 477 Harrison's building pursuant to an easement set forth in a recorded Indenture and Agreement dated June 28, 1926, (the "Indenture").

After 477 Harrison acquired its building from the prior owner, 477 Harrison announced that it was going to tear down the wall in which JACE had easement rights pursuant to the recorded Indenture. 477 Harrison wanted to tear down the Wall so that it could convert the second through fifth floors of its building from its prior use as a warehouse to luxury residential condominiums.

JACE and 477 Harrison had a dispute as to the continuing validity of a recorded 1926 Indenture that granted to JACE easement rights in the wall of 477 Harrison's building. 477 Harrison took the position that the recorded easement was no longer valid for several reasons and therefore it had the right to tear down the solid brick wall at the second-floor level. JACE maintained that the easement was valid, and that 477 Harrison did not have the right to tear down the wall at the second-floor level.

To resolve the dispute and protect its easement rights in the wall, JACE filed the Wall Case requesting a declaratory judgment as to its easement rights in the wall of 477 Harrison's building.

Pursuant to a "Stipulated Order" of the JACE Parties and 477 Harrison entered by the court prior to the trial of the Wall Case, 477 Harrison was permitted to, and did, tear down the solid brick wall at third, fourth and fifth levels in which JACE did not have an easement; and converted those floors to luxury residential condominiums. (A true and accurate copy of the "Stipulated Order" is attached hereto as **Exhibit C**).

Following a jury-waived trial, the Superior Court, (per Inge, J), entered judgment in favor of JACE declaring JACE's easement valid, and that 477 Harrison did not have the right to demolish the brick wall at the second-floor level in which JACE had an easement. The Court enjoined 477 Harrison from demolishing the brick wall at the second-floor level in which JACE had an easement. The Appeals Court affirmed the Superior Court Judgment. *See* **Exhibit B**.

ARGUMENT

477 Harrison may not claim damages for the second floor for 2 reasons.

First, as set forth in the "JACE Parties Motion in *Limine* Regarding Constitutional Defenses," such evidence is barred as JACE's filing of the Wall Case is constitutionally protected petitioning activity.

Second, 477 Harrison cannot, as a matter of law, establish that its claimed damages for not being able to tear down the wall at the second-floor level and build residential condominiums as it claims it had intended are the "natural and probable" consequence of JACE filing a declaratory judgment in the Wall Case.

In an action for abuse of process, the plaintiff must show that its damages "are the natural and probable consequence of the action complained of." *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 645 (2010) *quoting Malone v. Belcher*, 216 Mass. 209, 212 (1913).

477 Harrison seeks to introduce evidence of damages consisting of the difference in value of the second floor of its building being used as luxury residential condominiums and as commercial space. 477 Harrison claims that because it was not able to tear down the wall of its building at the second-floor level, it had to use the second floor for commercial condominiums instead of residential condominiums. 477 Harrison seeks $6 million dollars in damages on this claim.

The filing of JACE's declaratory judgment action cannot be the "natural and probable" cause of 477 Harrison's alleged damages. A declaratory judgment action does no more than ask the Court to determine the substantive rights of the parties. In the Wall Case, 477 Harrison and JACE had a dispute as to the validity of a recorded easement in the chain of title of both 477 Harrison and JACE. The easement had been granted by 477 Harrison's predecessor in title to JACE's predecessor in title in 1926.

The Superior Court held a multi-day non-jury trial on JACE's complaint seeking a declaratory judgment on the validity of the Indenture. The Superior Court received testimony from expert witnesses, resolved a wide range of disputed facts, and found that JACE had a valid easement in the second-floor wall, and that 477 Harrison's proposed destruction of the wall at the second-floor level would harm JACE's easement rights and harm JACE's building. As a result, the Superior Court entered Judgment declaring that JACE had valid easement rights in the wall of 477 Harrison's building and enjoined 477 Harrison from tearing down its wall at the second-floor level.

The cause of 477 Harrison's alleged damages was not JACE's filing a complaint seeking a declaratory judgment. 477 Harrison's damages, if any, were a result of the Court finding the questioned Indenture was valid and legally binding and therefore, 477 Harrison lacked the right

to tear down the wall at the second-floor level and destroy JACE's valid easement and damage JACE's property. What 477 Harrison decided to do within its development as to the second floor as a result of the court's decision upholding the easement was its decision and JACE cannot be found liable for any alleged damages resulting therefrom.

Conclusion

WHEREFORE, JACE Boston, LLC and Arthur Leon move for an order precluding 477 Harrison from introducing evidence regarding 477 Harrison's alleged damages for loss of value to the second floor of its property, including but not limited to 477 Harrison's claim of damages for the difference between the value of the second floor of its building as residential condominiums and the value of the second floor as commercial space.

Respectfully submitted,

JACE BOSTON, LLC and
ARTHUR LEON,
By their attorneys,

_/s/ Mark S. Furman_____

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Date: March 19, 2025

REQUEST FOR HEARING

Pursuant to Superior Court Rule 9C, Defendants JACE Boston, LLC, and Arthur Leon respectfully request a hearing on their foregoing *Motion in Limine* regarding to preclude 477 Harrison from presenting evidence of damages allegedly caused by the Wall Case.

/s/ Mark S. Furman
Mark S. Furman (BBO# 181680)

CERTIFICATE OF SERVICE

I, Mark S. Furman, hereby certify that on March 19, 2025, I caused a copy of the foregoing document to be served by email on Counsel for Plaintiff 477 Harrison Ave., LLC as follows:

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COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 15-0829-B

477 HARRISON AVE., LLC
Plaintiff,

v.

JACE BOSTON, LLC
and ARTHUR LEON,
Defendants.

JACE PARTIES' *MOTION IN LIMINE* REGARDING CONSTITUTIONAL DEFENSES

Defendants JACE Boston, LLC ("JACE") and Arthur Leon ("Leon," and together with JACE, the "JACE Parties") respectfully request that the Court enter an order precluding Plaintiff 477 Harrison Ave., LLC ("477 Harrison") from offering in support of its claims for abuse of process (Count I) and violation of Chapter 93A (Count II) evidence based on the JACE Parties' legitimate exercise of their constitutionally protected right to petition the government in the Wall Case, the 2012 Zoning Appeal, and the 2015 Zoning Appeal. As a matter of law, the JACE Parties are immunized from liability for exercising two of their fundamental constitutional rights: (1) the "natural, essential and unalienable right[]" to possess and protect property, as recognized by Article 106 of the Massachusetts Declaration of Rights (as amended); and (2) the JACE Parties' right to petition the government for redress, which the United States Supreme Court has described as being among "the most precious of the liberties safeguarded by the Bill of Rights."[1] *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967).

[1] In support of this motion, the JACE Parties also have submitted an Appendix of Documents (cited herein as "App. Ex. ___").

Under the standard articulated by the United States Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49 (1993), as recognized by the Supreme Judicial Court in *Bristol Asphalt Co., Inc. v. Rochester Bituminous Products, Inc.*, 493 Mass. 539 (2024), 477 Harrison cannot meet its burden to show that the Wall Case, the 2012 Zoning Appeal, and the 2015 Zoning Appeal were objectively baseless. As a matter of law, the JACE Parties' petitioning activity in these three cases is immunized and therefore cannot be a basis to hold the JACE Parties civilly liable in damages to 477 Harrison.[2] As a result, the only issues to be tried are (a) the abuse of process claim relating to the application for criminal complaint; and (b) the Chapter 93A claim to the extent that claim is based on matters other than the Wall Case, the 2012 Zoning Appeal, and the 2015 Zoning Appeal.

Procedural Background

After 477 Harrison filed its Amended Complaint in this action, the JACE Parties brought a special motion to dismiss pursuant to the anti-SLAPP statute, Mass. Gen. Laws ch. 231, § 59H, which motion was denied. The JACE Parties sought interlocutory review of the denial of the special motion to dismiss. On direct appellate review, the Supreme Judicial Court ("SJC") found that 477 Harrison failed to carry its burden to show that each of the Wall Case, the 2012 Zoning Appeal, and the 2015 Zoning Appeal lacked a reasonable basis in law or fact. *477 Harrison Ave., LLC v. JACE Boston, LLC*, 477 Mass. 162, 173 (2017). In making this determination, the SJC had before it, among other things, the decision in favor of the JACE Parties in the Wall Case, the JACE Parties' arguments in support of their standing to appeal the zoning relief at issue in the

[2] The JACE Parties asserted as affirmative defenses in their Answer to the Amended Complaint that they engaged in privileged petitioning activity protected by the First Amendment and the Massachusetts Declaration of Rights (Fifth and Sixth Affirmative Defenses, respectively). The JACE Parties in no way have waived these defenses. To the extent 477 Harrison argues otherwise, its argument is frivolous.

2012 Zoning Appeal, and the trial court's decision on 477 Harrison's motion for summary judgment based on standing in the 2015 Zoning Appeal. *See* App. Exs. 6, 15, 28.

On the same day the SJC issued its decision in this case in 2017, it announced in *Blanchard v. Steward Carney Hospital, Inc.*, 477 Mass. 141 (2017), the augmented *Duracraft* framework, under which a party opposing a special motion to dismiss could avoid dismissal if the trial court determined, in the exercise of its sound discretion, that the claim was not a SLAPP suit. *Blanchard*, 477 Mass. at 159. In light of *Blanchard*, the SJC remanded the JACE Parties' special motion to dismiss as to the abuse of process claim for consideration under the new framework. *See 477 Harrison Ave., LLC*, 477 Mass. at 176. On remand, the trial court found that 477 Harrison carried its burden under *Blanchard* and denied the special motion to dismiss.

In 2024, the SJC issued its decision in *Bristol Asphalt Co., Inc. v. Rochester Bituminous Products, Inc.*, 493 Mass. 539 (2024). In *Bristol Asphalt*, the SJC abandoned the augmented *Duracraft* framework and further held that the resolution of the constitutional issues surrounding the moving party's exercise of the right to petition which were not resolved at the special motion to dismiss stage would be addressed in the ordinary course of the litigation.[3]

Argument

In *Bristol Asphalt Co., Inc. v. Rochester Bituminous Products, Inc.*, 493 Mass. 539 (2024), the SJC expressly recognized that the denial of a special motion to dismiss under the

[3] In *Columbia Plaza Associates v. Northeastern University*, 493 Mass. 570 (2024), decided the same day as *Bristol Asphalt*, the SJC held that the standard announced in *Bristol Asphalt* applied to "cases in which an anti-SLAPP motion or appeal remains pending as of this court's issuance of the rescript in *Bristol Asphalt*." *Columbia Plaza Assocs.*, 493 Mass. at 578. The JACE Parties filed a motion to reconsider asserting that under the SJC's retroactivity analysis in *Columbia Plaza*, the new standard announced in *Bristol Asphalt* applied to the JACE Parties' special motion to dismiss 477 Harrison's Amended Complaint. The trial court denied the JACE Parties' motion for reconsideration. The JACE Parties reserve their rights to appeal that denial after judgment is entered in this case.

anti-SLAPP statute, Mass. Gen. Laws ch. 231, § 59H, would not foreclose the moving party's ability to assert constitutional defenses to claims based on the party's petitioning activity. Rather, the SJC fully expects that the substantive issue of the legitimacy of the petitioning activity will be sorted out "in the ordinary course of litigation." *Bristol Asphalt Co., Inc.*, 493 Mass. at 556.[4] In connection with its decision to eliminate the augmented *Duracraft* standard, the SJC explained:

> Importantly, this return to the traditional analysis at the threshold stage does not mean that a special motion proponent will be held liable for exercising his or her constitutional right to engage in legitimate petitioning activity merely because the special motion opponent advances a claim that is based only in part on said petitioning activity. Such petitioning may still be entitled to protection from liability under the State and Federal Constitutions as the case proceeds according to the ordinary litigation process.

Id.

In *Bristol Asphalt*, the SJC cited the Supreme Court's decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), to assess when petitioning activity loses its constitutional protection, *i.e.*, immunity from liability; only "sham" litigation is not constitutionally protected. In *Professional Real Estate Investors, Inc.*, the

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[4] To the extent 477 Harrison Ave. argues, as it did in the parties' Joint-Pre-Trial Memorandum dated December 3, 2021 ("Joint Pre-Trial"), that the JACE Parties' assertion of constitutional defenses is, in effect, an argument that the anti-SLAPP statute and/or the tort of abuse of process is unconstitutional, the SJC's rationale in *Bristol Asphalt* quickly disposes of that argument. The SJC explained the distinction between the "procedural protections of the special motion to dismiss" and the "substantive law" and the "ordinary course of litigation" as the vehicles to "sort[] out rights and responsibilities bound up in any surviving counts." *Bristol Asphalt Co., Inc.*, 493 Mass. at 556-57 (emphasis in original). That is, no tension exists between the immunity from suit that arises from the application of the anti-SLAPP statute and a party's raising during the litigation on the merits its entitlement to immunity from liability because it was engaged in legitimate petitioning activity. Nor does the assertion of a constitutional defense call into question the constitutionality or viability of abuse or process as a cause of action. The one cause of action that was the subject of the special motion to dismiss in *Bristol Asphalt* was abuse of process.

Supreme Court identified a two-part test for determining whether petitioning activity litigation constitutes a "sham," placing the burden to satisfy this test on the party seeking to establish the applicability of the "sham" exception. *See Professional Real Estate Investors, Inc.*, 508 U.S. at 60-61. "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized" and the sham exception must fail. *See id.* at 60. "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id.* The Supreme Court further made clear that "[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." *Id.* at 60, n. 5. The Supreme Court expressly cautioned that courts must "resist the understandable temptation to engage in *post hoc* reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation." *Id.* (internal quotation marks and citations omitted). Rather, the Supreme Court expressly acknowledged that a party may have "reasonable grounds for bringing suit" even when "the law or the facts appear questionable or unfavorable at the outset." *Id.* (internal quotation marks and citation omitted).

That the SJC in *Bristol Asphalt*, which involved a claim for abuse of process, cited *Professional Real Estate Investors, Inc.* makes clear that the SJC views *Professional Real Estate Investors, Inc.* as providing the framework for assessing whether petitioning activity should be granted immunity in general, not only in the antitrust context. Here, the Court should determine, as a matter of law, that the JACE Parties' petitioning activity for which 477 Harrison seeks to

hold them liable for abuse of process and violation of Chapter 93A was not objectively baseless and therefore is constitutionally protected.[5]

In addition to seeking to hold the JACE Parties liable for their legitimate exercise of their constitutional right to petition the government, 477 Harrison seeks to punish the JACE Parties for exercising their constitutionally protected right to possess and protect their property, which was at the core of each of the Wall Case, the 2012 Zoning Appeal, and the 2015 Zoning Appeal. 477 Harrison made it clear that it intended to remove the substantial majority of the north wall of its building in the area in which JACE asserted it had an easement. But for JACE's filing of the Wall Case asking the trial court to determine whether 477 Harrison had the right to destroy JACE's easement and demolish the majority of the second floor wall, JACE's property interest in the second floor wall would have been destroyed. Similarly, the 2012 Zoning Appeal and 2015 Zoning Appeal were the proper vehicles for challenging the zoning relief granted to 477 Harrison

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[5] Other courts have applied the *Noerr-Pennington* doctrine to common law claims, including in cases arising out of zoning challenges. *See, e.g.*, *Zeller v. Consolini*, 758 A.2d 376, 382 (Conn. App. Ct. 2000) (noting that the "*Noerr-Pennington* doctrine is a well established body of law applicable to a wide variety of situations involving petitioning activity, including local zoning and other municipality matters," and adopting "the *Noerr-Pennington* doctrine and its accompanying sham exception as the applicable analysis for cases such as this one"); *Cove Road Dev. v. Western Cranston Indus. Park Assocs.*, 674 A.2d 1234, 1237 (R.I. 1996) ("We reiterate here that the constitutional protection of the right to petition is no less compelling in the context of common law tort claims than in the framework of federal antitrust legislation."). To the extent 477 Harrison argues, as it did in the Joint Pre-Trial, that other states have "rejected attempts to extend the Noerr Pennington principal [sic] to abuse of process claims," this argument should be rejected because the case upon which 477 Harrison relied, *DirecTV, Inc. v. Zink*, 286 F. Supp. 2d 873 (E.D. Mich. 2003), is inapposite. In *DirecTV*, the court held that the *Noerr-Pennington* doctrine was inapplicable to a claim for abuse of process under Michigan law because the Michigan courts had redefined the elements of that tort. Under Michigan law, abuse of process only arises from "*subsequent* misconduct or abuse of proceedings, which occurs after the process has been initiated." *DirecTV, Inc.*, 286 F. Supp. 2d at 875 (emphasis in original). The court observed that the *Noerr-Pennington* doctrine, in contrast, "draws explicitly on jurisprudence for the common-law tort of wrongful civil proceedings, which is focused on the *instigation* of unreasonable proceedings." *Id.* (footnote omitted) (emphasis added).

which posed a unique risk of harm to the JACE Parties' property. Under the Agreement for Judgment entered in the 2012 Zoning Appeal, the parties, among other things, agreed to reserve their respective rights to seek and challenge any future zoning relief.

1. The Wall Case

Because "[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham," the Wall Case, as a matter of law, does not, and cannot, constitute sham litigation for the simple reason the JACE Parties prevailed in that case. *Professional Real Estate Investors, Inc.*, 508 U.S. at 60, n. 5. That is, the JACE Parties are entitled to constitutional immunity to the extent 477 Harrison seeks to assert claims against the JACE Parties based on the Wall Case.

After trial, the court entered judgment in favor of JACE, declaring, among other things, that (a) the Indenture and Agreement created an affirmative easement in favor of JACE's property; (b) the easement remains in existence, and has not been extinguished, irrespective of whether it is exercised, for so long as the building on the JACE property remains standing; and (c) 477 Harrison shall not take any action to demolish the area of the wall in which the easement exists. *See* App. Ex. 15. The trial court further found as a matter of fact that the building on the JACE Property would be harmed if 477 Harrison were allowed to take the wall down in the disputed area, both because doing so would (1) "eliminate the ability to tie the beams into the wall" and (2) "adversely affect the remaining portion of the wall through a process called elastic rebound." *Id.* at 5. The Appeals Court affirmed the trial court's decision. *See JACE Boston, LLC v. Holland Development LLC*, No. 15-P-388, 2016 Mass. App. Unpub. LEXIS 183 (Mass. App. Ct. Feb. 24, 2016) (copy attached as App. Ex. 23).

Because the JACE Parties cannot be held liable for abuse of process or violation of 93A based on its constitutionally protected petitioning activity, 477 Harrison should be precluded

from introducing evidence regarding the Wall Case in support of its abuse of process and 93A claims.

2. 2012 Zoning Appeal and 2015 Zoning Appeal

Similarly, the 2012 Zoning Appeal and the 2015 Zoning Appeal, as a matter of law, were not sham litigation and therefore cannot form the basis of 477 Harrison's abuse of process and 93A claims. As a result, 477 Harrison should be precluded from presenting any evidence regarding these cases in support of its claims.

A party has not engaged in sham litigation "[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome." *Professional Real Estate Investors, Inc.*, 508 U.S. at 60. Litigation is considered "objectively baseless" only if "no reasonable litigant could realistically expect success on the merits." *Id.* Both the 2012 Zoning Appeal and the 2015 Zoning Appeal, viewed objectively, were "reasonably calculated to elicit a favorable outcome." *Id.*

In both the 2012 Zoning Appeal and the 2015 Zoning Appeal, the JACE Parties asserted claims arising out of zoning relief granted to 477 Harrison by the City of Boston. By definition, in 2012 and again in 2015, 477 Harrison sought to develop its property in a manner that it was not otherwise entitled to as a matter of right. In both of the zoning appeals they filed, the JACE Parties challenged, among other things, overcrowding resulting from the violation of density requirements, including, the floor area limitation and the height limitation. Section 11 of the Boston Enabling Act provides that "[a]ny person aggrieved" by a decision of the Board of Appeal has standing to appeal that decision. 1956 Mass. Acts ch. 665, §11; *see also Epstein v. Bd. of Appeal of Boston*, 77 Mass. App. Ct. 752, 756 (2010). An abutter is presumed to be a person "aggrieved." *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996). Even if a defendant is able to rebut an abutter's presumption of standing, an abutter has

the opportunity to establish it is a person aggrieved, meaning that it suffers "some infringement of [its] legal rights." *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 700 (2012) (internal quotation marks and citation omitted).

As the immediate abutter to 477 Harrison's property, the JACE Parties were presumed to have standing to challenge the zoning relief granted to 477 Harrison in connection with the development of its property. The harm to the JACE Parties from the zoning relief granted to 477 Harrison was unique given JACE's building does not have its own wall along the property line with 477 Harrison's property; rather, JACE's building uses and ties into the north wall of the building on 477 Harrison's property by 20 beams. In addition, the foundation of the building on 477 Harrison's property is partly on the JACE Parties' property. In this context, the Court should find as a matter of law that the 2012 Zoning Appeal and the 2015 Zoning Appeal were not objectively baseless because they were "reasonably calculated to elicit a favorable outcome." *Professional Real Estate Investors, Inc.*, 508 U.S. at 60. That the 2015 Zoning Appeal ultimately proved unsuccessful does not deprive it of constitutional protection given it had an objectively reasonable basis. *See BE & K Construction Co., v. N.L.R.B.*, 536 U.S. 516, 531-532 (2002); *Professional Real Estate Investors, Inc.*, 508 U.S. at 60, n. 5.

Indeed, the trial court's decision granting 477 Harrison's motion for summary judgment in the 2015 Zoning Appeal demonstrates that appeal was not objectively baseless. The trial court recognized that JACE, as an abutter, had presumptive standing and further that JACE had presented evidence of potential harm to its property. The trial court acknowledged that it determined JACE did not have standing even though "there is no case directly on point" regarding whether JACE's concerns "over the structural integrity of JACE's building" arising from the variances granted to 477 Harrison can be a basis for standing. App. Ex. 28 at 6, 7.

Moreover, the SJC had before it the arguments in favor of standing in the 2012 Zoning Appeal and the trial court's decision in the 2015 Zoning Appeal and specifically decided that 477 Harrison failed to meet its burden to show these zoning appeals were without a reasonable basis in fact or law.

Conclusion

For the foregoing reasons, the JACE Parties respectfully request that the Court preclude 477 Harrison from claiming or mentioning to the jury that the Wall Case, the 2012 Zoning Appeal, and the 2015 Zoning Appeal were in any way wrongful. The abuse of process claim should be tried as to the application for criminal complaint only. The Chapter 93A claim should be tried to the extent it is based on matters other than the Wall Case, the 2012 Zoning Appeal, and the 2015 Zoning Appeal.[6]

Respectfully submitted,

JACE BOSTON, LLC and
ARTHUR LEON,
By their attorneys,

/s/ Mark S. Furman

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Dated: March 17, 2025

[6] The JACE Parties also reserve their right to assert at trial all defenses, including, but not limited to, constitutional defenses in connection with their petitioning activity.

CERTIFICATION PURSUANT TO SUPERIOR COURT RULE 9C

Counsel for Defendants JACE Boston, LLC and Arthur Leon hereby certifies that on March 13, 2025, Mark S. Furman, on behalf of Defendants JACE Boston, LLC and Arthur Leon, conferred with Andrew E. Goloboy, counsel for Plaintiff 477 Harrison Ave., LLC, by telephone in good faith to narrow the areas of disagreement between the parties. The parties were not able to resolve their differences.

/s/ Mark S. Furman
Mark S. Furman (BBO# 181680)

REQUEST FOR HEARING

Pursuant to Superior Court Rule 9C, Defendants for Defendants JACE Boston, LLC and Arthur Leon respectfully request a hearing on their *Motion in Limine* Regarding Constitutional Defenses.

/s/ Mark S. Furman
Mark S. Furman (BBO# 181680)

CERTIFICATE OF SERVICE

I, John D. Stuebing, hereby certify that on March 17, 2025, I caused a copy of the foregoing document and the document appendix to be served by email as set forth below:

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COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 15-0829-B

477 HARRISON AVE., LLC
Plaintiff,

v.

JACE BOSTON, LLC
and ARTHUR LEON,
Defendants.

477 HARRISON AVE., LLC'S OPPOSITION TO DEFENDANTS' MOTION IN *LIMINE* REGARDING CONSTITUTIONAL DEFENSES

Plaintiff, 477 Harrison Ave., LLC ("477 Harrison"), hereby submits its Opposition to the Defendants' Motion in *Limine* to preclude any and all evidence related to the Wall Case, the 2012 Zoning Appeal and the 2015 Zoning Appeal based upon constitutional defenses as articulated in *Professional. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.,* 508 U.S. 49 (1993) ("*Professional Real Estate*").

INTRODUCTION

After seven failed iterations of their anti-SLAPP Motion, the denial of their 12(b)(6) Motion and a complete denial of their Summary Judgment Motion, the Defendants now ask this Court--a decade after the Complaint was filed--to grant them immunity for their misconduct based upon constitutional grounds that they did not even deem worthy enough to advance on summary judgment. A fully briefed motion for summary judgment, not an eve-of-trial motion in *limine*, would have been the appropriate motion for the Defendants to utilize to argue their constitutional issues. And, most importantly, the summary judgment deadline expired 5 years

ago. Thus, the Defendants--if they truly believed their constitutional argument had any merit whatsoever--would have advanced their constitutional argument 5 years ago as opposed to advancing it three weeks before trial to short-circuit this decade's old, very expensive, litigation.

The sheer volume of the Defendants' 356 page "Appendix of Exhibits"--which accompanies their Motion In *Limine*--proves that it is completely inappropriate to address the constitutional issue in a Motion In *Limine*. Not only are the Defendants asking this Court to exclude, essentially, all of 477 Harrison's evidence related to its abuse of process and 93A claims, but it is also asking this Court to import the inapplicable *Noerr-Pennington* doctrine into this case even though the SJC, on numerous occasions, has held that the *Noerr-Pennington* doctrine applies only to antitrust cases. This Court should deem the Defendants' constitutional arguments untimely, inappropriate for a motion in *limine* and inapplicable.

Accordingly, this Court should deny the Defendants' Motion In *Limine* and allow the case to proceed to trial (in less than three weeks) as this Court, and the parties, envisioned after summary judgment. This Court certainly cannot allow the Defendants, at the 11th hour, to upend the trial, in a decade old case, with an inapplicable Hail Mary constitutional argument they never felt confident enough to advance at any earlier, and appropriate, stage of this litigation. 477 Harrison should be permitted to introduce evidence, and recover damages, related to the Wall Case, the 2012 Zoning Appeal and the 2015 Zoning Appeal.

BACKGROUND FACTS

This case arises out of 477 Harrison's attempts to re-develop its property located at 477-481 Harrison Avenue, Boston, Massachusetts (the "Property) and how JACE and its owner, Mr. Leon, (a competing real estate developer) spent many years telling people, neighborhood groups, the City of Boston, and courts about his plans to redevelop 1234 Washington Street, Boston,

Massachusetts (the "JACE Property") into a large residential or mixed use development. Once he learned that 477 Harrison intended to re-develop the Property, including installing windows with views of Boston that overlook the JACE Property, Leon resolved himself to (1) bankrupt 477 Harrison and purchase the Property for himself; (2) extract design concessions from 477 Harrison (including the removal of windows overlooking the JACE Property); (3) delay the redevelopment of the Property so that Leon could assemble plans for the development of the JACE Property first; and (4) slow down, or better yet stop, the development of the Property to force 477 Harrison into a cooperation agreement that would permit JACE to develop the JACE Property first and force a redesign of the Property.

After 477 Harrison rejected Mr. Leon's demands, JACE began a prolific campaign of opposition to the development of the Property, including the repeated institution of process with ulterior motives that delayed the redevelopment of the Property by years and caused 477 Harrison millions of dollars in damages. JACE's and Mr. Leon's use of process included appealing variances granted to 477 Harrison in 2012 and 2015 (the 2012 and 2015 Zoning Appeals), filing a declaratory judgment action asserting rights under an 1926 easement that could never be exercised and was not timely disclosed as a concern of Mr. Leon in numerous communications with 477 Harrison and the ZBA (the Wall Case), and Mr. Leon filing an application for a criminal complaint against 477 Harrison's principal, John Holland, which was dismissed and the Massachusetts Supreme Judicial Court found was devoid of any basis in law or fact.

Further, Mr. Leon submitted two false insurance claims and sought to leverage the 2012 and 2015 Zoning Appeals to obtain financial information from 477 Harrison that had no relationship whatsoever to those zoning appeals – which the Court rejected. Mr. Leon also

sought multiple injunctions in an effort to stop the removal of the wall--even in areas unrelated to the easement--and openly stated, when 477 Harrison inquired about Defendants' position on the penthouses in 2014, that "I can't allow you to have them; they will be expensive and people who have the money to buy them will have money to obstruct my development." These actions not only constitute an abuse of process, but they also violate G.L. c. 93A and, as a result, 477 Harrison suffered nearly $12 million in damages.

ARGUMENT

I. DEFENDANTS' MOTION IN LIMINE IS REALLY AN INAPPROPRIATE SECOND ATTEMPT AT SUMMARY JUDGMENT.

A motion in *limine* serves a very specific purpose. The purpose of a motion in *limine* is to prevent irrelevant, inadmissible or prejudicial matters from being admitted in evidence. *Com. v. Hood*, 389 Mass. 581, 594 (1983). Such motions are typically directed at specific items of evidence or testimony. *See e.g., Commonwealth v. Barber,* 14 Mass.App. 1008 (1982) (defendant's refusal to give urine sample); *Commonwealth v. Nighelli,* 13 Mass.App. 590 (references to defendant's other crimes); *Commonwealth v. Bailey,* 12 Mass.App. 104 (1981) (letter which indicated defendant had been in jail). These motions are typically filed prior to trial or, if unforeseen exigencies arise, they may be filed and heard during the course of a trial. *Com. v. Vaidulas*, 433 Mass. 247, 250 (2001).

A motion in *limine* "should be thoughtfully crafted by the movant and carefully evaluated by the judge to determine if it serves "a useful purpose."' *Com. v. Noble*, 24 Mass. App. Ct. 421, 423 (1987). A motion in *limine*, "should be used, if used at all, as a rifle and not as a shotgun." *Com. v. O'Malley*, 14 Mass. App. Ct. 314, 324–25 (1982). "That is, any such motion must be narrowly limited to focus on a discrete issue or item of anticipated evidence." *Id.*

Here, the Defendants --using their Motion In *Limine* as a shotgun--are attempting to exclude all of 477 Harrison's evidence related to the 2012 Zoning Appeal, the 2015 Zoning Appeal and the Wall Case based on the inapplicable *Noerr-Pennington* doctrine. The Defendants are seeking, in essence, a summary judgment decision that the *Noerr-Pennington* doctrine applies and that its application precludes 477 Harrison from introducing any evidence related to the 2012 Zoning Appeal, the 2015 Zoning Appeal and the Wall Case. 477 Harrison's evidence (related to the 2012 Zoning Appeal, the 2015 Zoning Appeal and the Wall Case) forms the lion's share of 477 Harrison's evidence to support its abuse of process and 93A claims against JACE (the only claims being tried in this case). This Court should not countenance JACE's attempt to skirt the long expired summary judgment deadline, on the eve of trial, with the faint hope that this Court will gut 477 Harrison's case through the application of the completely inapplicable *Noerr-Pennington* doctrine.

477 Harrison's Complaint was filed ten years ago. After two trips to the Supreme Judicial Court in 2017 and 2019 and the completion of discovery in 2019, the Defendants (in January 2020) served their Summary Judgment Motion. The Defendants' Summary Judgment Motion included a 20 page memorandum of law, and an appendix with over 1,200 pages of exhibits, that advanced numerous arguments. The Defendants did not make a single argument related to the *Noerr-Pennington* doctrine in their Summary Judgment Motion. On January 5, 2021, the Court denied the Defendants' Summary Judgment Motion in its entirety.

Summary judgment, with the detailed requirements of Rule 56 and Superior Court Rule 9A(b)(5), was the appropriate time for the Defendants to advance their specious argument based on the *Noerr-Pennington* doctrine. The Defendants' decision to ignore the *Noerr-Pennington* doctrine in their Summary Judgment Motion, and their last ditch effort to raise it half-heartedly

here--is proof positive that the Defendants know the *Noerr-Pennington* doctrine has no application. As such, this Court should deny the Defendants' Motion In *Limine* as an improper attempt to obtain summary judgment on the eve of trial through the misuse of a Motion in *Limine*.

II. THE *NOERR-PENNINGTON* DOCTRINE APPLIES ONLY TO ANTI-TRUST CASES.

Recently, in *Bristol Asphalt*, the SJC reiterated that the *Noerr-Pennington* doctrine is limited to antitrust cases. *See Bristol Asphalt Co., Inc. v. Rochester Bituminous Products, Inc.*, 439 Mass. 539, 556 (2024) ("petitioning activity with objectively reasonable basis is immunized from **antitrust liability**.") (emphasis added)[1]. Indeed, the SJC has recognized for, at least, the last 23 years that the *Noerr-Pennington* doctrine is limited to "the antitrust context." *See Sahli v. Bull HN Information Systems, Inc.*, 437 Mass. 696, 702 (2002); *see also Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 457 (2013)(the *Noerr-Pennington* doctrine is "a limit on antitrust liability."). And, more importantly, when the SJC was presented with the opportunity to address whether the *Noerr–Pennington* doctrine applied to common law tort claims, it declined. *Id.* at fn. 21. Instead, the SJC specifically noted that any previous extensions of the *Noerr–Pennington* doctrine were limited to "petitioning activity **under other [F]ederal statutes**." *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 457 (2013) (emphasis added).

In their Motion In *Limine*, the Defendants cite extensively to *Professional Real Estate Investors*. The Defendants spill much ink trying to twist the *sui generis Noerr-Pennington* doctrine into this common law abuse of process case. The US Supreme Court, however, stated specifically that the issue in *Professional Real Estate Investors* required the Court to:

> define the "sham" exception to the

[1] Specifically, the SJC cited to *Professional Real Estate Investors* which is an antitrust case applying the *Noerr-Pennington* doctrine.

> **doctrine of antitrust immunity** first identified in *Easter Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961). (emphasis added).

Without any logical analysis, the Defendants make the quantum leap that the SJC somehow imported the *Noerr-Pennington* doctrine into abuse of process cases in Massachusetts merely because the SJC (in *Bristol Asphalt*) cited to *Professional Real Estate Investors* once. The Defendants' reasoning is ludicrous. The Defendants completely ignore that in *Bristol Asphalt* the SJC cited *Professional Real Estate Investors* for the well-established proposition that certain petitioning activity, in antitrust cases, is immunized from liability. *Bristol Asphalt Co., Inc.*, 439 Mass. at 556.

Even more troubling is that the Defendants make the patently incorrect statement that, as a result of *Bristol Aspahlt*, "the SJC views *Professional Real Estate Investors, Inc.* as providing the framework for assessing whether petitioning activity should be granted immunity in general, not just in the antitrust context." The Defendants' blatant mischaracterization of the SJC's views in *Bristol Asphalt* is shocking especially in light of the already existing SJC precedent (including *Bristol Asphalt*) that the *Noerr-Pennington* doctrine is limited to antitrust cases. *See Sahli*, 437 Mass. at 702; *see also Evans*, 465 Mass. at 457 (2013).[2] The Defendants do not cite a single Massachusetts case where the *Noerr–Pennington* doctrine was extended beyond antitrust cases.[3]

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[2] It should not be lost on the Court that following the SJC's decision in *Bristol Asphalt*, the Defendants, as opposed to seeking leave to file a second motion for summary judgment on the *Noerr Pennington* doctrine, which they now claim provides them with immunity – instead, filed a Motion for Reconsideration of their anti-SLAPP Motion, which the Court quickly rejected because *Bristol Asphalt* has no applicability. *See* Docket Entry dated April 23, 2024 denying Docket No. 101. The Defendants' decision to pursue a seventh bite at the apple on their anti-SLAPP motion instead of advancing the *Noerr-Pennington* doctrine as a complete defense should be treated as an admission that the doctrine has no applicability to this case.

[3] The Defendants acknowledged that no Massachusetts cases exist to support their position that the *Noerr–Pennington* doctrine applies to this case because the Defendants were forced to cite cases from Connecticut and Rhode Island which, obviously, have no precedential value in this case. *See* Motion In *Limine*, p. 6, fn. 5.

In *Bristol Asphalt*, the SJC simply confirmed that the denial of a special motion to dismiss does not mean that a special motion proponent, such as the Defendants or anyone else, will be held liable for exercising their right to petition merely because their special motion to dismiss is denied. *Bristol Asphalt Co., Inc.*, 439 Mass. at 556. The SJC reminded litigants that there are other avenues, outside of the anti-SLAPP statute, that provide protection to petitioners. *Id.* The SJC used, as two examples, the *Sahli* and *Professional Real Estate Investors* cases to illustrate situations where petitioning activity is granted protection outside of the anti-SLAPP context. *Id.*

In *Sahli*, an employment discrimination case, the SJC balanced the employer's right to petition against the employee's right to be free from discrimination and retaliation. *Sahli*, 437 Mass. at 700-701. The SJC established a test, in the employment context, to protect legitimate petitioning activity. *Id.* at 704-705. The SJC stated that

> [w]hen an employer files a complaint seeking a declaration of its rights, duties, and obligations under a contract that it entered into with an employee, and the lawsuit has a legitimate basis in law and fact, the employer does not violate [anti-discrimination laws], absent evidence that the employer's purpose is other than to stop conduct it reasonably believes violates the terms of the contract.

Id. at 704-705. In *Professional Real Estate Investors*, an antitrust case, the US Supreme Court held that petitioning activity with objectively reasonable basis is immunized from antitrust liability. 508 US at 60-61.

Thus, the SJC in *Bristol Asphalt* was simply assuring litigants that there are protections (other than a special motion to dismiss) to shield their legitimate petitioning activity. The SJC certainly did not, as the Defendants suggest, import the *Noerr-Pennington* doctrine into abuse of process cases in Massachusetts. The Defendants' position is nothing more than fantasy.

To be sure, the Defendants--like the litigants in *Sahli* and *Professional Real Estate Investors*--are not without protection if they engaged in legitimate petitioning activity. The use of process "for an ulterior or illegitimate purpose" is a necessary element of an abuse of process claim. *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 631 (2010). Thus, as the United States Supreme Court acknowledged in *Professional Real Estate Investors*, the inability to prove an essential element of the tort of wrongful civil proceedings (or abuse of process) "is an absolute defense" available to defendants facing abuse of process claims. 508 U.S. at 63.

Consequently, the Defendants' "protection from liability" for "legitimate petitioning activity" outside of the anti-SLAPP statute, as explained in *Bristol Asphalt*, is the burden placed upon 477 Harrison to prove that the Defendants used process for an ulterior or illegitimate purpose. If the Defendants only engaged in legitimate petitioning activity, they will prevail and, therefore, be shielded from liability. As such, the Defendants' Motion In *Limine* should be denied as the unique and narrow *Noerr–Pennington* doctrine has no application to 477 Harrison's abuse of process and 93A claims.

Date Filed 4/2/2025 4:14 PM
Superior Court - Suffolk
Docket Number 1584CV00829

Respectfully submitted,

477 Harrison Ave., LLC

By its Attorney,

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Date Filed 4/2/2025 4:14 PM
Superior Court - Suffolk
Docket Number 1584CV00829

CERTIFICATE OF SERVICE

The above Opposition to Defendants Motion in Limine Regarding Constitutional Defenses was served upon counsel for the Defendants, Mark S. Furman Esquire via email on this 31st day of March 2025.

/s/ *Andrew E. Goloboy*

_____

Andrew E. Goloboy

PAGES: 1-75
EXHIBITS: NONE

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* * * * * * * * * * * * * * * * * *

477 HARRISON AVE., LLC

vs.

JACE BOSTON, LLC and
ARTHUR LEON

Docket No.: 1584CV00829

* * * * * * * * * * * * * * * * * *

HEARING: FINAL PRE-TRIAL CONFERENCE
BEFORE THE HONORABLE JAMES BUDREAU

Boston, Massachusetts
Courtroom 306
April 16, 2025

CAROLYN SPROUL
APPROVED COURT TRANSCRIBER

A P P E A R A N C E S

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the 2012, the same thing.

THE COURT: But isn't that argument? You're going to put in all these numbers, that's argument. That's not for an area for an expert to testify about, that's argument. I'm going to deny your request. I think you can do that very effectively. You can do that effectively with the jury. All those numbers will be in evidence. Motion is denied. Or motion not allowed.

MR. GOLOBOY: Granted with respect to Gilman --

THE COURT: Motion is allowed for the Plaintiff.

MR. GOLOBOY: -- and still under advisement with respect to Healy, right?

THE COURT: Yes. On Healy's it's under advisement.

Sorry, Attorney Furman?

MR. FURMAN: Okay. So, back to Healy?

THE COURT: Yeah.

MR. FURMAN: So, Your Honor, with regard to Healy, I mentioned Millennium Equity and what they -- you know, what the SJC said. So, JACE is entitled to put in evidence that it used the process for the purpose it was intended and under *Millennium* that it had reasonable grounds for using it.

Now, Mr. Healy is an expert on zoning. He's

permitted -- His whole career was --

THE COURT: I don't think there's any challenge to his expertise, at least I don't see one.

MR. FURMAN: And no court has ever ruled on whether or not they met the qualifications for a variance, which they did not, thank God. And it's a political process in the City of Boston and the real fight in the courts on variances, because they're so hard to be legally entitled to --

THE COURT: So you want to relitigate that whole issue?

MR. FURMAN: I don't want to relitigate the issue, but I do think that -- I do think that on the question of whether JACE had a reasonable basis to appeal to the Superior Court, I think it's in two parts -- did he have a reasonable basis to appeal based upon --

THE COURT: Well, let me ask the Plaintiff this. Are you arguing that he didn't have a basis to appeal?

MR. GOLOBOY: We're going to be arguing that --

THE COURT: His motive was --

MR. GOLOBOY: Was impure.

THE COURT: -- different?

MR. GOLOBOY: Yes.

THE COURT: Not that they didn't have a

legitimate -- You're not going to be outlining --

MR. GOLOBOY: It doesn't mean anything. They made this up. It's not for --

THE COURT: Well, putting aside, are you going to be arguing that he had no grounds whatsoever to, you know, appeal this judgment and that is the basis for --

MR. GOLOBOY: No. We're going to argue it was brought for ulterior motives to delay us, force redesigns, extract concessions out of us, give himself an advantage and --

THE COURT: That's my understanding.

MR. GOLOBOY: Yeah. But what's troubling to me is, keep hearing from Mr. Furman, we need to accept the *Wall* case, we need to accept the *Wall* case, but they want to reargue the other cases, the zoning cases, and he keeps saying whether JACE had a reasonable basis. Like I said, I don't think it means anything, but it's JACE, it's what Mr. Leon thought. It's not what Mr. Healy, a permitting lawyer, thinks, and the idea that he would get on the stand and say, Despite the fact ZBA granted variances, they weren't entitled to them. I think it's completely inappropriate and completely unduly prejudicial to 477 Harrison to relitigate something that legally has been

resolved.

MR. FURMAN: They should sign a stipulation that says there was a reasonable basis in fact and law for the *Wall* case in the two ZBA appeals. That --

THE COURT: Okay. Let's not -- Let's sit down and let Mr. Furman finish.

MR. FURMAN: They can then try to argue it was evil intent, if that's what they want to argue, but they can't have it both ways. They either agree that there was a reasonable basis in fact in *Wall* or they don't agree. And if they don't agree, then I think we should be able to put on evidence under *Millennium*.

THE COURT: How about that as a proposition?

MR. GOLOBOY: I don't think I have to enter into a stipulation on --

THE COURT: I'm not saying you have to do anything. I'm saying what about that as a preposition.

MR. GOLOBOY: Well, I don't agree to enter into a stipulation along those lines, because I don't believe *Millennium* allows experts to testify to the -- what was known to the defendants when they commenced process. And I think the motives are what matters and this is a red herring, but there is no scenario in which, from my perspective, Mr. Healy's testimony is

admissible in an abuse of process case. It's not relevant, it's not supported by any data, and it's completely unduly prejudicial and, worse, he tries to substitute his judgment for items that have already been decided by the parties with a legal responsibility to make those decisions.

THE COURT: Okay. Anything else, Attorney Furman?

MR. FURMAN: His evidence is, we say also, admissible on other issues, Your Honor, including damages. You know, 477 said, in writing, that if JACE appealed they were going to do the as of right project. They didn't do it. They just sat on their rights.

Mr. Healy, they didn't get a permit for construction until 2014. They're blaming 477 for delay. Mr. Healy would testify -- if I can grab his opinions?

THE COURT: Sure.

MR. FURMAN: Thank you, Your Honor.

THE COURT: Page 10?

MR. FURMAN: Page 10?

THE COURT: No. I'm sorry, that's a different --

MR. FURMAN: I mean, our position is Opinion 1 and 2 is he should be allowed to testify to, Your

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I, Carolyn Sproul, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

(The proper name spellings herein, unless otherwise indicated, are phonetically spelled.)

/s/ Carolyn Sproul — 12-08-25

Carolyn Sproul — Date

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SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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477 HARRISON AVE., LLC

vs.

JACE BOSTON, LLC and
ARTHUR LEON

Docket No.: 1584CV00829

HEARING: FINAL PRE-TRIAL CONFERENCE
BEFORE THE HONORABLE JAMES BUDREAU

Boston, Massachusetts
Room 306
April 18, 2025

CAROLYN SPROUL
APPROVED COURT TRANSCRIBER

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By: Mr. Albert A. DeNapoli, Esq.

(Court called to order.)

(2 p.m.)

(Defendant present.)

THE CLERK: Good afternoon. We're starting the Zoom conference. This is the continued final trial conference in the case of 477 Harrison Ave. versus JACE Boston, et al. Civil Action Number 2015-829. Will everybody on Zoom please introduce themselves to the Court and for the record, beginning with Plaintiff, please?

MR. GOLOBOY: Good afternoon, Your Honor. Andy Goloboy on behalf of the Plaintiff, 477 Harrison Ave. Along with me is Ronald Dunbar.

THE COURT: Okay. Attorney Goloboy and Attorney Dunbar, good afternoon.

MR. FURMAN: Good afternoon, Your Honor. Mark Furman appearing for JACE Boston, LLC and Arthur Leon, along with Arthur DeNapoli.

THE COURT: Okay. Attorney Furman and Attorney DeNapoli, good afternoon.

So, let's start out with the constitutional defenses that seems to be the core piece of the Defendants' position in this case. So, let's do that.

MR. FURMAN: Thank you, Your Honor.

So, Your Honor, we think there's two

constitutional rights involved in this case. The first the right to petition the government and, secondly, the right to protect property, which is explicit in the state Declaration of Rights.

In the last year, in the *Bristol Asphalt* case, an abuse of process case, the SJC wrote a recognition that there were constitutional defenses. This is totally unrelated to the procedural protections of the Anti-SLAPP statute, Your Honor, and those were to be sorted out in the ordinary course of litigation, and they cited a couple of cases. First, the United States Supreme Court's decision in professional real estate investors, in which the court adopted, in an antitrust case, this notion that petitioning activity that has a reasonable basis in fact and a reasonable basis in law is constitutionally immunized and that is a holding that was set out, that's been applied in other contexts we've cited in our memo various states that have used that same analysis in tort cases, in land use cases, and it is not limited to the anti-trust concept or

THE COURT: Has it ever been applied in Massachusetts in a common law tort?

MR. FURMAN: Your Honor, it's been applied in an employment discrimination case and that's the *Sally*

case. But, you know, the standard that we're talking about, Your Honor, in professional real estate investors, appears in the case that I submitted to you the other day, on page 7 of 15, about two thirds of the way down. It defines what sham petitioning is, in the paragraph that begins, "We now outline a two-part definition of sham litigation..." And the first part of the standard, which you don't go beyond, unless the Plaintiff meet this burden, it's got to show that it's objectively baseless in fact or law. In other words, it's a sham. There's no reasonable basis in fact or law for the petitioning activity. You only get to subjectivity once that is met.

Now, the *Sally* case of the Supreme Judicial Court, also cited professional real estate investors, and they did it in this context. In *Sally*, which is the third case that I submitted to Your Honor, the court in that case, a discrimination case was brought by an employee and a declaratory judgment action was brought by the employer in response, and the employee claimed that that was retaliation. And you don't have to go far into the opinion to see the holding. The holding appears, Your Honor, in the very first sentence of the decision on page 2. In this case, we hold that a lawsuit filed by an employer against the

former employee, who has lodged a charge of discrimination, is not an act of retaliation or interference in violation of the state's anti-discrimination laws, where the lawsuit had a legitimate basis in law and in fact. The court then went on to quote from professional real estate investors. Still, the only holding in the case is the first sentence in the case, but the quote appears on page 5, and it talks about the right to petition the government as one of the most precious liberties safeguarded by the Bill of Rights.

It cites to professional real estate investors as an antitrust case, also cites to a case in the labor relations area. And the next paragraph, Your Honor, the right to petition, however, is not absolute. For example, a baseless or sham litigation is not protected by the Constitution, and it defines what a sham is in the same way professional real estate investors does and quotes from it.

So, 477 does cite some dicta or, I'll call it, observation of the court. In *Sally*, later in the opinion, that's not part of the holding in which the court noted there was no evidence of intent in any event, Your Honor. But the core holding is that non-sham petitioning is constitutionally protected and

that's the burden is on the Plaintiff to show that the litigation, the *wall* case and the two ZBA appeals, did not have a legitimate basis in fact or a legitimate basis in law, and the court noted, in *Professional Real Estate Investors*, that whenever a party wins a case, by definition, it has a reasonable basis in fact and law. And, Your Honor, these cases are not decided based upon a trial and a jury. These cases were decided at summary judgment as --

THE COURT: Well, doesn't that beg the question as to why this was raised at summary judgment?

MR. FURMAN: Well, I'll tell you why it wasn't, Your Honor, because *Professional Real Estate Investors* had been not cited in an abuse of process case until 2024, Your Honor. We have constitutional defenses. There's no principle that says you waive them if you don't move on that basis at the summary judgment stage.

So, the first application and cite to *Professional Real Estate Investors* in an abuse of process claim was the SJC citation to it last year in *Bristol*. And in JACE 1, the Supreme Judicial Court decided that 477 failed to meet its burden that the *Wall* case and the two ZBA appeals did not have a reasonable basis in fact and law. They had before it

the arguments in the 2012 case; they had before it the decision on the *Wall* case; and they had before it the decision in 2017 on standing. And there's no question, the complaints say what they say, the decisions say what what they say, and the SJC's opinion says what it says.

Now, admittedly, that was done in the context of a special motion to dismiss, but what the court is saying in *Bristol Asphalt* last year is it's the same standard, can 477 show that there was no reasonable basis in fact or no reasonable basis in law. And I can cite for you in JACE case from 2017, Your Honor, where the court made that pronouncement on page 7, in the second whole paragraph, where the little (i), legitimacy of the defendant's petitioning activity, the court wrote, "The Plaintiff's abuse of process claim reps on numerous instances where the Defendants employed process and thereby engaged in petitioning activity. To defeat a special motion to dismiss, the Plaintiff must show that each such instance lacked a reasonable basis in law or fact, save for the application for criminal complaint, Holland, the Plaintiff, has not carried its burden."

So, that was the decision of the SJC in that context. Nothing is different, Your Honor. So, what

should go to the jury, Your Honor, we should be trying, is the application for criminal complaint and the 93A case that relates to the application for the criminal complaint. Those are the cases that should be tried. Everything else should be decided as a matter of law, we say, Your Honor, and that's our position, Your Honor. Thank you.

THE COURT: Okay. Attorney Goloboy.

MR. GOLOBOY: Actually, Your Honor, Attorney Dunbar is going to argue this one --

THE COURT: Attorney Dunbar. Excuse me.

MR. GOLOBOY: -- on behalf of the Plaintiff.

MR. DUNBAR: Good afternoon. Your Honor, so it does beg the question why wasn't this brought on summary judgment, and I think the reason is is JACE doesn't even believe that this *Noerr-Pennington* doctrine, which applies only to antitrust cases, and the case they keep citing, *Professional Real Estate Investors*, which simply defined a sham exception to antitrust liability, had absolutely no application here. And, as you know, a motion in limine is a very limited motion. It's supposed to be aimed to a discreet piece of evidence and they're now seeking summary judgment that somehow this unique *Noerr-Pennington* doctrine applies in an abuse of process

case in Massachusetts and thereby allows them to summary judgment on the issue of whether we can put in all of, essentially, the evidence of the abuse of process -- the 2012 zoning appeal, the 2015 zoning appeal, and the appeal in the *Wall* case.

And summary judgment, you know, this case was filed ten years ago. The summary judgment deadline expired five years ago, and when they had a chance to file summary judgment, they didn't hold back. They had a 20-page memo, they had 1200 pages of exhibits and did not advance the argument they're advancing today with respect to the *Noerr-Bennington* nowhere doctrine giving them somehow complete immunity from the abuse of process case and it's because it doesn't and they don't think it does, and they still don't think it does.

And to answer your other question, Your Honor, it has never been applied in Massachusetts; never, not once. And the two cases they cite -- there's a Rhode Island case, there's a Connecticut case -- and what the SJC has been saying in Massachusetts is that this is an antitrust doctrine. Even the *Sally* case that they cite to, if you look at *Sally* on page 702 it says, "Thus, in the antitrust context, the court has held that unless petition activities is both

abjectively and objectively a sham, it is immune from antitrust liability." The *Solly* case that, the *Evans* case says that and, more importantly, the *Professional Real Estate Investors* case said that. In *Professional Real Investors*, when the SJC cites to that case in *Bristol Asphalt*, it puts "petitioning activity with an objectively reasonable basis is immunized from antitrust liability. They didn't extend the *Noerr-Pennington* doctrine into abusive process cases in Massachusetts. Every SJC case on point has said this is an antitrust doctrine.

THE COURT: What accounts for the opening opinion in the *Sally* case, which states we're no -- the lawsuit had a legitimate basis in fact and law in fact?

MR. DUNBAR: Yeah. So, in the *Sally* case, which was also cited in *Bristol Asphalt*, the *Bristol Asphalt* SJC said, Look, just because we're denying your special motion to dismiss doesn't mean you don't have defenses. And here's two examples: (1) is a case in the employment context, which, Your Honor, this is not a case in the employment context --

THE COURT: But they're shifting presumptions in the employment context.

MR. DUNBAR: In the employment context, they came

up with a test, and they set forth the test, which is not the test in Massachusetts for an abuse of process case. So, if we were in a -- and it's not the *Noerr-Pennington* doctrine and its not the sham exception to the *Noerr-Pennington* doctrine that they're talking about in *Sally*. It's a test that the SJC came up with, on pages 704 and 705, that talks about when an employer files a complaint seeking a Declaration of Rights against an employee, whether that can be considered retaliation, and the court sets out a test in the anti-discrimination context that is to be applied, so there's no application. That test cannot be brought now over into an abusive process case.

And in *Sally*, as I cited earlier, the SJC recognizes, again, *Noerr-Pennington* is an antitrust doctrine, but there's a test now in the employment discrimination context, that can be applied to determine whether the petitioning activity of the employer could be considered retaliation against the employee for exercising his right, so it's an issue that's not in this case, it's a test developed not applicable to Massachusetts abuse of process cases. And as importantly, Your Honor, when the SJC was presented with the opportunity to do exactly what Attorney Furman is asking us to do, Hey, let's import

this *Noerr-Pennington* doctrine into court-based claims, they said no, we're not going to address that. So this is something the SJC had not even addressed when asked to do it or had the opportunity to do it.

The other thing, Your Honor, is that, you know, if there were cases they'd be citing, the only cases cited, Your Honor, were Rhode Island and Connecticut, and they have protection. And in *Professional Real Estate Developers -- Real Estate Investors,* the Supreme Court acknowledged, Well, in an abuse of process case, you have a complete defense, so the U.S. Supreme Court is saying if you're worried about an abuse of process case infringing on your right to petition, you have protection. You have protection and what the protection is is there is an element that's got to be proven by the plaintiff, that the process was used for an ulterior or illegitimate purpose, that's our burden.

If we fail, as they acknowledged in *Professional Real Estate Investors,* the US Supreme Court acknowledged that it's a complete defense if they engage in legitimate petitioning activity and we are unable to carry our burden of proof. So they have the protection that they're looking for. They certainly -- I understand they like the *Noerr-Pennington*

doctrine. They let it get the sham exception to antitrust liability. And if this were an antitrust case, we might -- you know, we'd have a longer discussion about it. But it has no application here and simply because the SJC in *Bristol Asphalt*, which was an Anti-SLAPP case, where they redefined what the test was in an Anti-SLAPP, just because they cited to *Professional Real Investors* once and for the proposition that it's an antitrust doctrine, the Defendants now think they can import that into this case simply because the *Bristol Asphalt* case happened to be an abuse of process case but was really an Anti-SLAPP case, that the SJC was creating a new standard. So you can't misquote or miscite the *Professional Relocate Investors* and say now we get the sham exception to the antitrust *Noerr-Pennington* doctrine in Massachusetts in tort cases. It's ludicrous. The SJC has never said it applies. The SJC has said the opposite. No cases in Massachusetts has ever said it applies, and they have the protection they're looking for. If we don't prove that their use of process was illegitimate or for an ulterior purpose, as the US Supreme Court has said, they have a complete defense.

THE COURT: Okay.

MR. FURMAN: Your Honor --

THE COURT: Yes. Go ahead.

MR. FURMAN: I appreciate Mr. Dunbar's argument, but he has no answer to the holding in the first sentence of the *Sally* case. There was no reason for for the court to cite *Professional Real Estate Investors* unless you thought it has relevance to an abuse of process claim. And the fact that the court used the same holding in *Sally* that the Supreme Court of the United States did in *Professional Real Estate Investors* and the first sentence makes it clear, Your Honor, that it does apply.

This is not an issue that we have raised on the verge of trial. This was briefed by the parties in the pretrial memo. We include it as the first unusual legal issue in that section, and we talked about *Professional Real Estate Investors*, we attached a copy of it to the pretrial, so any suggestion like this is like some sort of sandbag at the 11th hour is totally unfair. They've been on notice of the constitutional defense from the beginning. They've been on notice of our claims under *Professional Real Estate Investors*, but it's now time to decide what the jury decides and what can be decided as a matter of law, as the courts decided as a matter of law in *Sally* and *Professional Real Estate Investors*, with the benefit of the court

in JACE in 2017, where they said that they couldn't prove that the abuse of process -- that the *Wall* case and the two zoning appeals didn't have a reasonable basis in fact or in law, so that's the issue. Thank you.

THE COURT: Okay. I understand the issues.

In terms of lateness, I'm not going to find that this was filed so late that it does not warrant a decision by the Court, so that is preserved. But as to the underlying motion itself, the motion is denied for the reasons stated by the Plaintiff. I don't think the SJC, even in *Sally*, meant to suggest that it implies to anything beyond the context of an antitrust case in the context of federal statutes, and I think the SJC has not extended it to common law torts nor does it intend to, so that motion is denied. So, let's move forward on the other motions.

So, we have the motion on -- I think the other one that you wanted me to deal with today was the D'Angelo, motion in limine on Joseph D'Angelo, so let's address that.

MR. FURMAN: If I could just have a moment, Your Honor.

(Pause)

MR. FURMAN: So, Mr. D'Angelo, Your Honor, is

offered as an expert witness in the case.

THE COURT: Yes, I've read the motion.

MR. FURMAN: Okay. So, I mean, there is no disclosure that's consistent with the, you know, disclosure of obligations regarding experts, so I think our position is that -- and I'll be quite brief, Your Honor, since you indicated that you read everything -- is, you know, there's no methodology that's expressed in his affidavit, which you would expect someone who's appraising real estate as an expert to do. It's what JACE has referred to as ipsy dipsy. It's like it is because I say it is and there's no underlying methodology.

He doesn't define in his affidavit fair market value or market value. He lists a couple of properties, one in particular, but the process of appraisal and evaluating value requires looking at comparable properties and then making adjustments based upon the differences, because no two properties are the same. You know, the evidence in this case is going to be there that the Tremont Street property, the Chevron property -- that is really the sole property that he relies on -- has not had a single sale since 2013; not a single sale. And it is going to be undisputed that that property is of a totally

haven't yet decided whether I'm going to try to seek his testimony and ask the Court to allow that to occur remotely. So, you know, cases are old and we're all getting older as it is, and it certainly applies to Mr. Reamer. But he, as I mentioned, same issue on knowledge, motive, intent on an affidavit he filed in 2012. Some of what he would testify to relates to what the Plaintiff does as part of their case, and we don't exactly know where they're going to go now on some of these issues.

THE COURT: Right. And if doors are opened, doors are opened, and we'll address that as it goes. I agree with that, so we'll certainly keep an eye on things.

Okay. I understand the issues there. And now, finally, for I think Gilman, we already dealt with Gilman, correct?

MR. GOLOBOY: Yes, Your Honor.

THE COURT: So, really, the question is Healy's opinions, and he falls into the same kind of designation as Reamer in terms of, as the Plaintiff has said, kind of Monday morning quarter backing. Is there --

MR. GOLOBOY: Correct, Your Honor. Mr. Healy, you know, has nothing to do with any of the filings of

the lawsuit. They've just hired a zoning lawyer to basically say everything that Mr. Leon and JACE did was okay and that's not permissible under the law.

THE COURT: That's certainly isn't permissible. Attorney Furman, is there another reason why you're trying to put him in?

MR. FURMAN: Yes, Your Honor. The complexity of the development process, the role of the BRA, the role of the ZBA, what a variance is, what a special permit is, you know, the rights of an abutter. The jury is ill-equipped and lay witnesses are ill-equipped to communicate to the jury the intricacies of the zoning process. This is not a matter of common knowledge so, you know, I certainly respect the Court's decision on -- and that it will make on reasonableness, but this is a complicated area of the law and, you know, it's I think going to assist the jury, which is one of the standards for expert testimony, to understand the zoning process and understand what --

THE COURT: Well, within limits. I mean, I think you're right to some extent, but I am concerned that, you know, a witness like this could very easily turn to the subject matter without -- you know, very quickly on the underlying subject matter. Even if you're talking about an aggrieved person, you know,

that certainly I think would be permissible to define what that and even suggesting that Mr. Leon falls into that category. But, beyond that, I'm not sure how the testimony would be admissible on that subject matter, just using that as an example.

I understand explaining what the zoning process is, that might be helpful and I don't disagree with that; it might be helpful to the Court. But, again, going into a subject matter such as this was an appropriate filing or an appropriate appeal, that's beyond the scope of the appropriate testimony. Are you in agreement with that given my rulings?

MR. FURMAN: Well, given --

THE COURT: Given my rulings. You're not waiving anything by saying that, don't worry. I'm not trying to lead you into a trap. This is not federal court; I'm not trying to lead you into a trap.

MR. FURMAN: Thank you, Your Honor. I need all the help I can get to avoid falling into traps.

THE COURT: I'm not going to use any names of federal judges that I used to practice in front of who would do that to you; I'm not doing that.

MR. FURMAN: I understand what you're saying, Your Honor.

THE COURT: Okay. So, Attorney Goloboy, any

substantive reason why such an expert would not be helpful to a jury on those subject matters?

MR. GOLOBOY: Your Honor, I think the problem is they all lead to opinions for which they have --

THE COURT: Well, we're not going to permit opinions.

MR. GOLOBOY: Yeah. So, if I understand correctly, is that he's going to get up there and explain in order to get a permit you need to go to the ISD then the BRA and then the ZBA without any editorializing of stuff, because that's where I get concerned, is once he starts talking about, like your example, once a person aggrieved. In this case, the Court determined that Mr. Leon is not a person aggrieved, so he can't -- that sort of leaves the jury to think well, he could have been a person aggrieved.

MR. FURMAN: I think the issue, Your Honor, is who is the person aggrieved and at the time the suit was filed, Your Honor. When we talk about what parts of the 2017 decision are admissible, there was an easement case decided in 2016, a year after the 2015 ZBA case was filed and four years after the 2012 ZBA case, called *Picard*, where the SJC found that, notwithstanding the existence of an easement, there wasn't standing. It was cited in the 2017 decision.

The change --

THE COURT: Well, see, what I don't want to get confused with here, and I think this is potentially going down that road, is I don't think the parties, or at least my impression is that no is going to be arguing that these were inappropriate appeals on their face or inappropriate cases on their face. It's just that the motivation behind it, which is really what abuse of process is, the ulterior motive behind doing this was something different, something nefarious.

And if there is going to be some argument by the Plaintiff that the actual filings were inappropriate, that he knew he was going to lose it, you know, this was just ridiculous, you know, that's a different question, that may open some doors to responses. But if it is, this was done and ended up delaying the project and he had an ulterior motive for doing that and here it is, the ulterior motive is he wanted to build his own place and he wanted to bankrupt the 477. If that's what it is, then those -- anything regarding the underlying subject matters of those appeals -- the zoning appeals in the *Wall* case -- really are not even that much relevant, other than the fact they've been filed. So, you know, I do get concerned that the purpose of such a witness, it could very quickly veer

into some of the subject matter and, you know -- As a rebuttal witness maybe it might be appropriate, depending on how the case is approached and maybe that's where you should leave him, is to keep him in the shadows awaiting to see how the case is presented by the Plaintiff.

MR. FURMAN: Yes. I mean I think it's appropriate to decide this, you know, at the end of the Plaintiff's case, when they --

THE COURT: So why don't we reserve on that and see how the Plaintiff's case is put in and if it's as straightforward as Attorney Goloboy is suggesting, then there may be no need for him. And if it's not and it veers into areas that are problematic, we'll address it.

Attorney Goloboy?

MR. GOLOBOY: Thank you, Your Honor. With the one exception I did think you did rule on Wednesday, Opinion 5 is out, where Mr. Healy says 477 Harrison did not have a legitimate claim to recover damages allegedly resulting from the *Wall* case.

THE COURT: If that's what I said, I'll take a look at it again if necessary, but that would stand and, otherwise, we'll see where this goes and you can hold him as a rebuttal witness or as part of your case

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I, Carolyn Sproul, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

(The proper name spellings herein, unless otherwise indicated, are phonetically spelled.)

/s/ Carolyn Sproul 12-08-25

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VOLUME: II
PAGES: 1-151
EXHIBITS: 1-128

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* * * * * * * * * * * * * * * * * *

477 HARRISON AVE., LLC

vs. Docket No.: 1584CV00829

JACE BOSTON, LLC and
ARTHUR LEON

* * * * * * * * * * * * * * * * * *

TRIAL (BEFORE A JURY)
BEFORE THE HONORABLE JAMES BUDREAU

Boston, Massachusetts
Room 306
April 23, 2025

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APPROVED COURT TRANSCRIBER

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I N D E X

JURY IMPANELMENT	20
JURY CHARGE	67
OPENING STATEMENTS	
(By Plaintiff)	83
(By Defendants)	91

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
JOHN HOLLAND				
(By Mr. Goloboy)	99		X	
(By Mr. Furman)		X		X

EXHIBITS:		PAGE
1-125	Binder containing Exhibit Numbers 1 through 125	98
126	Email from John Holland to Arthur Leon; formerly Exhibit L for identification	126
127	BRA small project review filing, formerly Exhibit N for identification	129
128	Email from John Holland to Arthur Leon	136

in '011 was finalized, but it had not yet gotten the Boston Zoning Commission, which is another commission in Boston's vote to make it part of the permanent zoning, but that vote was coming in early 2012, so the expectation was the new zoning was going to be what came out of the strategic plan. So they wanted the project to conform to their strategic plan, which was about to become the zoning for that district.

Q And could you describe to the jury what you mean when you say the strategic plan and what did that entail?

A The strategic plan had basically -- it had uses that the city was pushing, like I said earlier, residential. They wanted more residences down in the neighborhood. They thought it was an area that was primed to -- they could infill with more housing. They also wanted to activate the streets with more retail. What had happened from the -- basically the 1910s, '20s, '30s, where a lot of this district was turned into manufacturing large blocks and the city's goal was to put back the original street grid of the city of Boston that existed before 1900. And, basically, within that street grid they were looking to create blocks that were more about 200 feet wide as opposed to blocks that were 4- and 500 feet so that it

would be more pedestrian friendly. And then the secondary goal for pedestrians was to make retail spaces on the ground level so they were active uses at ground level and then residential uses or office space above that.

Q And based off the new zoning that was coming, did you put together a plan for the design of 477 Harrison?

A I did. I analyzed the street grid that was in place. It seemed obvious to me that there was going to be a break in the street. There was about 270 feet between Savoy Street and where the edge of 477 Harrison was. I basically -- That matched basically the street grid that found its way down to Rollins Street and then Malden Street. They were all -- They ranged from 118 to 120 and then the next grouping would have been 177, so it was clear to me that this was an appropriate place to make a break in the street. It also would provide a southern elevation for the next block of buildings, which would be the next follow-on place, and it made a decent block between the edge of where 477 was and where Perry Street was. So I basically developed a set of plans expecting that what would have been a five-story brick wall, that that wall -- you can't just put a window in

a zero property line unless there's a street or some separation next to it, so what I did was I planned the building so that we removed a section of that wall, rebuilt a new wall that was set back ranging from 5 feet to 20 feet so that we could add windows and doors and balconies.

MR. GOLOBOY: Could you put up Exhibit 12, please? Slide that over a little bit, please.

Scroll down to page 2 and then to page 3, please.

Q Could you explain to the jury what they're seeing on page 2 of these plans?

A Sure. On page 2, it shows the location of 477 Harrison. It is between 485 Harrison, which would be -- I guess on this page would be to the south of it and then --

MR. GOLOBOY: Can you zoom in a little bit, please?

A -- and then the JACE property, which is basically to the north of this sheet and the rest of this sheet, so there's basically a building at 485 Harrison that's basically to the left. If you look at it from Harrison Avenue, that's about a seven-story building and it's got a solid wall against it, and then there's the JACE property to the north side of this, which is a one-story.

C E R T I F I C A T E

I, Carolyn Sproul, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, prepared to the best of my ability, from the audio recording produced by Court Personnel of the Superior Court Department court proceedings in the above entitled matter.

I, Carolyn Sproul, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Carolyn Sproul, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

(The proper name spellings herein, unless otherwise indicated, are phonetically spelled.)

/s/ Carolyn Sproul — 12-09-25

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NOTIFY

150

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 15-0829-B

477 HARRISON AVE., LLC Plaintiff, v. JACE BOSTON, LLC and ARTHUR LEON, Defendants.	)

DEFENDANTS' MOTION FOR DIRECTED VERDICT
AT CLOSE OF PLAINTIFF'S CASE

Pursuant to Mass. R. Civ. P. 50(a), Defendants JACE Boston, LLC ("JACE") and Arthur Leon ("Leon," and together with JACE, the "JACE Parties") respectfully request that the Court enter a directed verdict in their favor and against Plaintiff 477 Harrison Ave., LLC ("477 Harrison"). As grounds for this motion, the JACE Parties state that (1) 477 Harrison, after having put on its case-in-chief and having rested, failed to present sufficient evidence in support its claim for abuse of process (Count I); (2) the litigation privilege bars 477 Harrison from holding the JACE Parties liable based on, and/or to use as evidence of wrongdoing, statements made by the JACE Parties and/or their counsel in the contemplation of, institution of, and/or during litigation; and (3) the JACE Parties are entitled to judgment as a matter of law because 477 Harrison's claims are based on the JACE Parties' legitimate exercise of their right to petition the government and 477 Harrison failed to demonstrate that the JACE Parties' petitioning activity was objectively baseless.

4908-6781-7526

A. STANDARD OF REVIEW.

Even viewed in the light most favorable to 477 Harrison, the non-moving party, the evidence presented by 477 Harrison in its case-in-chief cannot "support a verdict" in its favor. *Porier v. Town of Plymouth*, 374 Mass. 206, 212 (1978). Rather, the JACE Parties are entitled to a judgment as a matter of law. *Donaldson v. Farrakhan*, 436 Mass. 94, 96 (2002) ("The judge must determine, on viewing the evidence in the light most favorable to the nonmoving party, whether a reasonable inference could be drawn in favor of the nonmoving party, or if the moving party is entitled to a judgment as a matter of law."); *Windross v. Village Automotive Group, Inc.*, 71 Mass. App. Ct. 861, 868 (2008) (holding that in reviewing a ruling on a motion for directed verdict the court asks "whether anywhere in the evidence from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff") (internal quotation marks and citation omitted). Any inferences drawn in 477 Harrison's favor must be reasonable, meaning that they must be based on "probabilities rather than possibilities" and must not be "the result of mere speculation and conjecture." *Porier*, 374 Mass. at 212 (internal quotation marks and citation omitted). Furthermore,"[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Donaldson*, 436 Mass. at 96 (internal quotation marks and citation omitted).

B. 477 HARRISON FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUPPORT ITS CLAIM FOR ABUSE OF PROCESS (COUNT I).

With respect to its claim for abuse of process, 477 Harrison was required to prove by a preponderance of the evidence as to each of the 2012 Zoning Appeal, the Wall Case, the 2015

Zoning Appeal, and the application for criminal complaint that the JACE Parties (a) used process (b) for an ulterior or illegitimate purpose and (c) caused damages to 477 Harrison. *See Psy-Ed Corp. v. Klein*, 459 Mass. 697, 713 (2011); *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 636 (2010); *Jones v. Brockton Pub. Mkts., Inc.*, 369 Mass. 387, 389-90 & n. 2 (1975); *Bristol Asphalt Co. v. Rochester Bituminous Prods.*, 2021 Mass. Super. LEXIS 1339, *20 (Mass. Super. Ct., Aug. 30, 2021) (holding that proceedings before town boards are not considered "process" for purposes of an abuse of process claim).

1. Insufficient Evidence of Ulterior or Illegitimate Purpose

Even viewing the evidence presented by 477 Harrison at trial in a light most favorable to it, a reasonable inference cannot be drawn in 477 Harrison's favor that the JACE Parties brought the 2012 Zoning Appeal, the Wall Case, the 2015 Zoning Appeal, and/or the application for criminal complaint for an ulterior or illegitimate purpose. 477 Harrison failed to present sufficient evidence to show with respect to the 2012 Zoning Appeal, the Wall Case, the 2015 Zoning Appeal, and the application for criminal complaint that:

- The JACE Parties used the process to accomplish some ulterior purpose for which the process was not designed or intended or that was not a legitimate purpose for the process. *See Psy-Ed Corp.*, 459 Mass. at 713; *Ladd v. Polidoro*, 424 Mass. 196, 198 (1997); *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 775 (1986); *Beecy v. Pucciarelli*, 387 Mass. 589, 595 (1982); *Wodinsky v. Kettenbach*, 86 Mass. App. Ct. 825, 836 (2015).
- The stated objective of the process was not the actual objective. *See Jones*, 369 Mass. at 391; *Silvia*, 35 Mass. App. Ct. at 454-55.

- The JACE Parties used the process to gain some collateral advantage not properly involved in the proceeding itself; that is, they used the process as a form of extortion. *See Cohen v. Hurley*, 20 Mass. App. Ct. 439, 442 (1985).
- There were no grounds to file each use of process. *See Millennium Equity Holdings,* 456 Mass. at 637.
- The JACE Parties knew the use of process was groundless. *See Psy-Ed Corp.*, 459 Mass. at 713; *Beecy,* 387 Mass. at 596; *Wodinsky*, 86 Mass. App. Ct. at 836; *Bednarz v. Bednarz*, 27 Mass. App. Ct. 668, 673 (1989).

2. Insufficient Evidence of Damages

Even viewing the evidence presented by 477 Harrison at trial in a light most favorable to it, a reasonable inference cannot be drawn in 477 Harrison's favor that the JACE Parties' use of process caused 477 Harrison to suffer any damages. 477 Harrison failed to present sufficient evidence to show as to each of the 2012 Zoning Appeal, the Wall Case, the 2015 Zoning Appeal, and the application for criminal complaint that:

- its alleged damages were the "natural and probable consequences" of each use of process. *Millennium Equity Holdings, LLC*, 456 Mass. at 645 (internal quotation marks and citation omitted).
- its alleged damages were anything other than speculative. *See Steele v. Kelley*, 46 Mass. App. Ct. 712, 741 n.28 (1999) (noting that damages cannot be speculative).
- it suffered any lost profits as a result of each use of process. *See, e.g.*, *Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 14 Mass. App. Ct. 396, 426 (1982); *see also Empire Today, LLC v. Nat'l Floors Direct, Inc.*, 788 F. Supp. 2d 7, 18-19 (D. Mass. 2011).

In addition, with respect to the application for criminal complaint, 477 Harrison also failed to present sufficient evidence to show that:

- 477 Harrison is responsible for or obligated to pay any legal fees incurred by John Holland in connection with the application for criminal complaint.
- 477 Harrison suffered any reputational harm as a result of the application for criminal complaint.
- 477 Harrison is entitled to recover for any reputational harm John Holland allegedly suffered as a result of the application for criminal complaint.
- 477 Harrison is entitled to recover for any emotional distress John Holland allegedly suffered as a result of the application for criminal complaint.

3. Insufficient Evidence of Lost Profits – 2012 Zoning Appeal, Wall Case, and 2015 Zoning Appeal

477 Harrison failed to present sufficient evidence of its alleged lost profits resulting from each of the 2012 Zoning Appeal, the Wall Case, and the 2015 Zoning Appeal. Even assuming 477 Harrison submitted sufficient evidence of its alleged increased costs from the 2012 Zoning Appeal and the 2015 Zoning Appeal, 477 Harrison failed to submit sufficient evidence of the value of the residential and commercial units. In particular, 477 Harrison relied exclusively on Mr. Holland's testimony regarding the value of the units. Mr. Holland's testimony is an insufficient basis on which the jury can find 477 Harrison suffered any lost profits.

Massachusetts recognizes a rebuttable presumption that an owner of real estate may express an opinion of its value. *CBI Partners Ltd. P'ship v. Chatham*, 41 Mass. App. Ct. 923, 924 (1996). The ability of an owner to express an opinion is not based on "holding the legal title," but on the owner's demonstrated "familiarity with the characteristics of the property, his

knowledge or acquaintance with its uses, and his experience in dealing with it."[1] *Id.* at 924-25 (assigning to the trial judge the responsibility to determine whether the owner "has the necessary knowledge and familiarity about his property to enable him to express his opinion about its market value"); *see also Blais-Porter, Inc. v. Simboli*, 402 Mass. 269, 272 (1988).

When an owner is permitted to testify regarding value, the owner offers an opinion on the actual fair market value of the property, real or personal, as of a particular point in time. *See, e.g., von Henneberg v. Generazio*, 403 Mass. 519, 524 (1988) (affirming admission of owner's testimony regarding value of damaged property); *Spinosa v. Tufts*, 98 Mass. App. Ct. 1, 11 (2020) (affirming damages award on claim for breach of contract based on owner's opinion of value of company as of time of breach); *Clapp v. Haynes*, 11 Mass. App. Ct. 895, 897 (1980) (reversing exclusion of owner's testimony of value of converted property, noting that "[f]air market value at the time and place of the conversion is the usual measure of damages for a wrongful seizure of property"). "A witness is competent to testify to the value of his own property if he is sufficiently familiar with it and if he can demonstrate an understanding of the relevant standard of value." *Clapp*, 11 Mass. App. Ct. at 897. In *Clapp*, the Court noted that the "definition of fair market value is the familiar one, i.e., the highest price which a hypothetical willing buyer would pay to a hypothetical willing seller in an assumed free and open market." *Id.* (permitting owner to testify regarding fair market value of personal property where owner's definition of market value . . . demonstrated an adequate understanding of the pertinent legal standard") (internal quotation marks and citation omitted).

---

[1] The same standard applies to a corporate officer testifying regarding the value of corporate property. *Blais-Porter, Inc. v. Simboli*, 402 Mass. 269, 273 (1988); *CBI Partners Ltd. P'ship*, 41 Mass. App. Ct. at 925.

Even assuming 477 Harrison could lay the necessary foundation for Mr. Holland's ability to offer a lay opinion as an owner regarding the fair market value of 477 Harrison's property, Mr. Holland did not purport to offer the type of opinion of fair market value about which owners are permitted to testify. Mr. Holland did not testify regarding his opinion of the fair market value of 477 Harrison's property as of a particular point of time. Instead, Mr. Holland testified about what his expectations were, namely, that the units would end up selling for $1,200 to $1,300 per square foot. This is not an opinion of the residential units' fair market value and is insufficient to support 477 Harrison's claim it suffered lost profits as a result of the JACE Parties' allegedly wrongful acts.

4. Insufficient Evidence of Damages and Causation – Wall Case

477 Harrison failed to present sufficient evidence to establish that the Wall Case was the cause of what it claims to be $6 million in damages it incurred as a result of not being able to tear down the north wall of its building at the second floor level so it could develop the second floor as residential units rather than commercial units.

477 Harrison's alleged damages – the difference in the value of the second floor developed as residential units versus the value of the second floor developed as commercial units – are not the "nature and probable consequence" of the filing of the Wall Cause. A declaratory judgment action does no more than ask the Court to determine the substantive rights of the parties. In the Wall Case, 477 Harrison and JACE had a dispute as to the validity of a recorded easement in the chain of title of both 477 Harrison and JACE. The easement had been granted by 477 Harrison's predecessor in title to JACE's predecessor in title in 1926.

The Superior Court held a multi-day non-jury trial on JACE's complaint seeking a declaratory judgment on the validity of the easement. The Superior Court received testimony from expert witnesses, resolved a wide range of disputed facts, and found that JACE had a valid

easement in the second-floor wall, and that 477 Harrison's proposed destruction of the wall at the second-floor level would harm JACE's easement rights and harm JACE's building. As a result, the Superior Court entered Judgment declaring that JACE had valid easement rights in the wall of 477 Harrison's building and enjoined 477 Harrison from tearing down its wall at the second-floor level.

The cause of 477 Harrison's alleged damages was not the JACE Parties' filing a complaint seeking a declaratory judgment. 477 Harrison's damages, if any, were a result of the Court finding the easement was valid and legally binding and, therefore, 477 Harrison lacked the legal right to tear down the wall at the second-floor level and destroy JACE's valid easement and damage JACE's property. Because 477 Harrison Ave. never had the legal right to redevelop the second floor of the 477 Harrison Ave. Property in a manner that interfered with JACE's easement, it never was entitled to realize the financial benefit from the redevelopment of the second floor into residential units with windows and balconies along the north wall. *See, e.g.*, *World Species List-Natural Features Registry Inst. v. Reading*, 75 Mass. App. Ct. 302, 310 (2009) (holding that the owner of a property subject to an easement, while entitled to use its property, is not permitted to "engage in activities that are inconsistent or materially interfere with a dominant owner's easement. The right of use arising out of [the] easement is superior to [the servient estate owner's] property interest, and the [servient estate owner] must avoid activities which are inconsistent with the [dominant estate owner's] use of the easement") (internal quotation marks and citations omitted) (alterations in the original).

Recognizing 477 Harrison Ave.'s damages theory with respect to the Wall Case would grant 477 Harrison Ave. a windfall and put it in a better position that it ever had the legal right to be. What 477 Harrison decided to do within its development as to the second floor as a result of

the Court's decision upholding the easement was its decision and the JACE Parties cannot be found liable for any alleged damages resulting therefrom.

C. THE LITIGATION PRIVILEGE PRECLUDES 477 HARRISON FROM SEEKING TO HOLD THE JACE PARTIES LIABLE FOR AND/OR TO USE AS EVIDENCE OF WRONGDOING STATEMENTS MADE IN CONTEMPLATION OF AND/OR IN CONNECTION WITH LITIGATION.

The litigation privilege precludes a party from being liable for "communications made by a party, witness, or attorney in connection with judicial proceedings or contemplated litigation." *Bassichis v. Flores*, 490 Mass. 143, 144 (2022). "[S]tatements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding are absolutely privileged provided such statements relate to that proceeding." *Sriberg v. Raymond*, 370 Mass. 105, 108 (1976). "The privilege applies regardless of malice, bad faith, or any nefarious motives . . . so long as the conduct complained of has some relation to the litigation." *Bassichis*, 490 Mass. at 150. Moreover, statements made in the preparation of and in the course of litigation may not be used as evidence of misconduct. *See Nnodim v. U.S. Bank Tr. Ass'n*, 703 F. Supp. 3d 296, 305-306 (D. Mass. 2023).

Any statements made by and/or actions taken by the JACE Parties or their attorneys in contemplation of or in connection with the 2012 Zoning Appeal are absolutely privileged by the litigation privilege and may not be a basis for liability. Similarly, any statements made by and/or actions action taken by the JACE Parties or their attorneys in contemplation of or in connection with the Wall Case, including, but not limited to, seeking an injunction, are absolutely privileged by the litigation privilege and may not be a basis for liability. The same is true for the 2015 Zoning Appeal. Any statements made by and/or actions taken by the JACE Parties or their attorneys in contemplation of or in connection with the 2015 Zoning Appeal, including, but not limited to, discovery sought from 477 Harrison in that action, are absolutely privileged by the

litigation privilege and may not be a basis for liability. Arthur Leon, individually, is entitled to the protection of the litigation privilege. Any statements made by and/or actions taken by Arthur Leon in contemplation of or in connection with the application for a criminal complaint are absolutely privileged by the litigation privilege and may not be a basis for liability.

D. THE JACE PARTIES ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THEY ENGAGED IN CONSTITUTIONALLY PROTECTED PETITIONING ACTIVITY.

In *Bristol Asphalt Co., Inc. v. Rochester Bituminous Products, Inc.*, 493 Mass. 539 (2024), the SJC expressly recognized that the denial of a special motion to dismiss under the first stage of the analysis under the anti-SLAPP statute, Mass. Gen. Laws ch. 231, § 59H, would not foreclose the moving party's ability to assert constitutional defenses to claims based on the party's petitioning activity. Because the SJC eliminated the "parsing" of claims at the first stage of the anti-SLAPP analysis, claims that are based in part on a party's petitioning activity will not be dismissed under the anti-SLAPP statute. That does not mean, however, the party loses its ability to defend itself on the grounds that it engaged in constitutionally protected petitioning activity. Indeed, the SJC fully expects that the substantive issue of the legitimacy of the petitioning activity will be sorted out "in the ordinary course of litigation." *Bristol Asphalt Co., Inc.*, 493 Mass. at 556. The SJC explained the distinction between the "procedural protections of the special motion to dismiss" and the "substantive law" and the "ordinary course of litigation" as the vehicles to "sort[] out rights and responsibilities bound up in any surviving counts." *Bristol Asphalt Co., Inc.*, 493 Mass. at 556-57 (emphasis in original). Whether assessed at the special motion to dismiss stage or later in the "ordinary course of litigation," the standard for determining whether a party's petitioning activity is constitutionally protected remains the same: Was there a reasonable basis in fact and law for the petitioning activity?

This is because the focus of the inquiry, whether at the special motion to dismiss stage under the anti-SLAPP statute or during "the ordinary course of litigation," is on the legitimacy of the petitioning activity on which the claim is based. The analysis does not take into consideration or turn on the nature or type of claim on which the petitioning activity is based. Rather, the assessment of whether the petitioning activity was legitimate is entirely independent of the elements of the claim which is based on the petitioning activity. Here, 477 Harrison has sought to confuse the analysis by asserting that the legitimacy of the JACE Parties' petitioning activity has to be viewed through the elements of 477 Harrison's abuse of process claim, arguing that the JACE Parties' petitioning activity cannot be assessed against an objective standard because, 477 Harrison maintains, the claim for abuse of process only considers the subjective motive of the JACE Parties. This is simply incorrect.

The JACE Parties are entitled to judgment as a matter of law to the extent 477 Harrison's abuse of process claim is based on the 2012 Zoning Appeal, the Wall Case, and the 2015 Zoning Appeal. The SJC previously found that 477 Harrison failed to carry its burden to show that these uses of process did not have a reasonable basis in fact or law. *See 477 Harrison Ave., LLC v. JACE Boston, LLC*, 477 Mass. 162, 173 (2017). In making this determination, the SJC had before it, among other things, the decision in favor of the JACE Parties in the Wall Case, the JACE Parties' arguments in support of their standing to appeal the zoning relief at issue in the 2012 Zoning Appeal, and the trial court's decision on 477 Harrison's motion for summary judgment based on standing in the 2015 Zoning Appeal. That is, the 2012 Zoning Appeal, the Wall Case, and the 2105 Zoning Appeal are constitutionally protected exercises of the JACE Parties' right to petition and therefore cannot be the basis for civil liability. *See, e.g., Sahli v. Bull HN Information Systems, Inc.*, 437 Mass. 696, 702 (2002) (explaining that the "United States

Supreme Court has recognized the right to petition the government, including the courts, as one of the most precious of the liberties safeguarded by the Bill of Rights," but noting that "[t]he right to petition is not, however, an absolute right. For example, baseless or sham litigation is not protected by the First Amendment") (internal quotation marks and citations omitted).

The United States Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), articulated a test to assess when petitioning activity loses its constitutional protection, *i.e.*, immunity from liability; only "sham" litigation is not constitutionally protected. Under the test set forth in *Professional Real Estate Investors, Inc.*, 477 Harrison had the burden to show that the JACE Parties' petitioning activity was objectively baseless. *See Professional Real Estate Investors, Inc.*, 508 U.S. at 60-61. 477 Harrison failed to present sufficient evidence to carry its burden.

Under *Professional Real Estate Investors, Inc.*, the two-part test first requires 477 Harrison to show that each of the JACE Parties' acts of petitioning "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized" and the sham exception must fail. *Professional Real Estate Investors, Inc.*, 508 U.S. at 60. "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id.* The Supreme Court further made clear that "[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." *Id.* at 60, n. 5. The Supreme Court expressly cautioned that courts must "resist the understandable temptation to engage in *post hoc* reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation." *Id.* (internal quotation marks and citations omitted). Rather, the Supreme Court expressly acknowledged that a party

may have "reasonable grounds for bringing suit" even when "the law or the facts appear questionable or unfavorable at the outset." *Id.* (internal quotation marks and citation omitted).

WHEREFORE, Defendants JACE Boston, LLC and Arthur Leon respectfully request that the Court enter a directed verdict in their favor and against Plaintiff 477 Harrison Ave., LLC pursuant to Mass. R. Civ. P. 50(a).

Respectfully submitted,

JACE BOSTON, LLC and
ARTHUR LEON,
By their attorneys,

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Dated: April 30, 2025

CERTIFICATE OF SERVICE

I, Mark S. Furman, hereby certify that on April 30, 2025, I caused a copy of the foregoing document to be served by hand on counsel for Plaintiff 477 Harrison Ave., LLC as set forth below:

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VOLUME: V
PAGES: 1-127
EXHIBITS: 145-147
I.D.: A-D

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* * * * * * * * * * * * * * * * * *

477 HARRISON AVE., LLC

vs. Docket No.: 1584CV00829

JACE BOSTON, LLC and
ARTHUR LEON

* * * * * * * * * * * * * * * * * *

TRIAL (BEFORE A JURY)
BEFORE THE HONORABLE JAMES BUDREAU

Boston, Massachusetts
Room 306
April 30, 2025

CAROLYN SPROUL
APPROVED COURT TRANSCRIBER

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By: Robert Leone, Esq.

I N D E X

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(By Mr. Goloboy)	X		35	
(By Mr. Furman)		10		48
CHRISTOPHER BASILE				
(By Mr. Dunbar)	55		X	
(By Mr. DeNapoli)		71		X
ARTHUR LEON				
(By Mr. Furman)	83		X	
(By Mr. Goloboy)		X		X

EXHIBITS:		PAGE
145	Appeals Court decision regarding the wall case, formerly Exhibit SSSSS for identification	14
146	Set of plans, formerly Exhibit AA for identification	41
147	Affidavit of Kathleen O'Donnell, formerly Exhibit HH for identification	125

IDENTIFICATION

A	Integrated business record, formerly Exhibit MMM for identification	9
B	Redacted docket sheet from the SJC case introduced on April 29, 2025	33
C	Letter from Attorney Goloboy to SJC (redacted)	33
D	SJC decision regarding Anti-SLAPP (redacted)	34

Q Could you state your full name and address, please?
A Arthur Leon, 98 Weatherbee Drive, Westwood.
Q And Mr. Leon, are you employed?
A Yes, I am.
Q What do you do?
A I'm an engineer.
Q And where do you work?
A At E. G. Leon Company and American Crane and Hoist.
Q And can you tell the jury what E. G. Leon and Company does?
A Electrical contracting.
Q And what type of projects?
A Industrial work.
Q And what is the location of E. G. Leon Company's business?
A 1234 Washington Street.
Q And are you currently the owner of E. G. Leon Company?
A Yes.
Q And how long have you worked for E. G. Leon Company?
A Since I was a teenager.
Q Is that more than 50 years ago?

A Yes.
Q And what do you do for E. G. Leon Company?
A Well, I'm the president, so I'm responsible for the operations, all the operations of the company.
Q And how long has E. G. Leon's business been operated out of 1234 Washington Street in the South End?
A Since 1978.
Q And before then you worked for E. G. Leon Company at a different location?
A Yes.
Q And was that in Quincy?
A Quincy.
Q And tell us a little bit about American Crane & Hoist Company (sic).
A America Crane and Hoist, we manufacture overhead cranes and monorails and wenches for industrial applications for factories.
Q And how long have you worked at American Crane and Hoist Corporation?
A Since 1971.
Q And where does American Crane and Hoist operate its business?
A 1234 Washington Street.
Q And since when?

A 1978.
Q Now, are you the owner of American Crane and Hoist?
A Yes.
Q And are you also the president?
A Yes.
Q And can you describe what you do for American Crane and Hoist?
A The same as E. G. Leon Company.
Q Now at some point you worked with your dad at these companies?
A Yes.
Q And what was your dad's name?
A Elias Leon.
Q And was he referred to as Lou?
A Yes.
Q And did he start E. G. Leon?
A Yes, he did.
Q And who started American Crane and Hoist?
A My father and I.
Q And --
A Excuse me. We purchased the company in 1971 that represented crane companies, and we eventually turned it into manufacturing.
Q Okay. And the manufacturing occurs at 1234

Washington Street?
A Yes.
Q At some point did you become an owner of 1234 Washington Street?
A Yes.
Q And when was that?
A In 1975.
Q And at some point thereafter -- In 1975, did you own 1234 Washington Street alone?
A My father and I purchased it.
Q And then at some point later did you become the sole owner of 1234?
A Yes.
Q Do you recall when that was?
A I think on my father's passing, but I'm not a hundred percent sure on that.
Q And was there a point in time that the title of the property at 1234 became owned by JACE Boston, LLC?
A Yes.
Q And do you recall approximately how many years ago that was?
A Possibly 20 years ago.
Q Can you describe for the jury and the Court your educational background?
A I'm an engineer. I graduated Northeastern

C E R T I F I C A T E

I, Carolyn Sproul, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, prepared to the best of my ability, from the audio recording produced by Court Personnel of the Superior Court Department court proceedings in the above entitled matter.

I, Carolyn Sproul, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Carolyn Sproul, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

(The proper name spellings herein, unless otherwise indicated, are phonetically spelled.)

/s/ Carolyn Sproul — 12-09-25

Carolyn Sproul
Approved Court Transcriber
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Date

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NOTIFY

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 15-0829-B

477 HARRISON AVE., LLC Plaintiff, v. JACE BOSTON, LLC and ARTHUR LEON, Defendants.	)

DEFENDANTS' MOTION FOR DIRECTED VERDICT
AT CLOSE OF PLAINTIFF'S CASE

Pursuant to Mass. R. Civ. P. 50(a), Defendants JACE Boston, LLC ("JACE") and Arthur Leon ("Leon," and together with JACE, the "JACE Parties") respectfully request that the Court enter a directed verdict in their favor and against Plaintiff 477 Harrison Ave., LLC ("477 Harrison"). As grounds for this motion, the JACE Parties state that (1) 477 Harrison, after having put on its case-in-chief and having rested, failed to present sufficient evidence in support its claim for abuse of process (Count I); (2) the litigation privilege bars 477 Harrison from holding the JACE Parties liable based on, and/or to use as evidence of wrongdoing, statements made by the JACE Parties and/or their counsel in the contemplation of, institution of, and/or during litigation; and (3) the JACE Parties are entitled to judgment as a matter of law because 477 Harrison's claims are based on the JACE Parties' legitimate exercise of their right to petition the government and 477 Harrison failed to demonstrate that the JACE Parties' petitioning activity was objectively baseless.

05/05/2025	Endorsement on Motion for Directed Verdict at Close of Plaintiff's Case (#150.0): DENIED Based upon the evidence viewed in the light most favorable to Plaintiff, sufficient evidence has been prosecuted for a reasonable jury to find by a preponderance of the evidence that Plaintiffs claim of abuse of process has been proved. (dated 4/30/2025)

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 15-0829-B

477 HARRISON AVE., LLC,
Plaintiff,

v.

JACE BOSTON, LLC
and ARTHUR LEON,
Defendants.

DEFENDANTS' REVISED PROPOSED JURY INSTRUCTIONS

Pursuant to Mass. R. Civ. P. 51(b), Defendants JACE Boston, LLC ("JACE") and Arthur Leon ("Arthur Leon," and together with JACE, the "JACE Parties") respectfully request that the Court submit the attached instructions to the jury at the trial of this matter.

The JACE Parties reserve their right to amend or supplement these instructions should the need so arise before the jury is instructed in this case.

Respectfully submitted,

JACE BOSTON, LLC AND ARTHUR LEON
by their attorneys,

/s/ Mark S. Furman

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Dated: May 3, 2025

CERTIFICATE OF SERVICE

I, Mark S. Furman, hereby certify that on May 3, 2025, I caused a copy of the foregoing document to be served by email on Counsel for Plaintiff 477 Harrison Ave., LLC as follows:

Andrew E. Goloboy, Esq.
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/s/ Mark S. Furman
Mark S. Furman (BBO# 181680)

CONSTITUTIONALLY PROTECTED PETITIONING ACTIVITY

1. In this case, the JACE Parties assert that they exercised their rights under the Federal and State constitutions to petition the government and protect their property.

2. Legitimate petitioning activity is entitled to constitutional protection, meaning that a party cannot be held liable to another party for legitimately exercising the right to petition. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49, 60-61 (1993); *Sahli v. Bull HN Information Systems, Inc.*, 437 Mass. 696, 696 (2002) ("In this case, we hold that a lawsuit filed by an employer against a former employee who has lodged a charge of discrimination is not an act of retaliation or interference in violation of the State's antidiscrimination laws where the lawsuit had a legitimate basis in law and in fact.").

3. The JACE Parties have a constitutional right to protect their property. *See* Massachusetts Declaration of Rights, Article 106.

4. 477 Harrison has the burden of proving that the 2012 Zoning Appeal was objectively baseless and that the JACE Parties had no realistic expectation of success on the merits. *See Professional Real Estate Investors*, 508 U.S. at 60.

5. If an objective litigant could conclude that the 2012 Zoning Appeal was "reasonably calculated to elicit a favorable outcome," then that suit is "immunized," *see Professional Real Estate Investors*, 508 U.S. at 60, meaning that the JACE Parties' petitioning activity is protected by the Constitution and you must find for the JACE Parties. In deciding the issue of whether the 2012 Zoning Appeal had a reasonable basis in fact and law, you are not to consider the JACE Parties' subjective motivation or intent. *See Professional Real Estate Investors*, 508 U.S. at 60.

6. 477 Harrison has the burden of proving that the Wall Case was objectively baseless and that the JACE Parties had no realistic expectation of success on the merits. *See Professional Real Estate Investors*, 508 U.S. at 60.

7. If an objective litigant could conclude that the Wall Case was "reasonably calculated to elicit a favorable outcome," then that suit is "immunized," *see Professional Real Estate Investors*, 508 U.S. at 60, meaning that the JACE Parties' petitioning activity is protected by the Constitution and you must find for the JACE Parties. In deciding the issue of whether the Wall Case had a reasonable basis in fact and law, you are not to consider the JACE Parties' subjective motivation or intent. *See Professional Real Estate Investors*, 508 U.S. at 60.

8. 477 Harrison has the burden of proving that the 2015 Zoning Appeal was objectively baseless and that the JACE Parties had no realistic expectation of success on the merits. *See Professional Real Estate Investors*, 508 U.S. at 60.

9. If an objective litigant could conclude that the 2015 Zoning Appeal was "reasonably calculated to elicit a favorable outcome," then that suit is "immunized," *see Professional Real Estate Investors*, 508 U.S. at 60, meaning that the JACE Parties' petitioning activity is protected by the Constitution and you must find for the JACE Parties. In deciding the issue of whether the 2015 Zoning Appeal had a reasonable basis in fact and law, you are not to consider the JACE Parties' subjective motivation or intent. *See Professional Real Estate Investors*, 508 U.S. at 60.

10. 477 Harrison has the burden of proving that the application for criminal complaint was objectively baseless and that Arthur Leon had no realistic expectation of success on the merits. *See Professional Real Estate Investors*, 508 U.S. at 60.

11. If an objective litigant could conclude that the application for criminal complaint was "reasonably calculated to elicit a favorable outcome," then that suit is "immunized," *see Professional Real Estate Investors*, 508 U.S. at 60, meaning that Arthur Leon's petitioning activity is protected by the Constitution and you must find for the JACE Parties. In deciding the issue of whether the application for criminal had a reasonable basis in fact and law, you are not to consider Arthur Leon's subjective motivation or intent. *See Professional Real Estate Investors*, 508 U.S. at 60.

12. "A winning lawsuit is by definition a reasonable effort at petitioning for redress" and is constitutionally protected. *Professional Real Estate Investors*, 508 U.S. at 60, n. 5.

13. A party may have "reasonable grounds for bringing suit" even when "the law or the facts appear questionable or unfavorable at the outset." *Professional Real Estate Investors*, 508 U.S. at 60, n. 5 (internal quotation marks and citation omitted).

14. Just because an action ultimately was unsuccessful does not mean it "must have been unreasonable or without foundation." *Professional Real Estate Investors*, 508 U.S. at 60, n. 5 (internal quotation marks and citations omitted).

15. If a suit is "reasonably calculated to elicit a favorable outcome," it is constitutionally protected. *Professional Real Estate Investors*, 508 U.S. at 60

16. Only if a suit that is "objectively baseless" is it possible for a party to lose its constitutional protection. *Professional Real Estate Investors*, 508 U.S. at 60.

The JACE Parties' Petitioning is Constitutionally Protected As a Matter of Law

17. I instruct you that the JACE Parties had a reasonable basis in fact and law for filing the 2012 Zoning Appeal. *See 477 Harrison Ave., LLC v. JACE Boston, LLC*, 477 Mass. 162, 173-74. Therefore, you must find for the JACE Parties on 477 Harrison's abuse of process claim to the extent it is based on the 2012 Zoning Appeal.

18. I instruct you that the JACE Parties had a reasonable basis in fact and law for filing the Wall Case. *See 477 Harrison Ave., LLC v. JACE Boston, LLC*, 477 Mass. 162, 173-74. Therefore, you must find for the JACE Parties on 477 Harrison's abuse of process claim to the extent it is based on the Wall Case.

19. I instruct you that the JACE Parties had a reasonable basis in fact and law for filing the 2015 Zoning Appeal. *See 477 Harrison Ave., LLC v. JACE Boston, LLC*, 477 Mass. 162, 173-74. Therefore, you must find for the JACE Parties on 477 Harrison's abuse of process claim to the extent it is based on the 2015 Zoning Appeal.

Constitutionally Protected Petitioning Activity (Alternative Request)
(Only to be given in the event the Court refuses to instruct the jury as to each act of petitioning being constitutionally protected as a matter of law)

20. Unless you find that 477 Harrison has met its burden to prove that the filing of the 2012 Zoning Appeal had no reasonable basis in fact or law, you must find for the JACE Parties on 477 Harrison's abuse of process claim to the extent it is based on this act of petitioning.

21. Unless you find that 477 Harrison has met its burden to prove that the filing of the Wall Case had no reasonable basis in fact or law, you must find for the JACE Parties on 477 Harrison's abuse of process claim to the extent it is based on this act of petitioning.

22. Unless you find that 477 Harrison has met its burden to prove that the filing of the 2015 Zoning Appeal had no reasonable basis in fact or law, you must find for the JACE Parties on 477 Harrison's abuse of process claim to the extent it is based on this act of petitioning.

23. Unless you find that 477 Harrison has met its burden to prove that the filing of the application for criminal complaint had no reasonable basis in fact or law, you must find for the JACE Parties on 477 Harrison's abuse of process claim to the extent it is based on this act of petitioning.

24. In considering whether 477 Harrison has met its burden to prove that any act of petitioning on which its abuse of process claim is based lacked a reasonable basis in fact or law, you may consider the evidence, including the following:

a. The legal standard for granting a variance

b. An abutter's presumptive standing to appeal a decision of the Board of Appeals

c. The affidavit of Kathleen O'Donnell the JACE Parties had prior to filing the Wall case

d. The Agreement for Judgment entered in the 2012 Zoning Appeal

e. 477 Harrison's ability to finance the purchase price for the 477 Harrison property even though it knew the JACE Parties had a right to appeal any zoning relief it obtained

f. 477 Harrison's ability to finance the cost of constructing the as-of-right project

g. 477 Harrison's ability to make reasonable use of its property without a variance

h. The Judgment in the Wall Case

i. All information of which JACE and/or Arthur Leon had knowledge as of the time the petitioning activity occurred.

ABUSE OF PROCESS
(ALTERNATIVE REQUEST)
(FOR EACH USE OF PROCESS WHICH IS NOT CONSTITUTIONALLY PROTECTED EITHER AS A MATTER OF LAW OR AS A MATTER OF FACT)

25. Only if you find that one or more of the acts of petitioning which form the basis of 477 Harrison's abuse of process claim had no reasonable basis in fact or law do you consider the instructions I will give you on abuse of process.

26. To recover on a claim for abuse of process, 477 Harrison must prove to you by a preponderance of the evidence as to each of the 2012 Zoning Appeal, the Wall Case, the 2015 Zoning Appeal, and the application for criminal complaint that the JACE Parties (a) used process (b) for an ulterior or illegitimate purpose and (c) caused damages to 477 Harrison. *See Psy-Ed Corp. v. Klein*, 459 Mass. 697, 713 (2011); *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 636 (2010); *Jones v. Brockton Pub. Mkts., Inc.*, 369 Mass. 387, 389-90 & n. 2 (1975); *See Bristol Asphalt Co. v. Rochester Bituminous Prods.*, 2021 Mass. Super. LEXIS 1339, *20 (Mass. Super. Ct., Aug. 30, 2021) (holding that proceedings before town boards are not considered "process" for purposes of an abuse of process claim).

27. I instruct you that no process was issued against 477 Harrison regarding the application for criminal complaint.

28. If you find that the application for criminal complaint was issued against John Holland in his capacity as a representative of Holland Construction and not against 477 Harrison, then you must find that no process was issued against 477 Harrison in connection with the application for criminal complaint.

29. Only if you find that 477 Harrison carried its burden of proving that the filing of the 2012 Zoning Appeal did not have a reasonable basis in fact or law, may you consider

whether 477 Harrison has met its burden of proof to show that the 2012 Zoning Appeal was an abuse of process.

30. Only if you find that 477 Harrison carried its burden of proving that the filing of the Wall Case did not have a reasonable basis in fact or law, may you consider whether 477 Harrison has met its burden of proof to show that the Wall Case was an abuse of process.

31. Only if you find that 477 Harrison carried its burden of proving that the filing of the 2015 Zoning Appeal did not have a reasonable basis in fact or law, may you consider whether 477 Harrison has met its burden of proof to show that the 2015 Zoning Appeal was an abuse of process.

32. Only if you find that the application for criminal complaint was filed against John Holland in his capacity as a representative of 477 Harrison and that there was not a reasonable basis in fact or law for the application for criminal complaint, may you consider whether 477 Harrison has met its burden of proof to show that the application for criminal complaint was an abuse of process.

33. If you find that JACE did not have an ulterior purpose in filing the 2012 Zoning Appeal, you must find for the JACE Parties with respect to 477 Harrison's claim for abuse of process to the extent it is based on the 2012 Zoning Appeal.

34. If you find that JACE did not have an ulterior purpose in filing the Wall Case, you must find for the JACE Parties with respect to 477 Harrison's claim for abuse of process to the extent it is based on the Wall Case.

35. If you find that JACE did not have an ulterior purpose in filing the 2015 Zoning Appeal, you must find for the JACE Parties with respect to 477 Harrison's claim for abuse of process to the extent it is based on the 2015 Zoning Appeal.

36. If you find that Arthur Leon did not have an ulterior purpose in filing the application for criminal complaint, you must find for the JACE Parties with respect to 477 Harrison's claim for abuse of process to the extent it is based on the application for criminal complaint.

Abuse of Process – Ulterior Purpose

2012 Zoning Appeal

37. 477 Harrison must prove that JACE filed the 2012 Zoning Appeal for an ulterior or illegitimate purpose. That means 477 Harrison must show JACE filed the 2012 Zoning Appeal to accomplish some ulterior purpose for which a zoning appeal was not designed or intended or that was not a legitimate purpose for a zoning appeal. *See Psy-Ed Corp.*, 459 Mass. at 713; *Ladd v. Polidoro*, 424 Mass. 196, 198 (1997); *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 775 (1986); *Beecy v. Pucciarelli*, 387 Mass. 589, 595 (1982); *Wodinsky v. Kettenbach*, 86 Mass. App. Ct. 825, 836 (2015).

38. If the stated objective of the 2012 Zoning Appeal, to challenge the basis for the Boston Board of Appeal's approval of the variances that 477 Harrison was seeking, was the actual objective, then there is no abuse of process. *See Jones*, 369 Mass. at 391; *Silvia*, 35 Mass. App. Ct. at 454-55.

39. 477 Harrison cannot carry its burden to show JACE filed the 2012 Zoning Appeal for an ulterior purpose by showing only that the JACE Parties used process to vex, annoy, or harass 477 Harrison. *See Psy-Ed Corp.*, 459 Mass. at 713-14.

40. Rather, 477 Harrison must show that JACE filed the 2012 Zoning Appeal to gain some collateral advantage not properly involved in the proceeding itself; in other words, a form of extortion. *See Cohen v. Hurley*, 20 Mass. App. Ct. 439, 442 (1985).

41. Whether JACE had grounds to file the 2012 Zoning Appeal is relevant to assessing whether the JACE Parties had an ulterior purpose. *See Millennium Equity Holdings,* 456 Mass. at 637.

42. Whether JACE had a basis in fact or law to file the 2012 Zoning Appeal is evidence you must consider in analyzing whether the JACE Parties had an ulterior purpose in using this process.

43. Even if 477 Harrison proves that JACE knew or should have known the 2012 Zoning Appeal was groundless, 477 Harrison still has to prove the existence of an ulterior purpose. *See Psy-Ed Corp.*, 459 Mass. at 713; *Beecy,* 387 Mass. at 596; *Wodinsky*, 86 Mass. App. Ct. at 836; *Bednarz v. Bednarz*, 27 Mass. App. Ct. 668, 673 (1989).

44. Finding that the filing of the 2012 Zoning Appeal was not groundless is evidence that the process was not used for an ulterior purpose.

45. There is no evidence that the 2012 Zoning Appeal was groundless.

46. In considering whether JACE had an ulterior purpose in filing the 2012 Zoning Appeal, you may consider the evidence, including the following:

a. The legal standard for granting a variance

b. An abutter's presumptive standing to appeal a decision of the Board of Appeals

c. 477 Harrison's ability to finance the purchase price and construction loan for its property even though it knew the JACE Parties had a right to appeal any zoning relief it obtained

d. The Agreement for Judgment entered in the 2012 Zoning Appeal

e. 477 Harrison's ability to finance the cost of constructing the as-of-right project

f. All information known to JACE and/or Arthur Leon at the time the 2012 Zoning Appeal was filed.

47. If you find that the purpose of the 2012 Zoning Appeal was to appeal the zoning relief 477 Harrison obtained from the Boston Board of Appeal, you must find that the 2012 Zoning Appeal was not an abuse of process.

48. If you find that a purpose of the 2012 Zoning Appeal was to appeal the zoning relief 477 Harrison obtained from the Boston Board of Appeal, you must find that the 2012 Zoning Appeal was not an abuse of process.

49. Even if you find that JACE possessed an improper motive for filing the 2012 Zoning Appeal, if you find JACE also filed the 2012 Zoning Appeal for the purpose for which such appeals are filed, there was no abuse of process.

50. "[I]f process is employed for its intended legal purpose, there can be no abuse of process even if the person also possessed an improper motive." *Pan American Airways, Corp. v. Barnes*, C.A. No. 04-10515-JLT, 2005 U. S. Dist. LEXIS 53723 at*9 (D. Mass. Oct. 19, 2005).

Wall Case

51. 477 Harrison must prove that JACE filed the Wall Case for an ulterior or illegitimate purpose. That means 477 Harrison must show JACE filed the Wall Case to accomplish some ulterior purpose for which a declaratory judgment action was not designed or intended or that was not a legitimate purpose for a declaratory judgment action. *See Psy-Ed Corp.*, 459 Mass. at 713; *Ladd v. Polidoro*, 424 Mass. 196, 198 (1997); *Datacomm Interface,*

Inc. v. Computerworld, Inc., 396 Mass. 760, 775 (1986); *Beecy v. Pucciarelli*, 387 Mass. 589, 595 (1982); *Wodinsky v. Kettenbach*, 86 Mass. App. Ct. 825, 836 (2015).

52. If the stated objective of the Wall Case, to seek a declaration from the Court as to the rights of the parties in the wall, was the actual objective, then there is no abuse of process. *See Jones*, 369 Mass. at 391; *Silvia*, 35 Mass. App. Ct. at 454-55.

53. 477 Harrison cannot carry its burden to show JACE filed the Wall Case for an ulterior purpose by showing only that the JACE Parties used process to vex, annoy, or harass 477 Harrison. *See Psy-Ed Corp.*, 459 Mass. at 713-14.

54. Finding that the filing of the Wall Case was not groundless is evidence that the process was not used for an ulterior purpose.

55. There is no evidence that the Wall Case was groundless.

56. Rather, 477 Harrison must show that JACE filed the Wall Case to gain some collateral advantage not properly involved in the proceeding itself; in other words, a form of extortion. *See Cohen v. Hurley*, 20 Mass. App. Ct. 439, 442 (1985).

57. Whether JACE had grounds to file the Wall Case is relevant to assessing whether the JACE Parties had an ulterior purpose. *See Millennium Equity Holdings,* 456 Mass. at 637.

58. Whether JACE had a basis in fact or law to file the Wall Case is evidence you must consider in analyzing whether the JACE Parties had an ulterior purpose in using this process.

59. That JACE won the Wall Case means JACE had grounds to file that case.

60. In considering whether JACE had an ulterior purpose in filing the Wall Case, you may consider the evidence, including the following:

a. The JACE building is tied into the north wall of the 477 Harrison building by 20 beams

b. The building on the JACE property is the same building that was located on the property when the Indenture was entered into

c. The opinion of Attorney Kathleen O'Donnell in her affidavit regarding the rights of the JACE property under the Indenture provided notice to JACE of JACE's rights under the Indenture.

d. 477 Harrison's plans for the redevelopment of its property included the installation of windows on the second floor of the north wall in the area in which JACE had a property right

e. All information known to JACE and/or Arthur Leon at the time the Wall Case was filed.

f. The trial court in the Wall Case determined that the JACE property would be adversely affected by the removal of the north wall of 477 Harrison's property at the second floor.

61. If you find that the purpose of the Wall Case was to declare the parties' respective rights under the Indenture, you must find that the Wall Case was not an abuse of process.

62. If you find that a purpose of the Wall Case was to declare the parties' respective rights under the Indenture, you must find that the Wall Case was not an abuse of process.

63. Even if you find that JACE possessed an improper motive for filing the Wall Case, if you find JACE also filed the Wall Case for the purpose of seeking a declaration of the rights of the parties in the wall, there was no abuse of process.

64. "[I]f process is employed for its intended legal purpose, there can be no abuse of process even if the person also possessed an improper motive." *Pan American Airways, Corp. v. Barnes*, C.A. No. 04-10515-JLT, 2005 U. S. Dist. LEXIS 53723 at*9 (D. Mass. Oct. 19, 2005).

2015 Zoning Appeal

65. 477 Harrison must prove that JACE filed the 2015 Zoning Appeal for an ulterior or illegitimate purpose. That means 477 Harrison must show JACE filed the 2015 Zoning Appeal to accomplish some ulterior purpose for which a zoning appeal was not designed or intended or that was not a legitimate purpose for a zoning appeal. *See Psy-Ed Corp.*, 459 Mass. at 713; *Ladd v. Polidoro*, 424 Mass. 196, 198 (1997); *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 775 (1986); *Beecy v. Pucciarelli*, 387 Mass. 589, 595 (1982); *Wodinsky v. Kettenbach*, 86 Mass. App. Ct. 825, 836 (2015).

66. If the stated objective of the 2015 Zoning Appeal, to challenge the basis for the Boston Board of Appeal's approval of the variances that 477 Harrison was seeking, was the actual objective, then there is no abuse of process. *See Jones*, 369 Mass. at 391; *Silvia*, 35 Mass. App. Ct. at 454-55.

67. 477 Harrison cannot carry its burden to show JACE filed the 2015 Zoning Appeal for an ulterior purpose by showing only that the JACE Parties used process to vex, annoy, or harass 477 Harrison. *See Psy-Ed Corp.*, 459 Mass. at 713-14.

68. Finding that the filing of the 2015 Zoning Appeal was not groundless is evidence that the process was not used for an ulterior purpose.

69. There is no evidence that the 2015 Zoning Appeal was groundless.

70. The fact that JACE lost the 2015 Zoning Appeal is not evidence that the appeal was groundless.

71. Rather, 477 Harrison must show that JACE filed the 2015 Zoning Appeal to gain some collateral advantage not properly involved in the proceeding itself; in other words, a form of extortion. *See Cohen v. Hurley*, 20 Mass. App. Ct. 439, 442 (1985).

72. Whether JACE had grounds to file the 2015 Zoning Appeal is relevant to assessing whether the JACE Parties had an ulterior purpose. *See Millennium Equity Holdings,* 456 Mass. at 637.

73. Whether JACE had a basis in fact or law to file the 2015 Zoning Appeal is evidence you must consider in analyzing whether the JACE Parties had an ulterior purpose in using this process.

74. Even if 477 Harrison proves that JACE knew or should have known the 2015 Zoning Appeal was groundless, 477 Harrison still has to prove the existence of an ulterior purpose. *See Psy-Ed Corp.*, 459 Mass. at 713; *Beecy,* 387 Mass. at 596; *Wodinsky*, 86 Mass. App. Ct. at 836; *Bednarz v. Bednarz*, 27 Mass. App. Ct. 668, 673 (1989).

75. In considering whether JACE had an ulterior purpose in filing the 2015 Zoning Appeal, you may consider the evidence, including the following:

a. The legal standard for granting a variance

b. An abutter's presumptive standing to appeal a decision of the Board of Appeals

c. The Agreement for Judgment entered in the 2012 Zoning Appeal

d. 477 Harrison's ability to finance the cost of constructing the as-of-right project

e. 477 Harrison's ability to make reasonable use of its property without a variance

f. All information known to JACE and/or Arthur Leon at the time the 2015 ZBA Appeal was filed.

76. If you find that the purpose of the 2015 Zoning Appeal was to appeal the zoning relief 477 Harrison obtained from the Boston Board of Appeal, you must find that the 2015 Zoning Appeal was not an abuse of process.

77. If you find that a purpose of the 2015 Zoning Appeal was to appeal the zoning relief 477 Harrison obtained from the Boston Board of Appeal, you must find that the 2015 Zoning Appeal was not an abuse of process.

78. Even if you find that JACE possessed an improper motive for filing the 2015 Zoning Appeal, if you find JACE also filed the 2015 Zoning Appeal to appeal the zoning relief 477 Harrison obtained from the Boston Board of Appeal, there was no abuse of process.

79. "[I]f process is employed for its intended legal purpose, there can be no abuse of process even if the person also possessed an improper motive." *Pan American Airways, Corp. v. Barnes*, C.A. No. 04-10515-JLT, 2005 U. S. Dist. LEXIS 53723 at*9 (D. Mass. Oct. 19, 2005).

Application for Criminal Complaint

80. 477 Harrison must prove that Arthurs Leon filed the application for criminal complaint against 477 Harrison or John Holland in his capacity as a representative of 477 Harrison. If the application for criminal complaint was filed against John Holland in his capacity as a representative of Holland Construction, you must find for the JACE Parties on this issue.

81. Even if you find that the application for criminal complaint was filed against John Holland in his capacity as a representative of 477 Harrison, 477 Harrison must prove that Arthur Leon filed the application for criminal complaint for an ulterior or illegitimate purpose. That means 477 Harrison must show Arthur Leon filed the application for criminal complaint to

accomplish some ulterior purpose for which an application for a criminal complaint was not designed or intended or that was not a legitimate purpose for an application for a criminal complaint. *See Psy-Ed Corp.*, 459 Mass. at 713; *Ladd v. Polidoro*, 424 Mass. 196, 198 (1997); *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 775 (1986); *Beecy v. Pucciarelli*, 387 Mass. 589, 595 (1982); *Wodinsky v. Kettenbach*, 86 Mass. App. Ct. 825, 836 (2015).

82. If the stated objective of the application for a criminal complaint, to protect JACE's property from trespassing by Holland Construction, was the actual objective, then there is no abuse of process. *See Jones*, 369 Mass. at 391; *Silvia*, 35 Mass. App. Ct. at 454-55.

83. 477 Harrison cannot carry its burden to show Arthur Leon filed the application for a criminal complaint for an ulterior purpose by showing only that Arthur Leon used process to vex, annoy, or harass 477 Harrison. *See Psy-Ed Corp.*, 459 Mass. at 713-14.

84. Rather, 477 Harrison must show that Arthur Leon filed the application for criminal complaint to gain some collateral advantage not properly involved in the proceeding itself; in other words, a form of extortion. *See Cohen v. Hurley*, 20 Mass. App. Ct. 439, 442 (1985).

85. Whether Arthur Leon had grounds to file the application for criminal complaint is relevant to assessing whether the JACE Parties had an ulterior purpose. *See Millennium Equity Holdings,* 456 Mass. at 637.

86. Whether Arthur Leon had a basis in fact or law to file the application for criminal complaint is evidence you must consider in analyzing whether the JACE Parties had an ulterior purpose in using this process.

87. Even if 477 Harrison proves that Arthur Leon knew or should have known the application for criminal complaint was groundless, 477 Harrison still has to prove the existence of an ulterior purpose. *See Psy-Ed Corp.*, 459 Mass. at 713; *Beecy,* 387 Mass. at 596; *Wodinsky*, 86 Mass. App. Ct. at 836; *Bednarz v. Bednarz*, 27 Mass. App. Ct. 668, 673 (1989).

88. In considering whether Arthur Leon had an ulterior purpose in filing the application for criminal complaint, you may consider the evidence, including the following:

a. Holland Construction was conducting the work on the north wall of its property

b. The manner and length of time Holland Construction had been using the roof of the JACE Property for staging and other construction-related activities

c. The email communications between Arthur Leon and John Holland as the President of Holland Construction regarding Holland Construction's continued presence on the roof of the JACE property

d. Holland Construction's failure to remove staging and other items from the roof of the JACE property by the date Holland Construction stated its use of the roof of the JACE property would be completed

e. The photographs demonstrating Holland Construction's use of the JACE property as well as the debris left on the roof of the JACE property

f. The advice Arthur Leon received from the police department before filing the application for criminal complaint

89. If you find that the purpose of the application for criminal complaint was to prevent Holland Construction from continuing to trespass on the JACE Parties' property, you must find that the application for criminal complaint was not an abuse of process.

90. If you find that a purpose of the application for criminal complaint was to prevent Holland Construction from continuing to trespass on the JACE Parties' property, you must find that the application for criminal complaint was not an abuse of process.

91. Even if you find that Arthur Leon possessed an improper motive for filing the application for a criminal complaint, if you find Arthur Leon also filed the application for a criminal complaint to prevent Holland Construction from continuing to trespass on the JACE Parties' property, there was no abuse of process.

92. "[I]f process is employed for its intended legal purpose, there can be no abuse of process even if the person also possessed an improper motive." *Pan American Airways, Corp. v. Barnes*, C.A. No. 04-10515-JLT, 2005 U. S. Dist. LEXIS 53723 at*9 (D. Mass. Oct. 19, 2005).

Abuse of Process – Damages

93. Even if you find that 477 Harrison has proven that the JACE Parties had an ulterior purpose in filing the 2012 Zoning Appeal, you must find for the JACE Parties unless 477 Harrison proves by a preponderance of the evidence that it suffered damages as a result of the filing of the 2012 Zoning Appeal. *See Jones*, 369 Mass. at 389.

94. 477 Harrison must prove that any damages it claims to have suffered were the "natural and probable consequences" of the filing of the 2012 Zoning Appeal. *Millennium Equity Holdings, LLC*, 456 Mass. at 645 (internal quotation marks and citation omitted).

95. 477 Harrison must prove its damages with a reasonable degree of certainty; damages cannot be speculative. *See Steele v. Kelley*, 46 Mass. App. Ct. 712, 741 n.28 (1999).

2012 Zoning Appeal

96. For 477 Harrison to meet its burden of proof, 477 Harrison must prove it suffered lost profits as a result of the filing of the 2012 Zoning Appeal; that is, it is necessary to consider both 477 Harrison's alleged increased costs and any increased revenue and/or value it received. *See, e.g.*, *Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 14 Mass. App. Ct. 396, 426 (1982); *see also Empire Today, LLC v. Nat'l Floors Direct, Inc.*, 788 F. Supp. 2d 7, 18-19 (D. Mass. 2011).

97. In considering whether 477 suffered damages as a result of an abuse of process based on the 2012 Zoning Appeal, you may consider the evidence, including the following:

a. The changes in the market over the period September 2013 through June 2019 in the South End

b. The changes in the market value of the commercial unit over the period September 2013 through June 2019

c. The changes in the market value of the residential units on floors 3-5 over the period September 2013 through June 2019

d. The changes in the market value of the penthouse units over the period September 2013 through June 2019

e. 477 Harrison's reservation of the right to redevelop the second floor for residential use for a period of 25 years.

98. JACE cannot be liable for 477's alleged damages based on John Holland's mistaken belief that he could do an as of right project if JACE filed the 2012 ZBA appeal.

99. You may not consider Mr. Holland's testimony about what he projected or expected to receive from sales of the units at 477 Harrison's property.

Wall Case

100. Even if you find that 477 Harrison has proven that the JACE Parties had an ulterior purpose in filing the Wall Case, you must find for the JACE Parties unless 477 Harrison proves by a preponderance of the evidence that it suffered damages as a result of the filing of the Wall Case. *See Jones*, 369 Mass. at 389.

101. 477 Harrison must prove that any damages it claims to have suffered were the "natural and probable consequences" of the filing of the Wall Case. *Millennium Equity Holdings, LLC*, 456 Mass. at 645 (internal quotation marks and citation omitted).

102. 477 Harrison must prove its damages with a reasonable degree of certainty; damages cannot be speculative. *See Steele v. Kelley*, 46 Mass. App. Ct. 712, 741 n.28 (1999).

103. For 477 Harrison to meet its burden of proof, 477 Harrison must prove it suffered lost profits as a result of the filing of the Wall Case; that is, it is necessary to consider both 477 Harrison's alleged increased costs and any increased revenue and/or value it received. *See, e.g.*, *Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 14 Mass. App. Ct. 396, 426 (1982); *see also Empire Today, LLC v. Nat'l Floors Direct, Inc.*, 788 F. Supp. 2d 7, 18-19 (D. Mass. 2011).

104. In considering whether 477 Harrison suffered damages as a result of an abuse of process based on the Wall Case, you may consider the evidence, including the following:

a. The changes in the market value of the commercial unit over the period September 2013 through June 2019

b. The cost of building out the second floor for commercial use as compared to the cost of building out the second floor for residential use

c. 477 Harrison's reservation of the right to redevelop the second floor for residential use for a period of 25 years

d. 477 Harrison's knowledge of the existence of the Indenture at the time it developed its plans to install windows on the second floor of the north wall

e. The existence of an easement in the north wall of the 477 Harrison property running in favor of the JACE Parties' property

f. 477 Harrison has no legal right to demolish the portion of the north wall in which the JACE Parties have an easement for so long as the building on the JACE Parties' property remains standing.

105. JACE cannot be liable for any alleged damages by 477 Harrison as a result of 477 Harrison's reliance on any information it received from its title company about the continuing existence of the easement in the wall.

106. I instruct you that you cannot find that 477 Harrison suffered any damages as a result of the Wall Case since 477 did not have the legal right to tear down the second floor

2015 Zoning Appeal

107. Even if you find that 477 Harrison has proven that the JACE Parties had an ulterior purpose in filing the 2015 Zoning Appeal, you must find for the JACE Parties unless 477 Harrison proves by a preponderance of the evidence that it suffered damages as a result of the filing of the 2015 Zoning Appeal. *See Jones*, 369 Mass. at 389.

108. 477 Harrison must prove that any damages it claims to have suffered were the "natural and probable consequences" of the filing of the 2015 Zoning Appeal. *Millennium Equity Holdings, LLC*, 456 Mass. at 645 (internal quotation marks and citation omitted).

109. 477 Harrison must prove its damages with a reasonable degree of certainty; damages cannot be speculative. *See Steele v. Kelley*, 46 Mass. App. Ct. 712, 741 n.28 (1999).

110. 477 Harrison has the burden of proving it suffered lost profits as a result of the filing of the 2015 Zoning Appeal; that is, it is necessary to consider both 477 Harrison's alleged increased costs and any increased revenue and/or value it received. *See, e.g.*, *Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 14 Mass. App. Ct. 396, 426 (1982); *see also Empire Today, LLC v. Nat'l Floors Direct, Inc.*, 788 F. Supp. 2d 7, 18-19 (D. Mass. 2011).

111. In considering whether 477 suffered damages as a result of an abuse of process based on the 2015 Zoning Appeal, you may consider the evidence, including the following:

a. The changes in the market over the period September 2013 through June 2019 in the South End

b. The changes in the market value of the penthouse units over the period September 2013 through June 2019.

Application for Criminal Complaint

112. Even if you find that 477 Harrison has proven that Arthur Leon had an ulterior purpose in filing the application for criminal complaint, you must find for the JACE Parties unless 477 Harrison proves by a preponderance of the evidence that it suffered damages as a result of the filing of the application for criminal complaint. *See Jones*, 369 Mass. at 389.

113. 477 Harrison must prove that any damages it claims to have suffered were the "natural and probable consequences" of the filing of the application for criminal complaint. *Millennium Equity Holdings, LLC*, 456 Mass. at 645 (internal quotation marks and citation omitted).

114. 477 Harrison must prove its damages with a reasonable degree of certainty; damages cannot be speculative. *See Steele v. Kelley*, 46 Mass. App. Ct. 712, 741 n.28 (1999).

115. The only damages 477 Harrison could possibly have incurred in connection with the application for a criminal complaint were the attorneys' fees it voluntarily paid on behalf of

Holland Construction in defending the application for criminal complaint. *See Millennium Equity Holdings, LLC*, 456 Mass. at 645-46.

116. In considering whether 477 Harrison suffered damages as a result of an abuse of process based on the application for criminal complaint, you may consider the evidence, including the following:

a. Whether 477 Harrison had any obligation to defend the application for criminal complaint which was brought against Holland Construction and John Holland as he is the President of Holland Construction.

b. Whether 477 Harrison had any obligation to pay the legal fees in defending the application for criminal complaint which was brought against Holland Construction and John Holland as he is the President of Holland Construction.

LITIGATION PRIVILEGE

117. "[S]tatements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding are absolutely privileged provided such statements relate to that proceeding." *Sriberg v. Raymond*, 370 Mass. 105, 108 (1976).

118. The litigation privilege precludes a party from being liable for "communications made by a party, witness, or attorney in connection with judicial proceedings or contemplated litigation." *Bassichis v. Flores*, 490 Mass. 143, 144 (2022).

119. "The privilege applies regardless of malice, bad faith, or any nefarious motives . . . so long as the conduct complained of has some relation to the litigation." *Bassichis*, 490 Mass. at 150.

120. Statements made in the preparation of and in the course of litigation may not be used as evidence of misconduct. *See Nnodim v. U.S. Bank Tr. Ass'n*, 703 F. Supp. 3rd 296, 305-306 (2023).

121. I instruct you that any statements made by and/or actions taken by the JACE Parties or their attorneys in contemplation of or in connection with the 2012 Zoning Appeal are absolutely privileged by the litigation privilege and may not be a basis for liability.

122. I instruct you that any statements made by and/or actions action taken by the JACE Parties or their attorneys in contemplation of or in connection with the Wall Case, including, but not limited to, seeking an injunction, are absolutely privileged by the litigation privilege and may not be a basis for liability.

123. I instruct you that any statements made by and/or actions taken by the JACE Parties or their attorneys in contemplation of or in connection with the 2015 Zoning Appeal are absolutely privileged by the litigation privilege and may not be a basis for liability.

124. I instruct you that any statements made by and/or actions taken by Arthur Leon in contemplation of or in connection with the application for a criminal complaint are absolutely privileged by the litigation privilege and may not be a basis for liability.

ADDITIONAL DEFENSES
(ALTERNATIVE REQUEST)
(FOR EACH USE OF PROCESS WHICH IS NOT CONSTITUTIONALLY PROTECTED EITHER AS A MATTER OF LAW OR AS A MATTER OF FACT)

Waiver

125. "Waiver may occur by an express and affirmative act, or may be inferred by a party's conduct, where the conduct is consistent with and indicative of an intent to relinquish voluntarily a particular right [such] that no other reasonable explanation of [the] conduct is possible." *KACT, Inc. v. Rubin,* 62 Mass. App. Ct. 689, 695 (2004) (internal quotations removed).

126. If you find that 477 Harrison's entering into the Agreement for Judgment to resolve the 2012 Zoning Appeal constitutes an affirmative act by 477 Harrison to voluntarily relinquish all relief sought under the ZBA decision at that time, November 7, 2013, then 477 Harrison is barred from basing its abuse of process claim on the 2012 Zoning Appeal.

127. In entering into the Agreement for Judgment to resolve the 2012 Zoning Appeal, 477 Harrison agreed that JACE and 477 Harrison could continue to assert their respective claims in the Wall case, therefore 477 Harrison is barred from basing its abuse of process claim on the Wall Case.

128. In entering into the Agreement for Judgment to resolve the 2012 Zoning Appeal, 477 Harrison agreed that JACE retained the right to challenge any future zoning relief sought by 477 Harrison, therefore 477 Harrison is barred from basing its abuse of process claim on the 2015 Zoning Appeal.

Estoppel

129. "Quasi estoppel precludes a party from subsequently repudiating an action to which he had previously manifested his assent, and from which assent he thereby

benefited." *Uccello v. Gold'n Foods, Inc.*, 325 Mass. 319, 325, (1950), *see also* 31 C.J.S. Estoppel and Waiver § 123 (1996) ("Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he ratifies the transaction, is bound by it, and cannot avoid its obligation or effect by taking a position inconsistent with it.").

130. If you find that 477 Harrison in the Agreement for Judgment voluntarily resolved the 2012 Zoning Appeal, then you must find that 477 Harrison is barred from seeking damages from the JACE Parties for bringing the 2012 Zoning Appeal.

131. If you find that 477 Harrison in the Agreement for Judgment it signed acknowledged the JACE Parties' right to continue the Wall Case and/or to challenge any zoning relief 477 Harrison sought in the future, you must find that 477 Harrison is barred from seeking damages from the JACE Parties for bringing the Wall Case and the 2015 Zoning Appeal.

Failure to Mitigate Damages

132. "A party injured by a tort [such as abuse of process] has a duty to use reasonable care to minimize the damages." *Brian v. B. Sopkin & Sons, Inc.*, 314 Mass. 180, 183 (1943).

133. If you find that 477 Harrison failed to take actions to minimize its damages, then you cannot find the JACE Properties responsible for any damages 477 Harrison failed to minimize.

NOTIFY

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 15-0829-B

477 HARRISON AVE., LLC Plaintiff, v. JACE BOSTON, LLC and ARTHUR LEON, Defendants.	)

DEFENDANTS' MOTION FOR DIRECTED VERDICT
AT CLOSE OF ALL EVIDENCE

Pursuant to Mass. R. Civ. P. 50(a), Defendants JACE Boston, LLC ("JACE") and Arthur Leon ("Leon," and together with JACE, the "JACE Parties") respectfully request that the Court enter a directed verdict in their favor and against Plaintiff 477 Harrison Ave., LLC ("477 Harrison").[1] As grounds for this motion, the JACE Parties state that (1) after the close of all evidence, there is insufficient evidence from which the jury can enter a verdict in favor of 477 Harrison with respect to its claim for abuse of process (Count I); (2) the litigation privilege bars 477 Harrison from holding the JACE Parties liable based on, and/or to use as evidence of wrongdoing, statements made by the JACE Parties and/or their counsel in the contemplation of, institution of, and/or during litigation; and (3) the JACE Parties are entitled to judgment as a matter of law because 477 Harrison's claims are based on the JACE Parties' legitimate exercise

[1] On April 30, 2025, the JACE Parties brought a motion for directed verdict pursuant to Mass. R. Civ. P. 50(a) after 477 Harrison rested. The Court denied JACE Parties' Motion for Directed Verdict at the Close of Plaintiff's Case.

4936-0308-1021

05/09/2025	Defendants Jace Boston LLC, Arthur Leon’s Motion for Directed Verdict At Close Of All Evidence Endorsement: Motion is denied. When the evidence is viewed in the light most favorable to nonmovant a reasonable jury could find all elements of the abuse of process have been satisfied. dated (5/5/25) Notice Sent 5/12/25

VOLUME: VIII
PAGES: 1-125
EXHIBITS: NONE

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* * * * * * * * * * * * * * * * * *

477 HARRISON AVE., LLC

vs. Docket No.: 1584CV00829

JACE BOSTON, LLC and
ARTHUR LEON

* * * * * * * * * * * * * * * * * *

TRIAL (BEFORE A JURY)
BEFORE THE HONORABLE JAMES BUDREAU

Boston, Massachusetts
Room 306
May 5, 2025

CAROLYN SPROUL
APPROVED COURT TRANSCRIBER

A P P E A R A N C E S

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By: Mr. Albert A. DeNapoli, Esq.
By: Mark Furman, Esq.
By: Robert Leone, Esq.

I N D E X

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
(No witnesses)				

JURY INSTRUCTIONS

Part 1	61
Part 2	102

CLOSING ARGUMENT

(For the Defendants)	74
(For the Plaintiff)	91

EXHIBITS:	PAGE
(No exhibits offered)	

can be another piece of process (phonetic at 10:18:58), given the person possessed an improper motive. I'll have to think about that and review that case.

MR. FURMAN: Okay. Thank you, Your Honor.

There are a number of requests that we've asked for in our request for instructions that we do want to preserve our rights regarding, Your Honor, so shall I briefly speak to that, or should I --

THE COURT: Why don't you identify them, the ones that you want me to put in --

MR. FURMAN: Okay.

THE COURT: -- by number, because they may already be included, some of them may not. There are recent ones that --

MR. FURMAN: Right, a bunch are not, Your Honor.

So Request 119 deal with the --

THE COURT: Constitutional rights.

MR. FURMAN: -- constitutional rights.

THE COURT: That's denied.

MR. FURMAN: And then if those are not given, Your Honor, then we were suggesting at least the instructions in 20 to 24 should be given.

THE COURT: That's the no reasonable basis in fact, the law on our side.

language in there, haven't we, without specifying it for any particular process, they can consider his state of mind.

MR. GOLOBOY: Yeah. I think that's what it is. We just (indiscernible -- away from microphone at 10:24:31).

THE COURT: Right. We actually improved it for the Defendant in that respect, but I understand you're making a specific request for me to put language in that deals with the actual process involved here. I'm going to deny that. I think the jury can figure that out, and that's as to all the different processes that were issued.

MR. FURMAN: What about 43, Your Honor? Sorry.

THE COURT: Forty-three? Well, we avoided all the groundlessness, now we're going back down that direction towards -- I really the question is ulterior purpose, and we have -- Let me just read the language we have in there for you. "If there's evidence that the Defendant believed there were legitimate grounds filing the legal process then that may be relevant for showing there was no ulterior motive." I mean that encapsulates, I think, really well your position.

MR. FURMAN: Well, the difference is objective and subjective.

THE COURT: Right. So if we're going to get into the objective, I'm denying it.

MR. FURMAN: Okay. So I'll just need to make an adjustment.

THE COURT: Sure. For all purposes on the record, objectiveness I'm denying.

MR. FURMAN: Okay. I think we've already talked about number 50.

THE COURT: Yes, and I'm going to look at that.

MR. DUNBAR: Your Honor, can I just address number 50 while you're thinking about it?

THE COURT: Sure.

MR. DUNBAR: I happened to read the case. First of all, it's unreported. But second of all, the quote that they want to use references a footnote, Footnote 21, and if you look at Footnote 21, that's actually the reported Massachusetts case, and you have that exact language in your instructions already. So Footnote 21 --

THE COURT: So I have --

MR. DUNBAR: You have the correct statement of the law from the Massachusetts reported case on page 4, the last sentence. You'll find that in Footnote 21 of the Pan American Airways unreported case.

THE COURT: All right.

C E R T I F I C A T E

I, Carolyn Sproul, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, prepared to the best of my ability, from the audio recording produced by Court Personnel of the Superior Court Department court proceedings in the above entitled matter.

I, Carolyn Sproul, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Carolyn Sproul, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

(The proper name spellings herein, unless otherwise indicated, are phonetically spelled.)

/s/ Carolyn Sproul 12-09-25

Carolyn Sproul
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Date

PLEASE NOTE: THE FOREGOING CERTIFICATION OF THIS TRANSCRIPT DOES NOT APPLY TO ANY REPRODUCTION OF THE SAME BY ANY MEANS UNLESS UNDER THE DIRECT CONTROL AND\OR DIRECTION OF THE CERTIFYING TRANSCRIBER.

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 15-0829-B

477 HARRISON AVE., LLC
Plaintiff,

v.

JACE BOSTON, LLC
and ARTHUR LEON,
Defendants.

PLAINTIFF, 477 HARRISON AVE., LLC'S, PROPOSED FINDINGS OF FACT AND RULINGS OF LAW ON ITS G.L. C. 93A, §11 CLAIM AGAINST JACE BOSTON, LLC AND ARTHUR LEON

Pursuant to this Court's May 6, 2025 Order, after the jury returned its verdict on 477 Harrison's Abuse of Process Claim against the Defendants, Jace Boston, LLC ("Jace") and Arthur Leon, 477 Harrison Ave., LLC ("477 Harrison") submits the following Proposed Findings of Fact and Rulings of Law regarding its G.L. c. 93A claim:

I. PROPOSED FINDINGS OF FACT

1. John Holland's trial testimony was credible. *See* Trial Testimony of John Holland.

2. Richard Leon's trial testimony was credible. *See* Trial Testimony of Richard Leon.

3. Christopher Basile's trial testimony was credible. *See* Trial Testimony of Christpher Basile.

4. Arthur Leon's trial testimony was not credible. *See* Trial Testimony of Arthur Leon and *contrast* Trial Testimony of John Holland, Richard Leon and Christopher Basile, and Trial Exhibits.

5. The jury found the Defendants liable for abuse of process. *See* Special Verdict Form.

6. The jury found that the Defendants commenced the 2012 Zoning Appeal, the 2015 Zoning Appeal and the Application for Criminal Complaint for ulterior or illegitimate purposes causing $5,801,550.00 in damages to 477 Harrison. *See* Special Verdict Form.

7. Arthur Leon and Jace acted in a business context. *See* e.g., Trial Exhibits 27-29, 31-33, 150, 151 and general trial testimony.

8. Arthur Leon and Jace interfered with trade or commerce. *See* Trial Testimony of John Holland, April 24, 2025 at pp. 79:7-12; 114:16:25-118:1*; see also* Trial Exhibits 23 at p. 104, 110,112-113,115, 90-92.

9. Arthur Leon and Jace engaged in unfair and deceptive business practices.

10. Arthur Leon and Jace acted willfully and knowingly. *See* Special Verdict Form, Questions 1a, 1c, and 1d (jury holding that the Defendants filed the 2012 Zoning Appeal, 2015 Zoning Appeal and Application for Criminal Complaint "with an ulterior or illegitimate purpose.").

A. <u>Mr. Leon the Real Estate Developer.</u>

11. Mr. Leon owns or controls real estate holdings valued in the tens of millions of dollars through multiple single purpose entities, including Jace. *See* Arthur Leon Trial Testimony, May 1, 2025 at pp. 103:12-16, 105:10-25; *see also* Trial Exhibits 7-9.

12. Each of these single purpose entities' Certificates of Organization, including Jace's Certificate of Organization, states that "[t]he business of the company is to own, manage, rent, buy, sell, and develop real property and to engage in any lawful activity for which a limited liability company may be formed under the laws of Massachusetts." *See* Trial Exhibits 7-9.

13. The business purpose of each of Mr. Leon's single purpose entities is the same as the business purpose of 477 Harrison Ave., LLC. *See* Trial Exhibits 7-9, 20; *see also* Trial Testimony of Arthur Leon, May 1, 2025 at p. 106:10-13.

14. On May 21, 2012, Mr. Leon's son, James, submitted a letter to the ZBA stating, "30 years ago we were the ones who started developing in the area, adding retail store fronts in our building on Washington Street. 10 Years [sic] ago we built the first successful restaurant in the area, on Washington St., when everyone said that a restaurant wouldn't survive unless it was on Tremont St. Now there are 20 restaurants in the area." *See* Trial Exhibit 34.

15. At the May 22, 2012 ZBA hearing, Mr. Leon referred to himself as a developer. *See* Trial Testimony of Arthur Leon (impeachment with deposition transcript) May 1, 2025 at pp. 127:7-128:25.

16. In or around 1999, Mr. Leon re-developed 1222 Washington Street where he served as the Engineer and his company E.G Leon served as the general contractor. *See* Trial Exhibit 148; *see also* Trial Testimony of Arthur Leon, May 1, 2025 at p. 107:1:108:20.

17. In 2011, Mr. Leon invested $50,000 in an LLC controlled by Ted Raymond for the redevelopment of a property located on Broad Street in Boston. *See* Trial Testimony of Arthur Leon, May 1, 2025 at p. 115:5-9.

18. In 2010, Mr. Raymond met with the BRA and Old Dover neighborhood Association and provided plans for the potential redevelopment of 1234 Washington Street to

Mr. Leon depicting hundreds of units and the current building torn down. *See* Trial Testimony of Arthur Leon, May 1, 2025 at 16:17-17-13; *see also* Trial Testimony of John Holland, April 23, at p. 134:11-22; April 30, 2025 at p. 53:6-56:12; *see also* Trial Exhibit 10 and 119.

B. <u>Mr. Leon's public statements regarding his intention to personally develop 1234 Washington Street.</u>

19. On or about December 20, 1999, Mr. Leon caused a letter to be sent to the developers of an abutting property 485-495 Harrison Avenue stating:

> Mr. Leon would like to make you aware of his plans to improve and develop his property, which plans will change both the height and perhaps the dimensions of Mr. Leon's property. Mr. Leon's intent is to develop his property to the maximum height he is allowed pursuant to the zoning laws or any special permit and/or variance he may be granted. Any windows which are installed on the side facing Mr. Leon's property will be blocked by Mr. Leon's development.

See Trial Exhibit 149.

20. In 2005, Mr. Leon submitted a written statement, stating "[w]ith the changes in the neighborhood, the highest and best use of the property [1234 Washington Street] today is for residential. Eventually, I expect to move my business and develop the site for residential use." *See* Trial Testimony of Arthur Leon, May 1, 2025 at p. 114:4-10.

21. During discussions with John Holland in 2012, Mr. Leon told John Holland he intended to develop 1234 Washington Street, including that he intended to construct a building that was 80 feet tall. *See* Trial Testimony of John Holland, April 23, 2025 at pp. 136:19-137:20; 131:6-25; *see also* Trial Exhibit 126 at pp. 3, 5.

22. In these meetings, Mr. Leon demanded that 477 Harrison delay its development plans by a year so that he could prepare his development plans and go first. *See* Trial Exhibit 126 at pp. 3, 5.

23. In these meetings, Mr. Leon demanded that 477 Harrison re-design its proposed project to remove all windows and balconies overlooking 1234 Washington Street to prevent the creation of views overlooking his property. *See* Trial Testimony of John Holland, April 23, 2025 at p. 131:6-25.

24. On March 10, 2012, Arthur Leon and James Leon wrote to John Holland, "[w]e are concerned about the impact on the future condo owners [at 477 Harrison] when we build up to the property line and block their windows. We are also concerned about the impact on our ability to develop our property." *See* Trial Exhibit 126 at pp. 3-4.

25. Mr. Leon did not express any objection to Mr. Holland, the BRA, or the ZBA to the plans presented at Old Dover or in the Application for Small Project review based on any alleged violation of his easement rights. *See* Trial Testimony of John Holland, April 24, 2025 36:4-19; *see also* Trial Testimony of Arthur Leon, May 2, 2025 at pp. 357:39-10; *see also* Trial Exhibits 27-29, 31-33.

26. As of May 7, 2012, Mr. Leon knew that 477 Harrison needed "to get into construction in August 2012 and be completed by September 2013." *See* Trial Exhibit 128.

27. In April and May 2012, Mr. Leon hired Kamran Zahedi of Urbanica, as his development manager, Attorney Kevin Joyce a permitting specialist, and Edward O'Donnell of Waypoint. *See* Trial Exhibits 27-29, 31-33.

28. As of May 10, 2012, Mr. Leon had decided that he would appeal any variances granted by the ZBA. *See* Trial Exhibit 150.

29. On May 10, 2012, the principal of Urbanica, Inc., Kamran Zahedi, e-mailed Mr. Leon's attorney, Kevin Joyce, stating: "In case you meet Mr. Fitzgerald or any one from BRA. Please relay the message that if BRA and ZBA approve the abutter's plan Mr. leon [sic] will

appeal and the case will end up in court for years. we strongly recommend the BRA delay the approval till Mr. leon [sic] shows good progress on his part." *See* Trial Exhibit 150.

30. Between May 10, 2012 and May 21, 2012, Mr. Leon and his counsel, Kevin Joyce, collectively submitted six (6) separate letters to the BRA and the ZBA stating that Mr. Leon intended to convert his property into a residential or mixed use development and that he was working with Urbanica, Inc., to prepare a submission to the BRA to request "Large Project Review." *See* Trial Exhibits 27-29, 31-33.

31. Mr. Leon's May 21, 2012 letter to the ZBA states, "if the Harrison Avenue Project is approved it will prohibit me from proceeding with my plans to convert the existing manufacturing facility into a mixed-use development." *See* Trial Exhibit 33 at p. 1.

C. Mr. Leon Declares 477 Harrison will go Bankrupt and he will buy the Property From the Bank.

32. In January 2012, Arthur Leon spoke to his cousin, Richard Leon, and asked him to look into Holland's financing because it/he had overpaid for the building by paying $7 million and that Holland would go bankrupt and lose the building to the bank and that he [Arthur Leon] would purchase 477 Harrison Avenue from the bank for "half the price." *See* Trial Testimony of Richard Leon, April 29, 2025 at pp. 19:1-20:17.

33. Prior to January 2012, Arthur Leon had consulted with Rick Leon regarding offers and proposed developments for 1234 Washington Street. *See* Trial Testimony of Richard Leon, April 29, 2025 at pp. 17:17-18:25.

34. Prior to his discussion with Rick Leon, the realtor for the owner of 477 Harrison spoke with Arthur Leon's son, James Leon, and informed him that there was a developer interested in purchasing 477 Harrison Avenue and had funding. *See* Trial Testimony of James Leon, May 2, 2025 at pp. 88:7:89-20.

D. The 2012 Zoning Appeal is Brought for Ulterior Purposes and Interferes With "Trade or Commerce."

35. In late July 2012, John Holland e-mailed Mr. Leon to tell him that 477 Harrison closed on 477 Harrison Avenue. *See* Trial Testimony of John Holland, April 23, 2025 at p. 159:21-25.

36. As of July 30, 2012, it was a matter of public record that 477 Harrison had borrowed $4,762,500 from Rockland Trust to purchase the Property, that John Holland and his brothers had personally guaranteed the loan, and that if 477 Harrison defaulted that Rockland Trust could foreclose. *See* Trial Exhibits 42-43.

37. 477 Harrison's financing for the acquisition of 477 Harrison Avenue had an original loan term of four months that matured on November 30, 2012. *See* Trial Exhibit 41; *see also* Trial Testimony of John Holland, April 23, 2025 at p. 159:1-7.

38. Mr. Leon knew that filing the 2012 Zoning Appeal would restrain the City of Boston from issuing a building permit to 477 Harrison and was the only appeal of the variances granted to 477 Harrison. *See* Trial Testimony of Arthur Leon, May 1, 2025 at p. 31:15-19.

39. But for the 2012 Zoning Appeal, 477 Harrison would have obtained a permit from ISD for the construction of 18 residential units on floors 2-6 of its building with first floor commercial space. *See* Trial Testimony of John Holland, April 24, 2025 at p. 16:25; *see also* Trial Exhibit 129 at p. 3 and Trial Exhibit 14.

40. The Complaint in the 2012 Zoning Appeal does not allege any harm to the Defendants' easement rights or that the proposed removal of the northeasterly wall violated the Defendants' easement rights in any manner. *See* Trial Exhibit 130.

41. During the course of the 2012 Zoning Appeal, 477 Harrison's loan to acquire the property came due multiple times and was extended multiple times at Rockland Trust's

discretion. *See* Trial Exhibits 131-132; *see also* Trial Testimony of John Holland, April 24, 2025 at p. 39:18:40-3.

42. On January 25, 2013, Mr. Zahedi wrote to his engineer, "we are looking in couple of years to start a project on Washington street (JACE BOSTON llc site). Next to the future development site there is a rehab project is proposed that they are planning to do recharge in their basement. Do you think this is going to have any consequences when we do our project. Our project is going to have below level parking." *See* Trial Exhibit 151.

43. Despite both engineers that Mr. Zahedi had review 477 Harrison's groundwater recharge system not identifying any issues, the Defendants continued to appeal 477 Harrison's conditional use permit for its groundwater recharge system. *See* Trial Exhibit 151; *see also* Trial Testimony of John Holland, April 24, 2025 at p. 30:15-17.

44. In September 2013, as a result of the 2012 Zoning Appeal and the Wall Case, 477 Harrison abandoned the zoning relief it obtained in 2012 from the ZBA. *See* Trial Testimony of John Holland, April 24, 2025 at p. 44:2-9; 47:14-18; *see also* Trial Exhibit 133. The Defendants' appeal of the ZBA's decision also negated the low income housing units. *See* Trial Testimony of John Holland, April 30, 2025 at pp. 37-39.

45. The 2012 Zoning Appeal delayed the construction of 477 Harrison and 477 Harrison was forced to re-design the development of its property to remove the penthouses and other design changes. *See* Trial Testimony of John Holland, April 24, 2025 at p. 113:19-114:1; 46:14-24.

46. The loss of the penthouses resulting from the 2012 Zoning Appeal eliminated at that time 2 units that would have views overlooking 1234 Washington Street. *See* Trial

Testimony of John Holland, April 24, 2025 at p. 93:12-19; *see also contrast* Trial Exhibits 14 and 52.

47. The 2012 Zoning Appeal was filed for illegitimate purposes to advance the Defendants' ulterior motives. *See* Jury Verdict, Question 1a.

48. The 2012 Zoning Appeal was contrary to Mr. Leon's stated goal of developing 1234 Washington Street to its maximum height and dimensions permitted by any variances he could obtain. *See* Trial Exhibit 149; *see also* Trial Testimony of John Holland, April 24, 2025, at p. 18:2-20.

49. On November 8, 2013, the Agreement for Judgment was filed in the 2012 Zoning Appeal and the Defendants filed an appeal to the ZBA of ISD's issuance of 477 Harrison's short form permit to frame floor decks and construct its groundwater recharge system. *See* Trial Exhibits 58 and 134.

50. In the appeal of the short form permit to frame floor decks and construct the groundwater recharge system, the Defendants asserted that 477 Harrison's plans for the re-development of floors 1 through 5 violated the zoning code with respect to floor area ratio, usable open space, and insufficient rear yard setback. *See* Trial Exhibit 58.

51. 477 Harrison's plans complied with the requirements for floor area ratio, usable open space, and rear yard set backs. *See* Trial Testimony of John Holland, April 30, 2025 at p.41:1-24.

E. <u>477 Harrison Seeks Penthouses a Second Time and the 2015 Zoning Appeal is Brought for Ulterior Purposes and Interferes With "Trade or Commerce."</u>

52. During a February 2014 lunch between Mr. Holland and Mr. Leon, Mr. Holland asked Mr. Leon what his opinion would be if 477 Harrison sought to re-permit penthouses. *See* Trial Testimony of John Holland, April 24, 2025, at pp. 58:15-61:7.

53. Mr. Leon responded in substance that " he [Mr. Leon] couldn't let [John Holland] have that. That people that could afford to purchase one of penthouses would – would be people that could afford to oppose [Mr. Leon's] future project" *See* Trial Testimony of John Holland, April 24, 2025, at p. 60:15-21.

54. In his February 5, 2015 letter to the ZBA, Mr. Leon represented that any work performed at the Property by 477 Harrison Ave. since November 2013 "remains subject to appeal." *See* Trial Exhibit 88 at p. 2.

55. As of February 5, 2015, it was public record that 477 Harrison had obtained $15,365,000 in financing from Rockland Trust, which was personally guaranteed by the Holland brothers and their companies, and none of the residential condominium units at the Property had been completed. *See* Trial Exhibit 86.

56. As of February 2015, 477 Harrison did not have sufficient funds to repay Rockland Trust the amount Rockland Trust had loaned 477 Harrison to construct floors 1-5 of the Property. *See* Trial Testimony of John Holland, April 24, 2025 at pp 83:4-84:24.

57. Mr. Leon knew that when the 2015 Zoning Appeal was filed that the City of Boston would not issue a building permit for the penthouses during the duration of the appeal. *See* Arthur Leon Trial Testimony, May 1, 2025 at p. 31:20-24.

58. At the time the 2015 Zoning Appeal was filed, Mr. Leon had not reviewed any structural plans for 477 Harrison's building. *See* Arthur Leon Trial Testimony, May 2, 2025 at pp. 57:4-58:13.

59. The Complaint in the 2015 Zoning Appeal references the potential re-development of 1234 Washington Street by stating "The new residential abutters will likely be

hostile to JACE's redevelopment of its property." (emphasis added). *See* Trial Exhibit 137 at p. 11.

60. In the 2015 Zoning Appeal, the Defendants sought financial information from 477 Harrison for both the penthouses and the development of floors 1 through 5. *See* Trial Testimony of John Holland, April 24, 2025 at p. 95:1-6.

61. In the 2015 Zoning Appeal, the Defendants filed a Motion to Compel 477 Harrison to produce its financial information with respect to the penthouses and the development of floors 1 through 5 of the property, which was denied by the Court. *See* Trial Testimony of John Holland, April 24, 2025 at pp. 95:13-16; 99:20-100:1.

62. In its February 2, 2017, summary judgment decision in the 2015 Zoning Appeal, the Court stated, "JACE has offered no evidence of the other impacts of density alleged in the Complaint, i.e., traffic, waste, noise, and shadows consist entirely of speculation and inadmissible opinions." *See* Trial Exhibit 138 at p. 8.

63. In its February 2, 2017 summary judgment decision in the 2015 Zoning Appeal, the Court stated, "JACE has failed to present any admissible evidence that 'demonstrate[s] a reasonable likelihood of any tangible, as opposed to speculative, harm to [its] property." *See* Trial Exhibit 138 at p. 8. 56 at p. 10.

64. As a result of the 2015 Zoning Appeal, ISD was enjoined from issuing a building permit to 477 Harrison. *See* Trial Testimony of John Holland, April 24, 2025 at p. 87:10-24; *see also* Trial Testimony of Arthur Leon, May 1, 2025 at p. 31:20-24.

65. The 2015 Zoning Appeal was contrary to Mr. Leon's stated goal of developing 1234 Washington Street to its maximum height and dimensions permitted by any variances he could obtain. *See* Trial Testimony of John Holland, April 24, 2025 at p. 89:13-90-15.

66. The 2015 Zoning Appeal was filed for illegitimate purposes to advance the Defendants' ulterior motives. *See* Jury Verdict Slip at Question 1C.

D. Mr. Leon Files an Application for a Criminal Complaint against 477 Harrison's principal, John Holland.

67. The Application for a Criminal Complaint identifies Mr. Leon as the "victim" and "complainant" and John Holland as the "Defendant." *See* Trial Exhibit 83.

68. The Application for a Criminal Complaint does not allege that John Holland personally trespassed at 1234 Washington Street. *See* Trial Exhibit 83.

69. At the time Mr. Leon applied for the Application for a Criminal Complaint, he was aware of the January 2014 Order in the Wall Case that permitted a trespass and that he had given 477 Harrison permission to access his roof at 1234 Washington Street to complete work on the northeasterly wall. *See* Trial Testimony of John Holland, April 24, 2025, at pp. 79:13-80:21 and Trial Testimony of Arthur Leon, May 1, 2025 at pp. 79:14:80:3; *see also* Trial Exhibit 62.

70. By the time of the probable cause hearing, Mr. Leon knew that any alleged trespass by anyone affiliated with 477 Harrison was over. *See* Trial Testimony of Arthur Leon, May 1, 2025 at p. 80:7:16.

71. Mr. Leon sought to leverage the criminal complaint against Mr. Holland, to force 477 Harrison to give up its rights under the January 2014 trespass order issued in the Wall Case. *See* Trial Testimony of John Holland, April 24, 2025 at pp. 79:13-80:5.

72. The clerk-magistrate found no probable cause to issue a criminal complaint against John Holland. *See* Trial Exhibit 83.

E. The Defendants' Meritless Insurance Claims.

73. On May 2, 2014, John Holland observed the alleged cracks in the slab of 1234 Washington Street and observed that they were not just in the area adjacent to 477 Harrison's

northeasterly wall. *See* Trial Testimony of John Holland, April 24, 2025, at pp. 64:24-66:9; *see also* Trial Exhibit 68.

74. John Holland observed Defendants' employees were cleaning old cracks to make them appear as new in the area adjacent to the northeasterly wall. *See* Trial Testimony of John Holland, April 24, 2025, at pp. 64:24-66:9.

75. The floor in the area adjacent to the northeasterly wall is slab on grade and the Defendants store steel and other materials weighing thousands of pounds on the floor in the area adjacent to the northeasterly wall. *See* Trial Testimony of Arthur Leon, May 2, 2025 at p. 44:14-16; *see also* Trial Exhibits 121-122.

76. In his January 20, 2015 letter, Mr. Leon's engineer, Evan Hankin, alleged that cracks in the floor at 1234 Washington were caused by 477 Harrison driving helical piles. *See* Trial Exhibit 87.

77. In Evan Hankin's January 2015 letter, he did not identify any damage to the northeasterly wall. *See* Trial Exhibit 87.

78. When 477 Harrison actually re-developed its property, it did not drive any helical piles. *See* Trial Testimony of John Holland, April 24, 2025 at p. 82:3-5; *see also* Trial Testimony of Timothy Donovan (Deceased Witness Deposition Testimony), May 5, 2025 at p. 17:20-21.

79. Holland Construction's insurer hired Rimkus Engineering to investigate the Defendants' claim and Christopher Basile, P.E. of Rimkus inspected 1234 Washington Street and spoke with Mr. Leon. *See* Trial Testimony of Christopher Basile, April 30, 2025, at pp. 60:16-18; 61:7-11.

80. Mr. Basile observed that the cracks in the slab allegedly caused by the construction slope away from the wall, which is the wrong direction if the cracks had been

caused by construction at 477 Harrison. *See* Trial Testimony of Christopher Basile, April 30, 2025, at pp. 69:15-70:16.

81. Mr. Basile further observed that the cracks were all old due to their rounded edges and that there were no cracks in the northeasterly wall. *See* Trial Testimony of Christopher Basile, April 30, 2025 at pp. 65:23-67:7.

82. Mr. Basile concluded that the construction at 477 Harrison Avenue had not caused any damage to the slab at 1234 Washington Street. *See* Trial Testimony of Christopher Basile, April 30, 2025 at pp. 67:2-70:26; *see also* Trial Exhibit 139.

83. On August 1, 2015, based on Mr. Basile's report, Selective rejected Mr. Leon's claim of damage to his floor. *See* Trial Exhibit 139.

84. The Defendants submitted an insurance claim for damage to the floor to their insurer and the insurer rejected the claim. *See* Trial Testimony of Arthur Leon, May 2, 2025 at p. p. 52:5:25.

85. On December 17, 2014, the same day that Mr. Leon's Application for a Criminal Complaint was dismissed, Mr. Leon submitted a claim alleging damage to his roof. *See* Trial Exhibits 83-84.

86. A month later, in his January 20, 2015 letter to Mr. Leon, Evan Hankin wrote with respect to the roof slab that "[t]he repairs needed in the bay adjacent to the Harrison Avenue building are not caused by the construction activity in this building." *See* Trial Exhibit 87.

F. <u>477 Harrison Suffers Millions of Dollars in Damages.</u>

87. As a result of the Defendants' multiple abuses of process, 477 Harrison has suffered approximately $5,801,550 in damages. *See* Jury Verdict Question 3; *see also* Trial

Testimony of John Holland, April 24, 2025 at pp. 79:7-12; 114:16:25-118:1*; see also* Trial Exhibits 23 at p. 104, 110,112-113,115, 90-92.

88. As a result of the delays and forced re-designs caused by the Defendants' conduct, 477 Harrison incurred more than $5.1 million in additional hard costs of construction. *See* Trial Testimony of John Holland, April 24, 2025 at pp. 114:16:25-118:1; *see also* Trial Exhibits 23 at p. 104, 112-113.

89. Due to the delays caused by the Defendants, 477 Harrison paid approximately $700,000 in additional interest to its lender Rockland Trust. *See* Trial Testimony of John Holland, April 24, 2025 at pp. 79:7-12; 114:16:25-118:1; *see also* Trial Exhibits 23 at p. 104, 110,112-113,115.

90. 477 Harrison paid $1,550 in attorneys' fees as a result of the Application for Criminal Complaint against Mr. Holland. *See* Trial Testimony of John Holland, April 24, 2025 at pp. 79:7-12 *see also* Trial Exhibits 90-92.

91. As a result of the Defendants' actions, completion of the redevelopment of 477 Harrison was delayed from 2013 until 2019. *See* Trial Testimony of John Holland, April 24, 2025 at pp. 113:19:114-1.

92. 477 Harrison had to make significant re-designs as a result of the Defendants' actions. *See* Trial Exhibits 117, 52 at p. 14, 78 at p. 1.

93. But for the Defendants' actions, 477 Harrison would have developed its property in accordance with its original plans and permits: 18 residential units on floors 2-5 with windows and balconies and commercial space on the first floor. *See* Trial Testimony of John Holland, April 24, 2025 at p. 15:8-16:25; April 30, 2025, at pp. 37:12:-38:1; *see also* Trial Exhibit 14, 129.

II. PROPOSED RULINGS OF LAW

A. Elements of a G.L. c.93A Claim.

94. To prevail on a claim under G. L. c. 93A, § 11, a plaintiff must establish "(1) that the defendant engaged in an unfair method of competition or committed an unfair or deceptive act or practice, as defined by G. L. c. 93A, § 2, or the regulations promulgated thereunder; (2) a loss of money or property suffered as a result; and (3) a causal connection between the loss suffered and the defendant's unfair or deceptive method, act, or practice." *Governo Law Firm LLC v. Bergeron*, 105 Mass. App. Ct. 1121 (2025).

B. The Defendants Engaged in Trade or Commerce and Interfered With Trade or Commerce.

95. G.L. c. 93A, § 11, applies to any "person who engages in the conduct of any trade or commerce." G. L. c. 93A, § 1(b) provides that "[t]rade" and "commerce" include "the sale, rent, lease or distribution of any services and any property". *Linkage Corp. v. Trustees of Boston Univ.*, 425 Mass. 1, 24 (1997). 477 Harrison only needs to show that the Defendants' actions "interfered with trade or commerce" for G.L. c. 93A to apply. *First Enters., Ltd. v. Cooper*, 425 Mass. 344, 347 (1997); *see also The Gillette Company v. Provost*, 2017 WL 2292748 at *9 (Mass. Super. April 19, 2017)(Salinger)(denying summary judgment after concluding that a fact finder could determine that litigation was brought in the business context even though there was no commercial relationship between the parties).

96. Mr. Leon and Jace certainly are involved in trade or commerce. Mr. Leon owns or controls real estate holdings valued in the tens of millions of dollars through multiple single purpose entities, including Jace. *See* Arthur Leon Trial Testimony, May 1, 2025 at pp. 103:12-16; 105:10-25; 114:4-10; *see also* Trial Exhibits 7-9. Indeed, Mr. Leon's single purpose entities have the exact same business purpose as 477 Harrison Ave., LLC. *See* Trial Exhibits 7-9, 20; *see*

also Trial Testimony of Arthur Leon, May 1, 2025 at 106:10-13. Mr. Leon and his son, James, represented to others that Mr. Leon and Jace are developers, Mr. Leon invested $50,000 in the redevelopment of property on Broad Street in Boston and, through Mr. Raymond, met with the BRA and Old Dover neighborhood Association and provided plans for the potential redevelopment of 1234 Washington Street depicting hundreds of units and the current building torn down. *See* Trial Exhibit 10, 34, 119 and 149; *see also* Trial Testimony of Arthur Leon, May 1, 2025 at 16:17-17-13 and 115:5-9; *see also* Trial Testimony of John Holland, April 23, at 134:11-22; April 30, 2025 at 53:6-56:12.

97. Moreover, in May 2012, Mr. Leon and his attorney sent six letters to the BRA and the ZBA stating that Mr. Leon was working with Urbanica on preparing an application for "Large Project Review" for the development of his property. *See* Trial Exhibits 27-29, 31-33. This is consistent with the 1999 letter that Mr. Leon had his attorney send to the developers of an abutting property (485-495 Harrison Avenue) stating that Mr. Leon planned to improve and develop his property to the maximum size permitted by any special permit or variance he could obtain. *See* Trial Exhibit 149. Moreover, Mr. Leon and Jace--through their multiple abuses of process and demands that Mr. Holland delay and redesign 477 Harrison Avenue--have "interfered with trade or commerce." Specifically, Mr. Leon and Jace abused process, and interfered with trade or commerce, when they filed the 2012 Zoning Appeal, the 2015 Zoning Appeal and the Application for a Criminal Complaint. *See* Special Verdict Form. Also, when Mr. Leon demanded that 477 Harrison (1) delay its development plans by a year so that he could prepare his development plans and go first and (2) redesign its proposed project to remove all windows and balconies overlooking 1234 Washington Street, the Defendants interfered with trade or commerce. *See* Trial Testimony of John Holland, April 23, 2025 at p. 131:6-25; *see also* Trial

Exhibit 126 at pp. 3, 5. Consequently, Mr. Leon and Jace are engaged in trade or commerce because they own, rent and develop real estate.

98. Additionally, the Defendants interfered with trade or commerce because Mr. Leon knew that filing the 2012 Zoning Appeal would restrain the City of Boston from issuing a building permit to 477 Harrison and, as he planned, Mr. Leon eventually forced 477 Harrison to abandon the zoning relief it obtained in 2012 from the ZBA. *See* Trial Testimony of Arthur Leon, May 1, 2025 at p. 31:15-19; *see also* Trial Testimony of John Holland, April 24, 2025 at pp. 44:2-9; 47:14-18; Trial Exhibit 133. Similarly, the Defendants interfered with trade or commerce because Mr. Leon knew that when the 2015 Zoning Appeal was filed that the City of Boston would not issue a building permit for the penthouses during the duration of the appeal and Mr. Leon wanted to prevent potential buyers of the penthouses from obstructing Mr. Leon's development. *See* Arthur Leon Trial Testimony, May 1, 2025 at p. 31:20-24; *see also* Trial Testimony of John Holland, April 24, 2025, at p. 58:15-61:7. And, as importantly, the Defendants' 2012 Zoning Appeal also negated the low income housing units thereby affecting trade or commerce. *See* Trial Testimony of John Holland, April 30, 2025 p. 37-39. Further, Mr. Leon's actions delayed the completion of the re-development of 477 Harrison's property until 2019, as opposed to late 2013 as expected, because the Defendants' actions forced multiple re-designs of the development. *See* Trial Testimony of John Holland, April 24, 2025 at pp. 113:19-114:1.

C. <u>The Defendants' Violated G.L. c. 93A.</u>

i. <u>Unfair or Deceptive Acts.</u>

99. G.L. c. 93A does not define what constitutes an "unfair or deceptive act or practice." *Kattar v. Demoulas*, 433 Mass. 1, 13 (2000). "Such a definition would be impossible,

because, as the Appeals Court aptly noted, '[t]here is no limit to human inventiveness in this field.'" *Id. quoting Levings v. Forbes & Wallace, Inc.,* 8 Mass.App.Ct. 498, 503 (1979). "[W]hat constitutes an unfair or deceptive act or practice requires a case-by-case analysis, and is neither dependent on traditional concepts nor limited by preexisting rights or remedies." *Exxon Mobil Corp. v. Att'y Gen.*, 479 Mass. 312, 316 (2018) (internal citations omitted). "This flexible set of guidelines as to what should be considered lawful or unlawful under c. 93A suggests that the Legislature intended the terms 'unfair and deceptive' to grow and change with the times." *Id. quoting Nei v. Burley*, 388 Mass. 307, 313 (1983).

100. In evaluating whether a practice is unfair in a G.L. c. 93A, § 11 claim, a court assesses "(1) whether the practice ... is at least within the penumbra of some common-law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; [and] (3) whether [the conduct] caused substantial injury ...." *PMP Associates, Inc. v. Globe Newspaper Co.,* 366 Mass. 593, 596 (1975). "To be held unfair or deceptive under c. 93A, practices involving even worldly-wise business people do not have to attain the anti-heroic proportions of immoral, unethical, oppressive, or unscrupulous conduct, but need only be within any recognized or established common law or statutory concept of unfairness." *VMark Software, Inc. v. EMC Corp.*, 37 Mass.App.Ct. 610, 620 (1994).

101. Unfairness is determined from an examination of all the pertinent circumstances. *Northern Security Ins. Co. v. R.I. Realty Trust*, 78 Mass.App.Ct. 691, 696 (2011). The inquiry focuses "on the nature of challenged conduct and on the purpose and effect of that conduct as crucial factors in making a G.L. c. 93A fairness determination." *Massachusetts Employers Ins. Exchange v. Propac–Mass, Inc.,* 420 Mass. 39, 42–43 (1995). "It is not the

definition of an unfair act which controls but the context—the circumstances to which that single definition is applied." *Kattar v. Demoulas,* 433 Mass. 1, 14 (2000).

102. The jury found that the Defendants abused process on three separate occasions (the 2012 Zoning Appeal, the 2015 Zoning Appeal and the Application for the Criminal Complaint). *See* Special Verdict Form. "Conduct amounting to an abuse of process may also constitute a violation of G.L. c. 93A and serve as the basis for a recovery under that statute." *Medford Co-Op Bank v. Skerry*, 2004 Mass.App.Div. 120, *5 (Aug. 12, 2004) citing *Wyler v. Bonnell Motors, Inc.*, 35 Mass.App.Ct. 563, (1993). It is not surprising that abuse of process is a violation of G.L. c. 93A given that an element of an abuse of process claim is that the process was used for an "ulterior or illegitimate purpose." And, pursuing litigation--for an ulterior or illegitimate purpose--violates G.L. c. 93A. *See e.g. Ross v. Continental Resources, Inc.,* 73 Mass.App.Ct. 497, 514-515 (2009) (defendant violated 93A when "knowing that it could not prove the amount [the defendant owed] commenced foreclosure proceedings 'intentionally and solely to scare [defendant] into paying money [and thereby] sough to profit through intimidation.'"); *see also Piccicuto v. Dwyer*, 32 Mass.App.Ct. 137, 138-139 (1992) (defendant violated 93A when he "campaign[ed] to sabotage plaintiff's [business]", "harass[ed] him with groundless complaints to the police and unjustified eviction actions" and admitted, through evidence adduced at trial, that "if you want to put someone out of business, you don't open up next door to them and compete against them, you sue them.") *see also G.S. Enterprises, Inc. v. Falmouth Marine, Inc.*, 410 Mass. 262, 273–275 (1991) (defendant, who brought lawsuit with intent to block purchase of property, would violate G.L. c. 93A, §§ 2(a) and 11).

103. The Defendants' overall conduct (in addition to the multiple abuses of process) was, by any definition, unfair, oppressive and unscrupulous. And, without a doubt, caused 477

Harrison $5,801,550 in damages. Not only did the Defendants abuse process, but they also engaged in a multi-year campaign to derail 477 Harrison's project through any means necessary.

104. The Defendants' campaign started in January of 2012 when Mr. Leon tasked his cousin, Richard Leon, to look into Mr. Holland's financing. *See* Trial Testimony of Richard Leon, April 29, 2025 at pp. 19:1-20:17. According to Mr. Leon, Mr. Holland had overpaid for the building, would go bankrupt and lose the building to the bank. *Id.* It was Mr. Leon's plan to purchase 477 Harrison Avenue from the bank for "half the price." *Id.*

105. Mr. Leon enlisted others to join his campaign. On May 10, 2012, the principal of Urbanica, Inc., Kamran Zahedi, e-mailed Mr. Leon's attorney, Kevin Joyce, stating: "In case you meet Mr. Fitzgerald or any one from BRA. Please relay the message that if BRA and ZBA approve the abutter's plan Mr. leon [sic] will appeal and the case will end up in court for years. we strongly recommend the BRA delay the approval till Mr. leon [sic] shows good progress on his part." *See* Trial Exhibit 150.

106. Mr. Leon, as soon as 477 Harrison closed on the property, executed his plan that he had previously disclosed to his cousin, Richard Leon, months earlier. In late July 2012, John Holland e-mailed Mr. Leon to tell him that 477 Harrison closed on 477 Harrison Avenue. *See* Trial Testimony of John Holland, April 23, 2025 at p. 159:21-25. As of July 30, 2012, it was a matter of public record that 477 Harrison had borrowed $4,762,500 from Rockland Trust to purchase the Property, that John Holland and his brothers had personally guaranteed the loan, and that if 477 Harrison defaulted that Rockland Trust could foreclose. *See* Trial Exhibits 42-43. 477 Harrison's financing for the acquisition of 477 Harrison Avenue had an original loan term of four months that matured on November 30, 2012. *See* Trial Exhibit 41; *see also* Trial Testimony of John Holland, April 23, 2025 at p. 159:1-7.

107. Mr. Leon knew that filing the 2012 Zoning Appeal would restrain the City of Boston from issuing a building permit to 477 Harrison and was the only appeal of the variances granted to 477 Harrison. *See* Trial Testimony of Arthur Leon, May 1, 2025 at p. 31:15-19. During the course of the 2012 Zoning Appeal, 477 Harrison's loan to acquire the property came due multiple times and was extended multiple times at Rockland Trust's discretion. *See* Trial Exhibits 131-132; *see also* Trial Testimony of John Holland, April 24, 2025 at p. 39:18:40-3.

108. As part of his devious plan, Mr. Leon did not miss a single opportunity to derail 477 Harrison's project and exert maximum financial pressure on 477 Harrison and Mr. Holland. As part of the 2012 Zoning Appeal, Mr. Leon appealed 477 Harrison's conditional use permit for its groundwater recharge system after being informed by his own engineers that the groundwater recharge system had no issues. *See* Trial Exhibit 151; *see also* Trial Testimony of John Holland, April 24, 2025 at p. 30:15-17. In his February 5, 2015 letter to the ZBA, Mr. Leon represented that any work performed at the property by 477 Harrison since November 2013 "remains subject to appeal" thus calling into question the legitimacy of two years of construction. *See* Trial Exhibit 88 at p. 2. And, as of February 5, 2015, it was public record that 477 Harrison had obtained $15,365,000 in financing from Rockland Trust, which was personally guaranteed by the Holland brothers and their companies, and none of the residential condominium units at the Property had been completed. *See* Trial Exhibit 86.

109. As of February 2015, 477 Harrison did not have sufficient funds to repay Rockland Trust the amount it had loaned 477 Harrison to construct floors 1-5 of the Property. *See* Trial Testimony of John Holland, April 24, 2025 at pp 83:4-84:24. Mr. Leon knew that when the 2015 Zoning Appeal was filed that the City of Boston would not issue a building permit for the penthouses during the duration of the appeal. *See* Arthur Leon Trial Testimony, May 1, 2025

at p. 31:20-24. Consequently, Mr. Leon's plan--to bankrupt 477 Harrison and buy the property from the bank for half price--was well underway.

110. Without a doubt, the Defendants' unfair and deceptive conduct, over several years, designed to bankrupt 477 Harrison is "within the penumbra of some common-law, statutory or other established concept of unfairness"; "is immoral, unethical, oppressive or unscrupulous"; and caused 477 Harrison "substantial injury." *See PMP Associates, Inc. v. Globe Newspaper Co.,* 366 Mass. 593, 596 (1975). This is especially true where, as here, the purpose and effect of the Defendants' conduct was to derail 477 Harrison's project so that Mr. Leon could purchase the property from the bank at half price. *See Massachusetts Employers Ins. Exchange,* 420 Mass. 39, 42–43 (1995) (the inquiry focuses "on the nature of challenged conduct and on the purpose and effect of that conduct as crucial factors in making a G.L. c. 93A fairness determination."). Therefore, the Defendants' conduct was unfair and deceptive in violation of G.L. c. 93A.

ii. <u>Used Unfair Methods of Competition.</u>

111. Additionally, the Defendants--through their campaign to destroy 477 Harrison's project--engaged in unfair methods of competition. Massachusetts courts, when analyzing claims under G.L. c. 93A, "are directed by the Legislature to be guided by the interpretations given by the…the Federal Courts" regarding claims under the Federal Trade Commission Act. *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 694 (1975). With respect to unfair methods of competition, the U.S. Supreme Court noted--in a case involving a claim under the Federal Trade Commission Act--that

> the word 'competition' imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals

in trade whose business will be, or is likely to be, lessened or otherwise injured. *F.T.C. v. Sperry & Hutchinson Co.,* 405 U.S. 233, 241–42 (1972).

112. Clearly, the Defendants' conduct directed at 477 Harrison--who was, at the very least, a potential competitor of the Defendants--injured 477 Harrison's business and caused damages of $5,801,550. As such, the Defendants also violated G.L. c. 93A through the use of unfair methods of competition.

D. 477 Harrison Suffered a Loss of Money Because of the Defendants' Violation of G.L. c. 93A.

113. To prevail on its claim under G.L. c. 93A, § 11, 477 Harrison must show a causal connection between the Defendants' violative conduct and the loss of money or property. *Shapiro v. Pub. Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. 648, 657 (1985). The jury found that 477 Harrison sustained damages--in the amount of $5,801,550--causally related to the Defendants' conduct. *See* Special Verdict Form. As such, 477 Harrison is entitled to recover under G.L. c. 93A.

E. The Defendants Committed a Willful or Knowing Violation of G.L. c. 93A Entitling 477 Harrison to Multiple Damages.

114. Under G.L. c. 93A, § 11, if there has been a "willful or knowing violation" of G.L. c. 93A by the Defendants, then the award to 477 Harrison shall be multiplied. *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 853-858 (1983). A "willful or knowing" violation is established when the Defendants had a subjectively culpable state of mind. *See Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 475 (1991); *Bump v. Robbins*, 24 Mass.App.Ct. 296, 311 (1987). By definition, abusing process requires a subjectively culpable state of mind. *See Shaw v. Fulton*, 266 Mass. 189, 191 (1929) ("[a]n action for the abuse of process or the malicious use of process does not lie in the absence of malice"). Consequently, the Defendants committed

a knowing violation of G.L. c. 93A through their abuse of process requiring, at least, the doubling of damages.

115. Likewise, abuse of process has been described as a "form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money." *Vittands v. Sudduth*, 49 Mass. App. Ct. 401, 406 (2000). The SJC, in other contexts, has defined coercion as "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done," *see Deas v. Dempsey*, 403 Mass. 468, 471 (1988) or "the active domination of another's will." *Delaney v. Chief of Police of Wareham,* 27 Mass.App.Ct. 398, 409 (1989). Thus, coercive conduct--such as abusing process--certainly proves a subjectively culpable state of mind. *See Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 475 (1991); *Bump v. Robbins*, 24 Mass.App.Ct. 296, 311 (1987).

116. Committing an intentional tort can form the basis for multiple damages under G.L. c. 93A. *See McEvoy Travel Bureau, Inc. v. Norton Co.,* 408 Mass. 704, 714 (1990) (intentional tort can constitute the basis of a willful or knowing violation of G.L. c. 93A); *see also Pepsi–Cola Metropolitan Bottling Co. v. Checkers, Inc.,* 754 F.2d 10, 17–19 (1st Cir.1985) (intentional conduct can constitute the basis of a willful or knowing violation of G.L. c. 93A).

117. The Defendants' other unfair and deceptive conduct--outside of their abuses of process--also shows a subjectively culpable state of mind. The Defendants lied about their development plans to 477 Harrison, the ZBA, the BRA, the Superior Court and neighborhood associations. *See* Trial Exhibit 10, 27-29, 31-33, 34, 119 and 149; *see also* Trial Testimony of Arthur Leon (impeachment with deposition transcript) May 1, 2025 at 127:7-128:25; *see also* Trial Testimony of Arthur Leon, May 1, 2025 at 16:17-17-13; *see also* Trial Testimony of John

Holland, April 23, at 134:11-22; April 30, 2025 at 53:6-56:12. The Defendants knew that Urbanica had not developed any plans or prepared an application for "Large Project Review." *See* Trial Exhibit 38. The Defendants also employed every means necessary to derail 477 Harrison's project including hiring construction and legal professionals to do their bidding. *See* Trial Exhibit 150. And, when all else failed, they pursued baseless insurance claims. *See* Trial Exhibit 139.

118. Moreover, in addition to a subjectively culpable state of mind, a "willful or knowing" violation can be proven where either the defendant affirmatively knew that a material representation was false or that the defendant made the representation with reckless disregard of its truth or falsity. *Shaw v. Rodman Ford Truck Center, Inc.,* 19 Mass.App.Ct. 709, 711-12 (1985). Here, the Defendants lied (on multiple occasions) about their development plans to 477 Harrison, the ZBA, the BRA, the Superior Court and neighborhood associations with the sole purpose of derailing 477 Harrison's development project. *See* Trial Exhibits 27-29, 31-33, 38; *see also* Trial Testimony of Arthur Leon (impeachment with deposition transcript) May 1, 2025 at 127:7-128:25; *see also* Trial Testimony of Arthur Leon, May 1, 2025 at 16:17-17-13; *see also* Trial Testimony of John Holland, April 23, at 134:11-22; April 30, 2025 at 53:6-56:12. As of today, the Defendants still have not developed Jace's property.

119. Based on the egregiousness of the Defendants' conduct, this Court should, at least, double the $5,801,550 in damages awarded by the jury to $11,603,100. *See Wyler v. Bonnell Motors, Inc.*, 35 Mass.App.Ct. 563, (1993)(Appeals Court upheld 93A violation, and the doubling of damages, based upon abuse of process) *see also Int'l Fid. Ins. Co. v. Wilson*, 387 Mass. 841, 853 (1983). The Defendants' multiple abuses of process, and several year campaign to bankrupt 477 Harrison so that they could purchase the property from the bank at half the price,

is exactly the type of conduct that G.L c. 93A was meant to address through the award of multiple damages (either double or treble). *Kraft Power Corp. v. Merrill*, 464 Mass. 145, 158 (2013)("Like punitive damages in tort law, multiple damages under G.L. c. 93A serve the twin 'goals of punishment and deterrence."'). Doubling or even trebling 477 Harrison's damages is consistent with the goals of punishment and deterrence for the Defendants' conduct--which includes using Suffolk Superior Court and the Boston Municipal Court and their respective precious and limited resources--as their unwitting accomplice to further their knowing and willful unfair and deceptive conduct.

F. 477 Harrison is entitled to a mandatory award of Attorneys' Fees and Costs for the Defendants' violation of G.L. c93A, §11.

120. G.L. c. 93A, §11 states, "[i]f the court finds in any action commenced hereunder, that there has been a violation of section two, the petitioner **shall**, in additional to other relief provided by this section and irrespective of the amount in controversy, **be awarded reasonable attorneys' fees and costs incurred in said action**." (emphasis added). Since the Defendants' violated G.L. c. 93A, this Court must award 477 Harrison its reasonable attorneys' fees. *See e.g. Drywall Sys., Inc. v. ZVI Const. Co.*, 435 Mass. 664, 672 (2002).

III. CONCLUSION

For the foregoing reasons, this Court should (1) conclude that the Defendants violated G.L. c. 93A, §11, (2) award 477 Harrison its reasonable attorneys' fees and costs, (3) find that the Defendants' violations of G.L. c. 93A, §11 were knowing and willful and either double or treble the $5,801,550 in damages previously awarded by the jury; and (4) enter judgment accordingly.

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Superior Court - Suffolk
Docket Number 1584CV00829

Respectfully submitted,

477 Harrison Ave., LLC.

By its Attorney,

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Dated: May 30, 2025

CERTIFICATE OF SERVICE

This document was served upon counsel of record for the Defendants, Mark S. Furman, Esquire via email on this 30th day of May 2025.

Andrew E. Goloboy

Andrew E. Goloboy

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 15-0829-B

477 HARRISON AVE., LLC,
Plaintiff,

v.

JACE BOSTON, LLC
and ARTHUR LEON,
Defendants.

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO PLAINTIFF'S CLAIM UNDER MASS. GEN. LAWS CH. 93A, § 11

Defendants JACE Boston, LLC ("JACE") and Arthur Leon ("Arthur Leon," and together with JACE, the "JACE Parties") respectfully submit the following proposed findings of fact and conclusions of law with respect to Plaintiff 477 Harrison Ave. LLC's ("477 Harrison") claim under Mass. Gen. Laws ch. 93A, § 11 (Count II), which claim was tried to the Court.

PROPOSED FINDINGS OF FACT

The Parties

1. Defendant JACE Boston, LLC ("JACE") owns the property located at 1234 Washington Street, Boston ("JACE Property"). *See* **Exhibit 9**; Direct Examination of Arthur Leon, 4/30/25, Pg. 90, Line Numbers 19-25.[1]

2. JACE leases the storefronts of the JACE Property to local businesses. *See* Arthur Leon DE, 4/30/25, Pg. 92, LL 8-25.

[1] References to the transcripts of testimony shall be hereto designated as follows: witnesses name; DE (direct exam), CE (cross examination), or RD (re-direct); Day #; Page # (Pg.); Line Numbers (LL).

3. JACE does not own any real estate other than the JACE Property and engages in no business other than owning and leasing the JACE Property. *See* Arthur Leon CE, 5/1/25, Pg. 104, LL 2-12.

4. Defendant Arthur Leon ("Arthur Leon") is an individual with a business address of 1234 Washington Street, Boston, Massachusetts. *See* Arthur Leon DE, 4/30/25, Pg. 88, 90, LL 23-25, 19-25.

5. Arthur Leon is the manager of JACE. *See* Arthur Leon CE, 5/1/25, Pg. 103-104, LL 7-25, 2-12.

6. Arthur Leon and his father, Elias Leon, purchased the JACE Property in 1975. *See* Arthur Leon DE, 4/30/25, Pg. 90, LL 5-15.

7. Arthur Leon owns and operates two businesses, American Crane & Hoist Corporation and E.G. Leon & Co., Inc., both of which have operated from the JACE Property since 1978. Arthur Leon's wife Judy works in the businesses as do his sons, James and Charlie. *See* Arthur Leon DE, 4/30/25, Pg. 87, 88, 89, 93, 94 LL 17-22, 7-9, 15-25, 3-7, 23-25, 1-15.

8. American Crane & Hoist manufactures overhead cranes and monorails and hoists and winches for industrial applications for factories. This is the sole business activity of American Crane & Hoist. *See* Arthur Leon DE, 4/30/25, Pg. 88, LL 15-19.

9. E.G. Leon is in the business of electrical contracting for industrial work. This is the sole business activity of E.G. Leon. *See* Arthur Leon DE, 4/30/25, Pg. 87, LL 12-16.

10. Arthur Leon, through George's Market, LLC, owns the real estate located at 1222 Washington Street, Boston. *See* Arthur Leon DE, 4/30/25, Pg. 98, LL 18-20; Exhibit 7.

11. Arthur Leon, through George's Market, LLC, renovated and reopened the Red Fez Restaurant located at 1222 Washington Street, Boston. *See* Arthur Leon DE, 4/30/25, Pg.

100, 101, LL 1-25, 1-8. Since 2014, George's Market, LLC, has rented the former Red Fez property to the Cathedral Station Restaurant. *See* Arthur Leon DE, 4/30/25, Pg. 101: LL 10-14.

12. On March 26, 2012, Plaintiff 477 Harrison, LLC ("477 Harrison") was formed as a single purpose entity organized for the specific purpose of purchasing and redeveloping the property located at 477-481 Harrison Avenue, Boston, Massachusetts ("477 Harrison Property"). *See* **Exhibit 20**.

13. Holland Development, LLC ("Holland Development") is the manager of 477 Harrison. *See* John Holland CE, 4/24/25, Pg. 119, LL 10-22.

14. Holland Development is a real estate development company which pursues opportunities-based acquisitions of buildings, land, and development sites for redevelopment. *See* John Holland CE, 4/24/25, Pg. 119, LL 10-14; Exhibit 6.

15. Holland Development typically creates a separate single purpose limited liability company for each of its redevelopment projects. *See* John Holland CE, 4/24/25, Pg. 119, LL 15-18.

16. At all relevant times, John Holland was one of the managers of Holland Development. The Certificate of Organization for 477 Harrison was signed by John Holland as manager for Holland Development. *See* **Exhibit 6**.

17. Holland Development hires M. Holland & Sons Construction, Inc. ("Holland Construction"), a general construction company organized as a Massachusetts corporation in July 1977, to perform construction work on Holland Development projects. *See* **Exhibit 65**.

18. Holland Development, Holland Construction, and Holland Rental Properties, operate under the umbrellas name, "The Holland Companies" with a purpose to build buildings,

develop buildings, and own and manage properties. *See* John Holland DE, 4/23/25, Pg. 109, LL 12-19.

19. John Holland and Holland Companies have developed numerous luxury residential condominiums including in Boston at 293 Marlborough Street, 451 Marlborough Street, Commonwealth Avenue, and Warren Street. John Holland, D.E. April 24, 2025, Pgs. 119, LL 23-120 LL 25 and 129, LL 15-25.

The Properties

20. The 477 Harrison Property and the JACE Property are abutting properties. *See* John Holland Re-CE, Pg. 50, 11-13.

21. Prior to being redeveloped by 477 Harrison, the building located on the 477 Harrison Property originally served as the horse stables for the Jordan Marsh Company and later was used for industrial and warehouse purposes. *See* John Holland DE, 4/23/25, Pg. 112, LL 11-21.

22. The JACE Property is improved with a one-story building built in 1926. The building contains approximately 60,000 square feet of space. *See* **Exhibit 135**, pg. 2-3.

23. The JACE Property does not have its own wall where it abuts the 477 Harrison Property. Rather, the JACE Property uses the north wall of the 477 Harrison Property and ties into that wall by 20 steel beams. *See* **Exhibit 135**, pg. 1-5.

24. In 1926, the predecessors in title to the JACE Property and the 477 Harrison Property entered into an Indenture and Agreement ("Indenture"), which created an easement in the north wall of the 477 Harrison Property up to a particular height running in the favor of the JACE Property. *See* **Exhibit 1; Exhibit 135**, pg. 1.

25. The foundation of the north wall of the 477 Harrison Property is located on the JACE Property. *See* **Exhibit 1; Exhibit 135**, pg. 3.

26. Prior to purchasing the 477 Harrison Property, 477 Harrison was aware of the Indenture from a title report prepared for the property. *See* John Holland CE, 4/29/25, Pg. 78, 79, LL 24-25, 1-2.

The Redevelopment of the 477 Harrison Property and the Resulting Litigation

27. On December 8, 2011, Holland Development entered into a purchase and sale agreement for Holland Development or its nominee to purchase the 477 Harrison Property. *See* **Exhibit 11.** The purchase price was $6,350,000. *See* **Exhibit 11**. The closing was originally scheduled for May 1, 2012. On April 30, 2012, a First Amendment to the Purchase Sale Agreement was signed extending the closing date to July 30, 2012. *See* **Exhibit 25**.

28. The purchase of the 477 Harrison Property was not contingent on Holland Development and/or its nominee obtaining necessary approvals from the City of Boston to convert the building into commercial and residential condominiums. *See* John Holland CE, 4/29/25, Pg. 55, LL 14-23. See **Exhibit 11.**

29. In particular, Holland Development's plan was to redevelop the first floor of the 477 Harrison Property for commercial use, build four floors of luxury residential condominiums on floors 2-5, and add a sixth floor for luxury penthouse condominiums. *See* John Holland CE, 4/24/2025, Pg. 132, 133, LL 1-25, 1-25, 4/29/25, Pg. 55, 56, LL 14-25, 1-10.

30. Holland Development's design for the redevelopment of the 477 Harrison Property called for demolishing the majority of the north wall of 477 Harrison's building, including the area of the second-floor brick wall that is subject to the easement for the benefit of the JACE Property. *See* John Holland CE, 4/29/25, Pg. 88, LL 22-25, 1.

31. As of January 2012, 477 Harrison had not yet been formed as an entity. *See* **Exhibit 20**.

32. Richard Leon testified that he walked into Arthur Leon's office in January 2012. Richard Leon claims that Arthur Leon asked him "to look into 477 Harrison Avenue about it having a $7 million loan on it, and he didn't think it could be sustained by the borrower." According to Richard Leon, Arthur Leon told him that Holland could not handle that size investment and would ultimately lose it and that Arthur Leon would buy the property from the bank for about half the price Holland paid. *See* Rick Leon DE, 4/29/25, Pg. 17, 19, 20 LL 17-22, 1-25, 1-7. Arthur Leon denies that this conversation between him and Richard Leon occurred. *See* Arthur Leon DE, 4/30/25, Pg. 122: LL 22-25. Neither Arthur Leon nor Richard Leon knew of John Holland at this time.

33. Arthur Leon and Richard Leon were not on speaking terms as of January 2012. *See* Arthur Leon DE, 4/30/25, Pg. 122, LL 22-25.

34. I find Richard Leon's testimony not credible. As discussed below, Arthur Leon had no knowledge of John Holland and/or his plans for the 477 Harrison Property until late February 2012.

35. There is no evidence that Arthur Leon ever looked into Holland's finances or that he had any interest in owning the 477 Harrison Property. *See* Arthur Leon DE, 5/1/25, Pg. 93, LL 4-24.

36. The first time John Holland presented plans for the redevelopment of the 477 Harrison Property to the Old Dover Neighborhood Association was in late February 2012. *See* **Exhibit 16**; John Holland DE, 4/23/25, Pg. 128, LL 8-17.

37. In or about February 2012, John Holland presented plans which included a "Phase II" for the redevelopment of the 477 Harrison Property which included adding a street to the

JACE Property to create a separation between the 477 Harrison Property and the JACE Property. *See* **Exhibit 12** at 477H03207**; Exhibit 15** at 477H03218, 477H03231.

38. The first time James Leon, Arthur Leon's son, met John Holland was in late February 2012. *See* James Leon DE, 5/2/25, Pg. 73, LL 10-12.

39. The first time Arthur Leon met or spoke with John Holland was in late February 2012, on or about February 29, 2012. *See* **Exhibit 16**; John Holland CE, 4/24/25, Pg. 127, LL 22-24; Arthur Leon DE, 4/30/25, Pg. 103: LL 18-20.

40. On March 9, 2012, the Boston Inspectional Services Department ("ISD") denied Holland Development's application for a building permit because the proposed plans violated a number of provisions of the Boston Zoning Code and required relief from the Boston Board of Appeal. *See* **Exhibit 18**.

41. On March 16, 2012, Holland Development filed an appeal of the ISD's denial with the Boston Board of Appeal. *See* **Exhibit 140**.

42. On April 10, 2012, Holland Development submitted to the Boston Redevelopment authority an Application for Small Project Review pursuant to Article 80E of the Boston Zoning Code. *See* **Exhibit 24**.

43. Arthur Leon and his attorney Kevin Joyce submitted letters to the Boston Redevelopment Authority dated May 10, 2012, and May 14, 2012, respectively, requesting that the Boston Redevelopment Authority deny approval of the proposal to redevelop the 477 Harrison Property. *See* **Exhibit 27-29.**

44. In a letter to the BRA dated May 10, 2012, Arthur Leon raised concerns about the proposed project with respect to its impact on the JACE Property, as well as to the surrounding neighborhood. For example, Arthur Leon observed that "it is customary under Article 80 of the

Zoning Code for a project to create a public benefit, including but not limited to the provision of affordable housing. . . . Thus far, the Holland Companies have failed to provide any indicia of the Harrison Avenue Project being a benefit to the public." *See* **Exhibit 27**.

45. The letter also identified specific concerns relating to the design of the project, as well as zoning-related concerns. For example, Arthur Leon wrote, "[t]he design, as proposed, would expand the building envelope on the Property. As such, the design needs significant zoning variances from density limits (FAR), heigh limits, minimum rear yard setback and minimum open space, even though the zoning for the SENZD is the product of a recent and extensive community process. The BRA should recommend against the requested variances, for which the Holland Companies can demonstrate no hardship." *See* **Exhibit 27**.

46. Kevin Joyce's letter to the BRA dated May 10, 2012, included a copy of a letter from Edward O'Donnell of Waypoint Construction Consultants dated May 8, 2012. Mr. O'Donnell's letter set forth his comments and observations regarding 477 Harrison's Application for Small Project Review. Among other things, Mr. O'Donnell concluded that the information in 477 Harrison's application was "insufficient to adequately describe the impacts that 477-481 Harrison Avenue will have upon your property and the South End community." In addition, the application failed to "adequately describe how the development of 477-481 Harrison Avenue will seek to mitigate whatever negative impacts might arise [sic] the project." Mr. O'Donnell's recommendation was that Arthur Leon ask the BRA to request additional information from 477 Harrison before approving the application. "That information should include, at minimum, a thorough analysis of the expected impacts arising from 477-481 Harrison Avenue upon the transportation, environmental protection, infrastructure systems and site plan elements." *See* **Exhibit 28**.

47. In an email to Mr. Joyce dated May 10, 2012, Kamran Zahedi wrote, "if BRA and ZBA approve the abutter's plan Mr. [L]eon will appeal and the case will end up in the court for years." *See* **Exhibit 150**. Arthur Leon was not copied on Mr. Zahedi's email.

48. Mr. Zahedi's email was not a threat in that it was directed to Arthur Leon's attorney and simply made an observation regarding how long an appeal would take.

49. There is no evidence that Arthur Leon ever saw, approved, and/or ratified the comments made by Kamran Zahedi in the email dated May 10, 2012.

50. Mr. Joyce's letter to the BRA dated May 14, 2012, included "copies of letters from nine abutting property owners who also oppose the Harrison Avenue Project." *See* **Exhibit 29.**

51. On or about May 15, 2012, the Boston Redevelopment Authority, without allowing Arthur Leon or his representatives to speak, approved the application to redevelop the 477 Harrison Property. The approval included authorization to enter into an Affordable Rental Housing Agreement and an Affordable Housing Contribution Agreement. *See* **Exhibit 30**.

52. A hearing was scheduled for May 22, 2012, before the Zoning Board of Appeal for the City of Boston. *See* **Exhibit 31**.

53. Arthur Leon and his attorney Kevin Joyce submitted letters to Robert Shortsleeve, Chairman of the Zoning Board of Appeal for the City of Boston opposing the grant of zoning variances to redevelop the 477 Harrison Property. *See* **Exhibits 31-34**. Among other things, the letters noted that the "Holland Companies cannot point to any practical difficulty or demonstrate any substantial hardship that it would suffer if the BOA [Zoning Board of Appeal] were to deny the variances." *See* **Exhibit 31**.

54. On or about May 22, 2012, the Zoning Board of Appeal granted the zoning variances requested for the 477 Harrison Property. *See* **Exhibit 129**.

55. On May 22, 2012, Urbanica sent an invoice to James Leon, (Arthur Leon's son) for the services Urbanica provided in connection with the hearings before the Boston Redevelopment Authority and Zoning Board of Appeal. *See* **Exhibit 38**.

56. In June 2012, Arthur Leon suffered a serious injury and was unable to work for several weeks. *See* **Exhibit 39;** Arthur Leon DE, 4/30/25, Pg. 119, LL 3-24.

57. Although there were references in the correspondence to the BRA and the Board of Appeal that Urbanica was assisting Arthur Leon with his intention to redevelop his property, no such redevelopment efforts took place after the BRA and the Board of Appeal approved Holland Development's plans to redevelop the 477 Harrison Property. *See* Arthur Leon Re-DE, 5/2/25, Pg. 68, LL 6-16.

58. On July 30, 2012, 477 Harrison, as the nominee of Holland Development, purchased the property located at 477-481 Harrison Ave., Boston, for $6,350,0000. *See* **Exhibit 42**.

59. The decision of the Board of Appeal approving the variances sought by 477 Harrison was entered in the Inspectional Services Department on August 14, 2012. *See* **Exhibit 129.**

60. On August 29, 2012, within the time limit required for an appeal, JACE filed an appeal of the Board of Appeal's decision, an action entitled, *JACE Boston, LLC v. Board of Appeal of the City of Boston,* Civil Action No. 12-3241 (Suffolk Superior Court) ("2012 Zoning Appeal"). *See* **Exhibit 130**.

61. Paragraph 18 of the complaint filed in the 2012 Zoning Appeal alleged, "Pergola's Property along the side lot line that abuts Plaintiff's Property is subject to a party wall agreement for the benefit of Plaintiff's Property." *See* **Exhibit 130**.

62. JACE brought the 2012 Zoning Appeal because it objected to the variances sought by 477 Harrison on the grounds that it did not believe 477 Harrison understood an easement existed for JACE's benefit and he believed that the granting of the variances would harm the JACE Property by allowing 477 Harrison to tear down the part of the wall covered by the easement. *See* Arthur Leon DE, 5/1/25, Pg. 26, LL 5-22.

63. As an abutter of 477 Harrison's property, JACE was a "person aggrieved" and had presumptive standing to challenge the zoning relief 477 Harrison obtained in 2012. *See* Arthur Leon DE, 4/30/25, Pg. 27, 28, LL 22-25, 1-7.

64. In connection with the 2012 Zoning Appeal, the JACE Parties obtained an affidavit from Kathleen O'Donnell ("O'Donnell Affidavit"). *See* **Exhibit 147**. Based on the O'Donnell Affidavit, the JACE Parties and 477 Harrison had notice that in Attorney O'Donnell's opinion, the Indenture was valid and remained in effect for the benefit of JACE. *See* Arthur Leon DE, 5/1/25, Pg. 26, LL 5-10.

65. On or about February 14, 2013, 477 Harrison obtained a demolition permit and began demolishing the inside of 477 LLC's building. *See* **Exhibit 46**.

66. In May 2013, 477 Harrison received an offer to purchase the 477 Harrison Property for $12,500,000. *See* **Exhibit 49**. The offer was $6,150,000 more than 447 Harrison paid for the property in July 2012. 477 Harrison did not accept the offer. *See* John Holland DE, 4/23/25, Pg. 158, LL 15-16, John Holland CE, 4/29/25, Pg. 81, 82 LL 20-25, 1-9.

67. In June 2013, 477 Harrison decided to redevelop the property as an "as of right" project which did not need any variance. *See* **Exhibit 51; Exhibit 133**.

68. In an email dated June 18, 2013, John Holland wrote that 477 Harrison was going forward with permitting an as of right project, but that the building "is being structured with the intent on constructing the penthouse in the future." *See* **Exhibit 51**.

69. On June 13, 2013, JACE filed an action for declaratory judgment entitled, *JACE Boston, LLC v. Holland Development, LLC and 477 Harrison Ave., LLC* , Civil Action No.13-2167-H (Suffolk Superior Court) (the "Wall Case"), in which it sought a declaration of the parties' rights under the Indenture. *See* **Exhibit 50**.

70. The JACE Parties brought the Wall Case to declare the parties' rights under the Indenture. *See* **Exhibit 50**; Arthur Leon DE, 4/30/25, Pg. 132, LL 2-16.

71. On July 8, 2013, Holland Development made an offer to purchase the JACE Property and 1222 Washington Street, another property owned by Arthur Leon through a separate limited liability company, either directly or through a nominee, for $28,000,000. *See* **Exhibit 142**.

72. 477 Harrison's permit plans for the as of right project dated October 4, 2013, showed windows in the north wall on the second floor of the 477 Harrison Property, notwithstanding the pendency of the Wall Case. *See* **Exhibit 56**.

73. ISD issued a permit dated October 10, 2013, for the groundwater recharge system and to frame the floor decks of the 477 Harrison Property. *See* **Exhibit 57**.

74. To resolve the 2012 Zoning Appeal, JACE and 477 Harrison, along with the City of Boston, entered into an Agreement for Judgment dated November 7, 2013. Among other things, the Agreement for Judgment provided:

a. The variances 477 Harrison obtained in 2012 to construct the sixth floor and penthouse units was vacated (**Exhibit 134, ¶ 1**);

b. 477 Harrison reserved the right to seek variances at a later date, including the right to add a penthouse floor (**Exhibit 134, ¶ 2**); and

c. JACE reserved the right to object to and appeal any variance granted to 477 Harrison at a later date, including allowing the addition of a penthouse floor to 477 Harrison's property (**Exhibit 134, ¶ 3**).

d. JACE waived and released any right to object to, oppose, or appeal the issuance of a conditional use permit for the groundwater recharge system (**Exhibit 134, ¶ 6**).

75. On or about November 8, 2013, the JACE Parties filed an appeal of the permit ISD issued on October 10, 2013. *See* **Exhibit 58**. The grounds for the appeal were zoning code violations and JACE's easement. The appeal did not object to the storm water recharge system. *See* **Exhibit 58**.

76. There is no evidence that the November 8 appeal had any impact on the construction of 477 Harrison's as of right project.

77. In or about November 2013, Arthur Leon read an article about a property John Holland was redeveloping in [town]. The renovation project had been approved to demolish one wall of the structure; when the work was done, however, three of the walls were demolished. The article caused Arthur Leon to be concerned that 477 Harrison would take some action with respect to the north wall of the 477 Harrison Property in which JACE claimed an easement that would be irreversible. *See* Arthur Leon Re-DE, 5/2/25, Pg. 66, 67, 68, LL 13-25, 1-25, 1-2.

78. In November 2013, on the Wednesday before Thanksgiving, John Holland informed Arthur Leon that 477 Harrison planned to start demolishing the north wall on Monday. *See* Arthur Leon DE, 5/1/25, Pg. 34, LL 4-24.

79. Thereafter, the JACE Parties sought a preliminary injunction in the Wall Case to prevent the demolition of the portion of the north wall of the 477 Harrison Property in which JACE claimed an easement under the Indenture. *See* Arthur Leon DE, 5/1/25, Pg. 35, LL 5-7.

80. To resolve JACE's motion for a preliminary injunction, 477 Harrison and JACE entered into a Stipulated Order, dated on December 10, 2013, which was entered as an order of the Court. The Stipulated Order, among other things,

a. Prohibited 477 Harrison from demolishing the portion of the north wall in which JACE claimed an easement (**Exhibit 60, ¶ 4**); and

b. Allowed 477 Harrison to demolish the north wall on floors 3 through 5 (**Exhibit 60, ¶ 3**).

81. ISD issued a permit dated December 19, 2013, upon which 477 Harrison relied to trespass onto the JACE Property for the purpose of putting protections on the JACE Property. *See* **Exhibit 61**.

82. In January 2014, the JACE Parties sought a preliminary injunction to enjoin 477 Harrison from trespassing on the JACE Property. The motion was denied. *See* **Exhibit 62**.

83. In an email dated March 19, 2014, 477 Harrison's attorney acknowledged that JACE honored the provision of the Agreement for Judgment under which it waived its right to appeal the Article 32 Conditional Use Permit for a groundwater recharge system issued to 477 Harrison. *See* **Exhibit 144**.

84. A jury-waived trial in the Wall Case was held in April 2014. *See* **Exhibit 135**, pg. 2.

85. According to John Holland, he delayed finishing the work on the north wall until after the Wall Case was decided. *See* John Holland DE, 4/24/25, Pg. 73: LL 20-24.

86. After a trial in the Wall Case, the Superior Court entered judgment in favor of JACE. *See* **Exhibit 135**.

87. The Superior Court ruled in favor of JACE, affirming the continued existence and validity of the Indenture and prohibiting 477 Harrison from demolishing the brick wall in the area of JACE's easement rights. *See* **Exhibit 135**.

88. 477 Harrison appealed the Superior Court's judgment to the Appeals Court. *See* **Exhibit 145**.

89. On appeal, the Appeals Court affirmed the decision of the Superior Court in February 2016. *See* **Exhibit 145**.

90. The Appeals Court concluded that "the terms of the easement are not ambiguous." *See* **Exhibit 145**.

91. In the fall of 2014, Holland Construction's workers, staging, and other construction-related materials remained on the roof of the JACE Property. *See* Arthur Leon DE, 5/1/25, Pg. 56, 57 LL 5-25, 1-6.

92. Arthur Leon believed that Holland Construction's continued presence on the JACE Property as of the fall of 2014 was not permitted under either an earlier court order, relevant law, and/or an agreement reached between him and John Holland in March 2014. *See, e.g.*, **Exhibit 72**.

93. During the fall of 2014, Arthur Leon communicated with John Holland to attempt to have Holland Construction remove its workers, planking, tires, and construction debris from the roof of the building on the JACE Property. *See* **Exhibits 72-76**.

94. Arthur Leon was not able to reach a negotiated resolution with John Holland of what Arthur Leon perceived as Holland Construction's trespass on the building on the JACE Parties' property. *See* **Exhibits 72-76**.

95. In October 2014, John Holland represented to Arthur Leon that "the work that requires physical access to your roof will be completed this week." *See* **Exhibit 73**. John Holland further represented that the remaining tires and planks on the roof of the JACE Property were "necessary to continue to provide protections to the roof while we complete work on the front section of the sidewall using the swing staging . . . I expect the work on this final section of the wall will be completed over the next month." *See* **Exhibit 73**.

96. As of December 6, 2014, Holland Construction's workers, construction materials, and debris remained on the roof of the JACE Property. *See* Arthur Leon DE, 5/1/25, Pg. 68 LL 1-14.

97. Arthur Leon sent an employee to the Boston Police Department to see what the police could do about what Arthur Leon thought was a trespass. The police told the employee to speak to ISD. ISD, however, was unable to provide assistance to stop the trespass. *See* Arthur Leon DE, 5/1/25, Pg. 68, 69, 70, LL 24-25, 1-25, 1.

98. Thereafter, Arthur Leon went to speak to someone at the Boston Police Department. Arthur Leon went to the police out in an effort to seek some assistance to end what he believed was Holland Construction's trespass on the JACE Property. It was not Arthur

Leon's intent to have criminal charges brought against John Holland. *See* Arthur Leon DE, 5/1/25, Pg. 70, 77, 78, LL 18-23, 22-25, 1-5.

99. The police officer with whom Arhtur Leon spoke prepared the police report. *See* Arthur Leon DE, 5/1/25, Pg. 71:1-73:9. 477 Harrison was not mentioned in the Police Report. *See* **Exhibit 79**.

100. The Police Report states

> PO Horgan spoke to Mr. Arthur who states that since July 2, 2014 Holland Construction Company's workers continue to stand on his roof which is 1234 Washington Street Boston Ma to work on the building adjacent to his 477 Harrison Ave Boston Ma. Mr. Arthur reports that he has repeatedly instructed the Holland Construction Company not to stand on his roof to work. Mr. Arthur further states that they have left construction equipment on his roof, he has found nails, construction debris, and has used chemicals on the building and that the workers refuse to tell him what the chemical is. Mr. Arthur has also repeatedly instructed the Holland Construction Company to stop trespassing on his property which they refuse to comply. Holland Construction Company's owner is John Holland.
>
> PO Horgan advised Mr. Arthur to seek a trespass order in Boston Municipal Court.

See **Exhibit 79**.

101. Following the advice of the police, Arthur Leon went to the Boston Municipal Court ("BMC"). Arthur Leon gave the person he spoke with at the BMC a copy of the police report. Someone at the BMC gave Arthur Leon a court date and wrote up the papers for Arthur Leon to sign, which he did. While the form was entitled, "Application for Criminal Complaint," Arthur Leon did not read that part and did not notice or intend to have criminal charges brought against John Holland. The only thing on the Application that Arthur Leon wrote was his signature. *See* Arthur Leon DE, 5/1/25, Pg. 74, 77, 78, 75, LL 9-13, 22-25, 1-5, 7-11.

102. The application references "John Holland (John) Holland Construction," in the defendant section of the application. *See* **Exhibit 83**. The "Remarks" section begins, "Complainant alleges that the above listed defendant, owner of Holland Construction has approximately four people standing on his roof." *See* **Exhibit 83**. 477 Harrison is not mentioned in the application. The application did not state that John Holland was personally standing on the roof of the JACE Property.

103. On December 17, 2014, Arthur Leon attended the hearing on the application without a lawyer. John Holland appeared at the hearing with two lawyers. As directed by the court, Arthur Leon first sought to resolve the issue with John Holland and his lawyers, but he was unable to do so. As a result, the hearing went forward. The court determined there was no probable cause to issue a criminal complaint and told Arthur Leon to return to the Superior Court. *See* Arthur Leon DE, 5/1/25, Pg. 78, 79, 80, LL 13-25, 1-25, 1-6.

104. Arthur Leon was not trying to cause John Holland to be arrested or put in jail. His goal was to have Holland Construction stay off of his roof. *See* Arthur Leon, DE, 5/1/25, 81:15-82:11.

105. ISD issued a zoning code refusal dated December 16, 2014, in connection with 477 Harrison's application for a permit to construct three penthouse units dated November 24, 2014. *See* **Exhibit 82**.

106. On December 17, 2014, 477 Harrison appealed ISD's denial to the Board of Appeal. *See* **Exhibit 85.**

107. A hearing on 477 Harrison's request for a variance to build a sixth floor to add luxury penthouse condominiums to the 477 Harrison Property was scheduled for March 24, 2015. *See* **Exhibit 136**.

108. In advance of the hearing, Arthur Leon submitted a letter dated February 2, 2015, to the Board of Appeal outlining his opposition to the zoning relief 477 Harrison was seeking. *See* **Exhibit 88**.

109. On March 23, 2015, 477 Harrison filed this action.

110. At the hearing on March 24, 2015, the Board of Appeal approved the zoning relief 477 Harrison requested. *See* **Exhibit 136**.

111. The decision of the Board of Appeal approving the penthouse variances sought by 477 Harrison was entered in the Inspectional Services Department on May 12, 2015. *See* **Exhibit 136.**

112. On May 28, 2015, within the time limit required for an appeal, JACE filed an appeal of the Board of Appeal's decision, an action entitled, *JACE Boston, LLC v. Board of Appeal of the City of Boston,* Civil Action No. 15-1585H (Suffolk Superior Court) ("2015 Zoning Appeal"). *See* **Exhibit 137**.

113. JACE brought the 2015 Zoning Appeal because it objected to the variance sought by 477 Harrison to construct the penthouse units on the grounds that it did not believe 477 Harrison was legally entitled to the variance and it believed that the granting of the variance would harm the JACE Property. *See* Arthur Leon DE, 5/1/25, Pg. 88, 89, 90, LL 10-25, 1-25, 1-3.

114. As an abutter of 477 Harrison's property, JACE was a "person aggrieved" and had presumptive standing to challenge the zoning relief 477 Harrison obtained in 2015. *See* **Exhibit 138,** pg. 5.

115. On or about June 10, 2015, 477 Harrison filed an Amended Complaint in this action adding the 2015 Zoning Appeal to the scope of its abuse of process and 93A claims. *See* John Holland CE, 4/30/25, Pg. 13, LL 20-24.

116. 477 Harrison and JACE expressly agreed in the Agreement for Judgment in the 2012 Zoning Appeal that 477 Harrison could seek variances in the future and JACE could oppose and appeal any such variances granted to 477 Harrison. *See* **Exhibit 134**.

117. In the 2015 Zoning Appeal, 477 Harrison brought a motion for summary judgment on the grounds that JACE lacked standing, which motion JACE opposed. *See* Arthur Leon DE, 5/1/25, Pg. 92, LL 15-24.

118. The Superior Court granted 477 Harrison's motion for summary judgment in the 2015 Zoning Appeal. In granting 477 Harrison's motion for summary judgment on standing, the Superior Court acknowledged that there was not a case directly on point. *See* **Exhibit 138, pg. 6**. The Superior Court further recognized that the JACE Parties alleged that their property would be harmed by the work contemplated by the variances, but that the nature of the harm did not fall within the zone of interest of the zoning code. *See* **Exhibit 138, pg. 6-7**.

Submission of Insurance Claims to Holland Construction's Insurer

119. 477 Harrison represented to the JACE Parties that they were additional insureds under Holland Construction's insurance policy. *See* **Exhibit 73**.

120. In a letter dated May 2, 2014, Arthur Leon submitted a letter to Holland Construction's insurer in which Arthur Leon indicated he was asserting a claim against Holland Construction for damage, specifically cracking and sinking, to the floor of the JACE Property. *See* **Exhibit 68**.

121. By letter dated December 17, 2014, Arthur Leon submitted another claim to Holland Construction's insurer relating to damage caused to the JACE Property. *See* **Exhibit 84**.

122. In a letter dated January 20, 2015, Evan Hankin, a structural engineer who had been monitoring the JACE Property, wrote, "it is my opinion that the vibrations and the removal of the subgrade material caused the movement in the slab-on-grade and the subsidence of the support material below the slab. The new cracks, the widening of the existing cracks, and the settlement of the slab are directly related and caused by the construction activity at 477 Harrison Avenue." *See* **Exhibit 87**.

123. Mr. Hankin further explained that the construction at the 477 Harrison Property caused new cracks and/or widened existing cracks in the concrete slab-on-grade floor at the JACE Property in the bay adjacent to the north wall of the 477 Harrison Property and further that the construction has caused the slab floor of the JACE Property to settle or sink downward. *See* **Exhibit 87.**

124. On or about August 1, 2015, Holland Construction's insurer denied the JACE Parties' claims. *See* **Exhibit 139**. The JACE Parties did not file a lawsuit against Holland Construction after the denial of the claim. JACE did file a claim with its insurer which claim was denied for lack of coverage for damage caused by earth movement.

Damages-Related Facts

125. John Holland's testimony regarding his expectations that the residential units would have sold for $1,200 to $1,300 per square foot if they had been completed when 477 Harrison originally planned is speculative, self-serving, inconsistent with what he told his bank and its appraiser, and not credible. Moreover, Mr. Holland's testimony about his expectations of value is an insufficient basis to treat Mr. Holland's opinion as an owner's opinion of the fair market value of its property.

126. In an email dated March 26, 2012, John Holland informed Rockland Trust and the bank's appraiser that "[w]e can start the project with a demo permit and a plan limited to as of right work and then add the addendum drawing for the penthouses and rear bump out." *See* **Exhibit 21**.

127. In an appraisal dated April 9, 2012, prepared for 477 Harrison's bank, Rockland Trust, Joseph J. Blake and Associates, Inc. ("Blake") appraised the as-completed value of the 477 Harrison Property as of August 1, 2013, to be $19,300,000. *See* **Exhibit 23**. At the time of that appraisal, the planned redevelopment of the 477 Harrison Property included one floor of commercial spaces and 18 residential condominium units, including a sixth floor with two penthouse units. *See* **Exhibit 23**.

128. The owner supplied information that was included in the Blake appraisal dated April 9, 2012, anticipated that sales of the commercial and residential units, when completed, would generate total sales of $24,410,000. *See* **Exhibit 23**. At that time, 477 Harrison communicated to Rockland Trust that it expected each of the 2 penthouse units to each sell for $2,125,000. *See* **Exhibit 23**.

129. The owner supplied information that was included in the Blake appraisal dated April 9, 2012, anticipated that the per square foot sales price of the residential units would range from $576.92 to $888.45, with the penthouse units expected to sell at the rate of $850.00 per square foot. *See* **Exhibit 23**.

130. On May 22, 2012, at 4:10 p.m., John Holland wrote to Helen Garvey at Rockland Trust that, "[a]fter the hearing, [Arthur Leon] agreed to sit down with me [John Holland] to discuss jointly designing the two projects so it work [sic] today and for his future project. Arthur [Leon] has not done anything in 36-years so I'm not holding my breath. I am working on two

sets of plans one for the as of right [in case] Arthur [Leon] appeals and one for the full project." *See* **Exhibit 37**.

131. In response to Ms. Garvey's question about the deadline by which Arthur Leon would have to file an appeal, Mr. Holland wrote later in the afternoon on May 22, 2012, that "[a]fter the filing he has 20-days. I'm going to assume he appeals and we start construction on the as of right portion." *See* **Exhibit 37**.

132. In an email to Ms. Garvey dated July 2, 2012, Mr. Holland explained that he "spoke with the BRA today and they are helping out the as of right financing by officially drop[ing] the low income requirement for the project. I don't know when but we are getting the PH units without condition." *See* **Exhibit 141**.

133. A few minutes later, Mr. Holland further wrote to Ms. Garvey, "It is funny[.] Leon rattled the BRA cage and he actually saved me $1mm on the project. I should offer him $500,000 not to appeal." *See* **Exhibit 141**.

134. John Holland testified that he was truthful and at no time made any misrepresentations to Rockland Trust or Blake because he knew Rockland Trust and Blake would be relying on his statements. John Holland CE, 4/30/25, Pg. 36, LL 2-14.

135. In an email to Blake and Rockland Trust dated May 17, 2013, John Holland wrote "there are no affordable units in the as of right. It is below 15-units so it is exempt[.]" *See* **Exhibit 48**.

136. In an email dated August 22, 2013, John Holland informed Rockland Trust that 477 Harrison was considering selling the first two floors of the 477 Harrison Property to an entity which intended to use both floors for non-residential purposes. *See* **Exhibit 53**.

137. Blake prepared an appraisal for Rockland Trust in September 2013, which included an appraisal value of an as-of-right redeveloped property (i.e., no penthouses) with an expected completion date of January 1, 2015. *See* **Exhibit 55**. Blake's appraisal was $25,000,000. *See* **Exhibit 55**.

138. The owner supplied information included in Blake's September 2013 appraisal projected sales prices of the commercial and residential units totaling $31,875,000. *See* **Exhibit 55.** The range of per square foot selling prices for the residential units was $988 to $1,031. *See* **Exhibit 55**; *see also* **Exhibit 54** (in September 2013, projecting total sales of $32,300,000, with a range of sales price per square foot of $988.21 to $1,137.42).

139. A further Blake appraisal prepared in February 2014, appraised the 477 Harrison Property redeveloped as of right, with an expected completion date of January 1, 2015, under two different scenarios. The first scenario projected the JACE Parties lost the Wall Case, thereby allowing 477 Harrison to develop the second floor as residential units. Under this scenario, Blake appraised the property at $25,000,000. *See* **Exhibit 64** (assuming three residential units per floor). The second scenario presented an appraisal in the event the JACE Parties won the Wall Case, concluding to a value of $21,000, 000. *See* **Exhibit 64** (assuming three residential units per floor).

140. The owner-supplied information for the February 2014 Blake appraisal, projected total sales of the commercial and residential units under the first scenario (*i.e.*, the JACE Parties lose the Wall Case) of $31,900,000, with per square foot sales prices for the residential units ranging from $982.14 to $1,093.02. *See* **Exhibit 64** (assuming three residential units per floor). For the second scenario (*i.e.*, the JACE Parties won the Wall Case), the owner-supplied

information projected total sales of the commercial and residential units of $28,600,000. *See* **Exhibit 64** (assuming three residential units per floor).

141. In addition, the owner-supplied information, for both scenarios, projected the sales prices for two future penthouse units totaling $6,150,00, with an average per square foot sales price of $1,198.83. *See* **Exhibit 64**.

142. 477 Harrison's projections in February 2014 of the sales prices of the penthouse units as of some date after January 1, 2015, represent the first time 477 Harrison anticipated a sales price per square foot in the range of $1,200. *See* **Exhibit 64.**

143. As ultimately redeveloped, 477 Harrison, in addition to retaining ownership of the commercial condominium, and the yearly rental payments derived from them, sold the residential units for a total of $37,885,0000, with sales price per square foot ranging from $1,253.37 to $1,831.86, as set forth below:

Unit	Sales Date	Sales Price	Unit Square Footage	$ / Square Foot
3A	8/11/2016	$2,875,000	2,150	$1,337.21
3B	4/19/2017	$2,200,000	1,687	$1,304.09
3C	1/3/2019	$1,395,000	1,113	$1,253.37
3D	11/18/2019	$2,850,000	2,160	$1,319.44
4A	9/23/2016	$2,900,000	2,150	$1,348.84
4B	5/9/2016	$2,200,000	1,687	$1,304.09
4C	5/11/2016	$1,475,000	1,113	$1,325.25
4D	9/23/2019	$2,975,000	2,160	$1,377.31
5A	6/21/2016	$2,775,000	2,150	$1,290.70
5B	10/11/2016	$2,340,000	1,687	$1,387.08

Unit	Sales Date	Sales Price	Unit Square Footage	$ / Square Foot
5C	5/6/2016	$1,500,000	1,113	$1,347.71
5D	8/29/2017	$2,800,000	2,160	$1,296.30
PHA	6/6/2019	$4,000,000	2,200	$1,818.18
PHB	6/6/2019	$5,600,000	3,057	$1,831.86

See **Exhibit 104** (deeds from sale of each residential unit); **Exhibit 100, Exhibit B** (Exhibit B to Master Deed with square footage for residential units of floors 3-5); **Exhibit 114, Exhibit B** (Exhibit B to First Phasing Amendment to Master Deed with square footage for penthouse units).

144. 477 Harrison retained in the Master Deed for the property the right to change the use of the second floor to residential use at any time in the future. *See* **Exhibit 100, § 17(b)(ii) at pg. 23**.

145. Over an approximately 10 year period, 477 Harrison has collected approximately $3,889,000 in rent from the commercial units on the first two floors of the 477 Harrison Property. *See* **Exhibit 97** (as of September 2015, projecting annual net rental income of $388,600).

PROPOSED CONCLUSIONS OF LAW

1. The jury verdict on 477 Harrison's abuse of process claim has no preclusive effect on 477 Harrison's claim under Chapter 93A. *See Wyler v. Bonnell Motors, Inc.*, 35 Mass. App. Ct. 563, 567 (1993).

2. "A judge may make independent and, therefore, different, findings on the c. 93A aspect of a case that arises out of the same facts which give rise to parallel common law claims." *Klairmont v. Gainsborough Restaurant, Inc*., 465 Mass. 165, 186 (2013) (quoting *Wyler v. Bonnell Motors, Inc*., 35 Mass. App. Ct. 563, 567 (1993)).

3. "It is indeed both possible and feasible for a judge deciding a c. 93A claim to make findings that are contrary to those made by a jury on parallel common law claim." *Klairmont*, 465 Mass. at 186 (internal quotation marks and citation omitted); *see also Velleca v. Uniroyal Tire Co*., 36 Mass. App. Ct. 247, 251 (1994).

4. The JACE Parties' Constitutionally Protected Petitioning Activity

5. "The United States Supreme Court has recognized the right to petition the government, including the courts, as one of the most precious of the liberties safeguarded by the Bill of Rights." *Sahli v. Bull HN Information Systems, Inc.*, 437 Mass. 696, 702 (2002).

6. "The right to petition is not, however, an absolute right. For example, baseless or sham litigation is not protected by the First Amendment." *Sahli v. Bull HN Information Systems, Inc.*, 437 Mass. 696, 702 (2002) (internal quotation marks and citations omitted).

7. The United States Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), articulated a test to assess when petitioning activity loses its constitutional protection, *i.e.*, immunity from liability; only "sham"

litigation is not constitutionally protected. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 51 (1993).

8. Under the test set forth in *Professional Real Estate Investors, Inc.*, 477 Harrison had the burden to show that the JACE Parties' petitioning activity was objectively baseless. *See Professional Real Estate Investors, Inc.*, 508 U.S. at 60-61.

9. Under *Professional Real Estate Investors, Inc.*, the two-part test first requires 477 Harrison to show that each of the JACE Parties' acts of petitioning "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized" and the sham exception must fail. *Professional Real Estate Investors, Inc.*, 508 U.S. at 60.

10. "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id.*

11. "A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." *Id.* at 60, n. 5.

12. The Supreme Court expressly cautioned that courts must "resist the understandable temptation to engage in *post hoc* reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation." *Id.* (internal quotation marks and citations omitted). A party may have "reasonable grounds for bringing suit" even when "the law or the facts appear questionable or unfavorable at the outset." *Id.* (internal quotation marks and citation omitted).

13. In *Sahli*, the SJC held that "a lawsuit filed by an employer against a former employee who has lodged a charge of discrimination is not an act of retaliation or interference in

violation of the State's antidiscrimination laws where the lawsuit had a legitimate basis in law and in fact." *Sahli*, 437 Mass. at 696.

14. In *Bristol Asphalt Co., Inc. v. Rochester Bituminous Products, Inc.*, 493 Mass. 539 (2024), the SJC expressly recognized that the denial of a special motion to dismiss under the first stage of the analysis under the anti-SLAPP statute, Mass. Gen. Laws ch. 231, § 59H, would not foreclose the moving party's ability to assert constitutional defenses to claims based on the party's petitioning activity. *Bristol Asphalt Co., Inc.*, 493 Mass. at 556-57 (explaining the distinction between the "procedural protections of the special motion to dismiss" and the "substantive law" and the "ordinary course of litigation" as the vehicles to "sort[] out rights and responsibilities bound up in any surviving counts") (emphasis in original).

15. The JACE Parties are entitled to judgment as a matter of law to the extent 477 Harrison's Chapter 93A claim is based on the 2012 Zoning Appeal, the Wall Case, and the 2015 Zoning Appeal.

16. The SJC previously found that 477 Harrison failed to carry its burden to show that these uses of process did not have a reasonable basis in fact or law. *See 477 Harrison Ave., LLC v. JACE Boston, LLC*, 477 Mass. 162, 173 (2017). In making this determination, the SJC had before it, among other things, the decision in favor of the JACE Parties in the Wall Case, the JACE Parties' arguments in support of their standing to appeal the zoning relief at issue in the 2012 Zoning Appeal, and the trial court's decision on 477 Harrison's motion for summary judgment based on standing in the 2015 Zoning Appeal.

17. Because the 2012 Zoning Appeal, the Wall Case, and the 2105 Zoning Appeal are constitutionally protected exercises of the JACE Parties' right to petition, they cannot be the basis for liability under Chapter 93A.

The JACE Parties' Entitlement to the Protection of the Litigation Privilege

18. The litigation privilege precludes a party from being liable for "communications made by a party, witness, or attorney in connection with judicial proceedings or contemplated litigation." *Bassichis v. Flores*, 490 Mass. 143, 144 (2022).

19. "[S]tatements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding are absolutely privileged provided such statements relate to that proceeding." *Sriberg v. Raymond*, 370 Mass. 105, 108 (1976).

20. "The privilege applies regardless of malice, bad faith, or any nefarious motives . . . so long as the conduct complained of has some relation to the litigation." *Bassichis*, 490 Mass. at 150.

21. Statements made in the preparation of and in the course of litigation may not be used as evidence of misconduct. *See Nnodim v. U.S. Bank Tr. Ass'n*, 703 F. Supp. 3d 296, 305-306 (D. Mass. 2023).

22. Any statements made by and/or actions taken by the JACE Parties or their attorneys in contemplation of or in connection with the 2012 Zoning Appeal are absolutely privileged by the litigation privilege and may not be a basis for liability.

23. Similarly, any statements made by and/or actions taken by the JACE Parties or their attorneys in contemplation of or in connection with the Wall Case, including, but not limited to, seeking an injunction, are absolutely privileged by the litigation privilege and may not be a basis for liability.

24. Any statements made by and/or actions taken by the JACE Parties or their attorneys in contemplation of or in connection with the 2015 Zoning Appeal, including, but not limited to, discovery sought from 477 Harrison in that action, are absolutely privileged by the litigation privilege and may not be a basis for liability.

25. Arthur Leon, individually, is entitled to the protection of the litigation privilege. Any statements made by and/or actions taken by Arthur Leon in contemplation of or in connection with the application for a criminal complaint are absolutely privileged by the litigation privilege and may not be a basis for liability.

Chapter 93A – Merits

26. Mass. Gen. Laws ch. 93A, § 11 prohibits unfair methods of competition or unfair or deceptive business practices between parties engaged in trade or commerce. Mass. Gen. Laws ch. 93A, § 11.

Chapter 93A – Trade or Commerce Requirement

27. Mass. Gen. Laws ch. 93A, § 11 requires that there be "a commercial transaction between a person engaged in trade or commerce [and] another person engaged in trade or commerce." *Linkage Corp. v. Trustees of Boston Univ.*, 425 Mass. 1, 23 (1997).

28. For Mass. Gen. Laws ch. 93A, § 11 to apply here, 477 Harrison was required to prove that there was a commercial transaction between it and JACE and Arthur Leon, and that each of them was acting in trade or commerce, such that the parties were acting in a "'business context.'" *Milliken & Co. v. Duro Textiles, LLC*, 451 Mass. 547, 563 (2008).

29. For Mass. Gen. Laws ch. 93A, § 11 to apply here, 477 Harrison was required to prove that there was a commercial transaction between it and the JACE Parties. *Szalla v. Locke*, 421 Mass. 448, 451-52 (1995).

30. "[T]he mere filing of litigation does not of itself constitute 'trade or commerce.'" *Milliken*, 451 Mass. at 564 (internal quotation marks omitted); *see also Arthur D. Little, Inc. v. East Cambridge Sav. Bank*, 35 Mass. App. Ct. 734, 743 (1994); *Gillette Co. v. Provost*, Civil Action No. 1584CV00149BLS2, 2017 WL 2292748, at *9 (Mass. Super. Ct. Apr. 19, 2017).

31. 477 Harrison failed to prove by a preponderance of the evidence that it was engaged in trade or commerce with the JACE Parties.

32. 477 Harrison's and the JACE Parties' status as neighboring property owners is insufficient to carry 477 Harrison's burden to prove the existence of the necessary business context between 477 Harrison and the JACE Parties under Section 11. *See L.B. Corp. v. Schweitzer-Mauduit Int'l, Inc.*, 121 F. Supp. 2d 147, 151-52 (D. Mass. 2000); *Cash Energy, Inc. v. Weiner*, 768 F. Supp. 892, 893-94 (D. Mass. 1991).

33. The JACE Parties are not competitors of 477 Harrison.

34. The JACE Parties' leasing of storefronts at the JACE Property and George's Market, LLC's, re-opening of the Red Fez Restaurant at 1222 Washington Street, Boston, *see* **Exhibit 34**, long before 2012 are insufficient to treat the JACE Parties as real estate developers in competition with 477 Harrison.

35. In 2012, while Arthur Leon communicated to the City that he was planning to redevelop the JACE Property, he did not have any plans prepared and did not go forward with redeveloping the JACE Property in 2012 or since then.

36. As of the spring of 2012, John Holland did not consider Arthur Leon to be serious about developing the JACE Property. *See* Exhibit 37 (writing in May 2012 that "[a]fter the hearing, [Arthur Leon] agreed to sit down with me [John Holland] to discuss jointly designing the two projects so it work [sic] today and for his future project. Arthur [Leon] has not done anything in 36-years so I'm not holding my breath").

37. In filing the 2012 Zoning Appeal, JACE was acting as an abutting property owner seeking to challenge the grant of variances to 477 Harrison by the Boston Board of Appeal. The

JACE Parties were not acting as a business competitor or in the context of a commercial transaction with 477 Harrison.

38. In filing the Wall Case, JACE was acting as an abutting property owner seeking to protect its property right, namely, the easement in a portion of the north wall of 477 Harrison's property. The JACE Parties were not acting as a business competitor or in the context of a commercial transaction with 477 Harrison.

39. In filing the 2015 Zoning Appeal, JACE was acting as an abutting property owner seeking to challenge the grant of variances to 477 Harrison by the Boston Board of Appeal. The JACE Parties were not acting as a business competitor or in the context of a commercial transaction with 477 Harrison.

40. By filing the application for criminal complaint, Arthur Leon was not acting as a business competitor or in the context of a commercial transaction with 477 Harrison, John Holland, and/or Holland Construction. Arthur Leon was acting as an abutting property owner who was seeking to protect his property from what he perceived to be trespass by Holland Construction.

41. By opposing the relief sought by 477 Harrison from the BRA, the JACE Parties were not acting as a business competitor or in the context of a commercial transaction with 477 Harrison.

42. By opposing the relief sought by 477 Harrison from the ZBA, the JACE Parties were not acting as a business competitor or in the context of a commercial transaction with 477 Harrison.

43. The JACE Parties were not acting as a business competitor or in the context of a commercial transaction with 477 Harrison and/or Holland Construction in connection with the

JACE Parties' submission of insurance claims relating to the floor and roof of the JACE property to Holland Construction's insurance company.

Chapter 93A – Standard of Proof

44. Even assuming 477 Harrison carried its burden to satisfy the trade or commerce element under Mass. Gen. Laws ch. 93A, § 11, 477 Harrison also was required to prove by a preponderance of the evidence each of the following: (1) the JACE Parties "engaged in an unfair method of competition or committed an unfair or deceptive act or practice;" (2) 477 Harrison suffered "a loss of money or property;" and (3) "a causal connection between the loss suffered and the [JACE Parties'] unfair or deceptive method, act, or practice." *Auto Flat Car Crushers, Inc. v. Hanover Ins. Co.*, 469 Mass. 813, 820 (2014) (footnote omitted).

45. Factors to consider regarding whether 477 Harrison has proven by a preponderance of the evidence that the JACE Parties committed an unfair act or practice include:

a. whether the act or practice falls within some established concept of unfairness;

b. whether the defendants' act or practice was immoral, unethical, oppressive, unscrupulous, or otherwise unconscionable.

Datacomm Interface, Inc., 396 Mass. at 778 (quoting *PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 596 (1975)); *VMark Software, Inc. v. EMC Corp.*, 37 Mass. App. Ct. 610, 620 (1994).

46. Liability under Mass. Gen. Laws ch. 93A, §11 exists only if 477 Harrison was able to prove that the JACE Parties' conduct is such that a reasonable business person would find it reprehensible. *See Schwanbeck v. Federal-Mogul Corp.*, 31 Mass. App. Ct. 390, 414 (1991), superseded, 412 Mass. 703 (1992). I find that 477 Harrison failed to prove this by a preponderance of the evidence. Among other things, in filing the 2012 Zoning Appeal and the

2015 Zoning Appeal, the JACE Parties did nothing more than exercise their right as an abutter, who, by statute, is presumed to be a person aggrieved, to challenge the finding of the Board of Appeal that 477 Harrison had demonstrated an entitlement to a variance. Prior to filing the 2012 Zoning Appeal, the JACE Parties had knowledge that their attorney and consultants had advised the ZBA that 477 Harrison did not meet the requirements for granting a variance. Similarly, before filing the Wall Case, Arthur Leon was aware of Kathleen O'Donnell's opinion that the Indenture and the easement running in favor of the JACE Property was valid and remained in effect. In filing the Wall Case, the JACE Parties did nothing more than seek to protect their property interest.

47. To the extent 477 Harrison's Chapter 93A claim is based on its allegations of abuse of process, 477 Harrison was required to prove by a preponderance of the evidence as to each of the 2012 Zoning Appeal, the Wall Case, the 2015 Zoning Appeal, and the application for criminal complaint that the JACE Parties (a) used process (b) for an ulterior or illegitimate purpose and (c) caused damages to 477 Harrison. *See Psy-Ed Corp. v. Klein*, 459 Mass. 697, 713 (2011); *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 636 (2010); *Jones v. Brockton Pub. Mkts., Inc.*, 369 Mass. 387, 389-90 & n. 2 (1975); *See Bristol Asphalt Co. v. Rochester Bituminous Prods*., 2021 Mass. Super. LEXIS 1339, *20 (Mass. Super. Ct., Aug. 30, 2021) (holding that proceedings before town boards are not considered "process" for purposes of an abuse of process claim).

48. Even if there was an abuse of process, that finding does not require the Court to find that the conduct was a violation of Chapter 93A because Chapter 93A requires reprehensible conduct. *See Schwanbeck v. Federal-Mogul Corp.*, 31 Mass. App. Ct. 390, 414 (1991), superseded, 412 Mass. 703 (1992). As explained above, I find that 477 Harrison failed to prove

that the JACE Parties did not act reprehensibly. Furthermore, the JACE Parties did not commit any unfair or deceptive acts or practices.

49. Notwithstanding the jury's verdict with respect to the 2012 Zoning Appeal, the 2015 Zoning Appeal, and the application for criminal complaint, I find that the JACE Parties did not use process for an ulterior purpose.

50. Even if a finding of abuse of process required a finding that there was a violation of Chapter 93A, I find that 477 Harrison failed to prove that the 2012 Zoning appeal, the Wall Case, the 2015 Zoning Appeal, and the application for criminal complaint, was used for an ulterior or illegitimate purpose. 477 Harrison failed to prove each action was filed to accomplish some ulterior purpose for which the action was not designed or intended or that was not a legitimate purpose of the action. *See Psy-Ed Corp.*, 459 Mass. at 713; *Ladd v. Polidoro*, 424 Mass. 196, 198 (1997); *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 775 (1986); *Beecy v. Pucciarelli*, 387 Mass. 589, 595 (1982); *Wodinsky v. Kettenbach*, 86 Mass. App. Ct. 825, 836 (2015).

51. If the stated objective of the action was the actual objective, then there is no abuse of process. *See Jones*, 369 Mass. at 391; *Silvia*, 35 Mass. App. Ct. at 454-55.

52. 477 Harrison cannot carry its burden to show that the JACE Parties had an ulterior purpose by showing only that the JACE Parties used process to vex, annoy, or harass 477 Harrison. *See Psy-Ed Corp.*, 459 Mass. at 713-14.

53. Rather, 477 Harrison was required to show that the JACE Parties filed the action to gain some collateral advantage not properly involved in the proceeding itself; in other words, a form of extortion. *See Cohen v. Hurley*, 20 Mass. App. Ct. 439, 442 (1985).

54. Whether the JACE Parties had grounds to file an action is relevant to assessing whether the JACE Parties had an ulterior purpose. *See Millennium Equity Holdings,* 456 Mass. at 637.

55. Whether the JACE Parties had a basis in fact or law to file an action is relevant to analyzing whether the JACE Parties had an ulterior purpose in using this process.

56. Even if 477 Harrison proved that the JACE Parties knew or should have known that a particular action was groundless, which I find 477 Harrison failed to do, 477 Harrison still was required to prove the existence of an ulterior purpose. *See Psy-Ed Corp.*, 459 Mass. at 713; *Beecy,* 387 Mass. at 596; *Wodinsky*, 86 Mass. App. Ct. at 836; *Bednarz v. Bednarz*, 27 Mass. App. Ct. 668, 673 (1989).

57. "[I]f process is employed for its intended legal purpose, there can be no abuse of process even if the person also possessed an improper motive." *Pan American Airways, Corp. v. Barnes*, C.A. No. 04-10515-JLT, 2005 U. S. Dist. LEXIS 53723 at*9 (D. Mass. Oct. 19, 2005).

58. 477 Harrison failed to carry its burden to show that any of the JACE Parties' use of process constituted an abuse of process.

59. The JACE Parties did not bring the 2012 Zoning Appeal for an ulterior or illegitimate purpose.

60. The stated objective of the 2012 Zoning Appeal, to challenge the basis for the Boston Board of Appeal's approval of the variances that 477 Harrison was seeking, was the actual objective of that action.

61. The 2012 Zoning Appeal was not groundless given, among other things, the JACE Parties, as abutters, had presumptive standing as a person aggrieved to challenge the

decision of the Boston Board of Appeal and had raised legitimate challenges to whether 477 Harrison was entitled to a variance on the grounds of hardship.

62. The 2012 Zoning Appeal was not brought for the purpose of causing 477 Harrison to lose its property to the bank so the JACE Parties could buy the 477 Harrison Property from the bank.

63. The 2012 Zoning Appeal was not brought for the purpose of delaying the development of 477 Harrison's property so as to gain an unfair advantage in the development of the JACE property.

64. Among other things, I find that Kamran Zahedi's email to Kevin Joyce, Arthur Leon's lawyer at the time, dated May 10, 2012, is not the "smoking gun" 477 Harrison argues it is. Mr. Zahedi's email did nothing more than make the observation that resolving an abutter's appeals through the court system takes time. It did not state that the only reason Arthur Leon would bring an appeal would be for the purpose of delaying 477 Harrison's project. In any event, even if that was Mr. Zahedi's intent, there is no evidence that Arthur Leon ever saw the email and/or approved or ratified Mr. Zahedi's position.

65. The 2012 Zoning Appeal was not brought for the purpose of forcing 477 Harrison to redesign its project to remove any windows that provided views over the JACE property.

66. The JACE Parties did not bring the Wall Case for an ulterior or illegitimate purpose.

67. The stated objective of the Wall Case, to seek a declaration from the Court as to the rights of the parties in the wall, was the actual objective of that case.

68. The Wall Case was not groundless. Indeed, the trial court entered judgment in favor of the JACE Parties, which the Appeals Court affirmed.

69. The Wall Case was filed to resolve a good faith dispute between JACE and 447 Harrison regarding the continued existence and meaning of the Indenture.

70. In connection with 477 Harrison's motion for summary judgment in the 2012 Zoning Appeal, the JACE Parties and 477 Harrison had notice of Kathleen O'Donnell's opinion that that the Indenture was valid and remained in effect, provided the building on the JACE Property was the same building that existed in 1926.

71. In its claim alleging the Wall Case violated chapter 93A, 477 Harrison asserts the JACE Parties acted with the same ulterior motives with which it brought the 2012 Zoning Appeal. This claim is not credible.

72. The Wall Case was not brought for the purpose of causing 477 Harrison to lose its property to the bank so the JACE Parties could buy the 477 Harrison Property from the bank. Within a month after filing the Wall Case, John Holland, on behalf of the Holland Companies, extended an offer to purchase the JACE Property and 1222 Washington Street for $28 million. *See* **Exhibit 142**. From that point forward, the JACE Parties could not have reasonably believed that the Wall Cause would cause 477 Harrison to lose the 477 Harrison Property to the bank.

73. The Wall Case was not brought for the purpose of delaying the development of 477 Harrison's property so as to gain an unfair advantage in the development of the JACE property. Among other things, there is no evidence that as of June 2013, the JACE Parties were in the process of preparing plans for the redevelopment of the JACE Property and/or taking any other action indicating they had immediate plans to redevelop the JACE Property.

74. The Wall Case was not brought for the purpose of forcing 477 Harrison to redesign its property to remove windows and balconies that have views over the JACE Property. The complaint in the Wall Case sought only to protect the area of the north wall of the 477

Harrison Property in which JACE claimed an easement. Consistent with that goal, the parties entered into the Stipulated Order, which allowed 477 Harrison to demolish the north wall on floors 3-5, thereby facilitating the installation of windows and balconies. *See* **Exhibit 60**.

75. The JACE Parties did not bring the 2015 Zoning Appeal for an ulterior or illegitimate purpose.

76. The stated objective of the 2015 Zoning Appeal, to challenge the basis for the Boston Board of Appeal's approval of the variances that 477 Harrison was seeking as to the penthouses, was the actual objective of that action.

77. That 477 Harrison's motion for summary judgment with respect to JACE's standing was granted is not evidence that the 2015 Zoning Appeal was groundless.

78. That 477 Harrison's motion for summary judgment with respect to JACE's standing was granted is not evidence that the 2015 Zoning Appeal lacked a reasonable basis in fact or law.

79. The 2015 Zoning Appeal was not groundless. Among other things, JACE had presumptive standing as an abutter to challenge the zoning relief granted to 477 Harrison. 477 Harrison's successful redevelopment of its property as of right demonstrated that 477 Harrison was able to make reasonable use of its property without a variance. In granting 477 Harrison's motion for summary judgment, the trial court acknowledged that there was no case on point and relied on a decision of the Supreme Judicial Court that was decided one year **after** the 2015 Zoning Appeal was filed.

80. 477 Harrison makes the same claims regarding the JACE Parties' allegedly ulterior purpose with regard to the 2015 Zoning Appeal that it made with regard to the 2012 Zoning Appeal and the Wall Case. This claim is not credible.

81. By the time the JACE Parties filed the 2015 Zoning Appeal in May 2015, it was clear that the JACE Parties' opposition to the variance for the penthouses 477 Harrison was seeking would not cause 477 Harrison to lose the 477 Harrison Property to the bank. It was equally clear that the JACE Parties were not seeking to delay the redevelopment of the 477 Harrison Property so as to allow the JACE Property to be redeveloped first. In the three years before the filing of the 2015 Zoning Appeal, the JACE Parties had not developed any plans or taken any steps to start the process of redeveloping the JACE Property. Moreover, by 2015, 477 Harrison had installed windows and balconies on the north wall on floors 3-5 of its property overlooking the JACE Property.

82. Arthur Leon did not bring an application for criminal complaint against the Plaintiff in this case: 477 Harrison.

83. Arthur Leon reasonably believed that Holland Construction's continued presence on the JACE Property as of the fall of 2014 was not permitted under either an earlier court order, relevant law, and/or an alleged agreement reached between him and John Holland in March 2014. *See, e.g.*, **Exhibit 72**.

84. During the fall of 2014, Arthur Leon communicated with John Holland to try to have Holland Construction remove its workers, planking, tires, and construction debris from the roof of the building on the JACE Property. *See* **Exhibits 72-76**.

85. Arthur Leon was not able to reach a negotiated resolution with John Holland of what Arthur Leon believed was Holland Construction's trespass on the building on the JACE Parties' property, *See* **Exhibits 72-76**, however, in **October 2014**, John Holland represented to Arthur Leon that "the work that requires physical access to your roof will be completed this week." **Exhibit 73**. John Holland further represented that the remaining tires and planks on the

roof of the JACE Property were "necessary to continue to provide protections to the roof while we complete work on the front section of the sidewall using the swing staging . . . I expect the work on this final section of the wall will be completed over the next month." **Exhibit 73**.

86. As of December 6, 2014, Holland Construction's workers, construction materials, and debris remained on the roof of the JACE Property.

87. Frustrated, Arthur Leon sent an employee to the Boston Police Department to see what the police could do about what Arthur Leon perceived to be the trespass. The police told the employee to speak to ISD. ISD, however, was unable to provide assistance to stop the trespass.

88. Thereafter, Arthur Leon went to speak to someone at the Boston Police Department. Arthur Leon went to the police out of frustration and in an effort to seek some assistance to end what he believed was Holland Construction's trespass on the building on the JACE Parties' property. It was not Arthur Leon's intent to have criminal charges brought against John Holland.

89. 477 Harrison was not mentioned in the Police Report. *See* **Exhibit 79**.

90. The Police Report states, among other things, that PO Horgan advised Mr. Arthur to see a trespass order in Boston Municipal Court ("BMC"). *See* **Exhibit 79**.

91. There was nothing in the report indicating that the BMC would be issuing a criminal complaint. *See* **Exhibit 79**.

92. Following the advice of the police, Arthur Leon went to BMC. After speaking with Arthur Leon and reviewing the police report, the clerk at the BMC and not Arthur filled out a form, which Arthur Leon signed. While the form was entitled, "Application for Criminal

Complaint," it was not Arthur Leon's intent to have criminal charges brought against John Holland.

93. Arthur in seeking to deal with what he believed was the continuing trespass did not take actions knowingly to bring criminal charges against the plaintiff, 477 Harrison, and did not act in violation of Chapter 93A.

94. 477 Harrison, the plaintiff in this case, does not have standing to assert a claim under Mass. Gen. Laws ch. 93A, § 11 based on the JACE Parties' submission of insurance claims relating to the floor and roof of the JACE Parties' property to Holland Construction's insurer.

95. The JACE Parties did not commit any unfair or deceptive act or practice by submitting insurance claims relating to damage to the floor and roof of the JACE Property to Holland Construction's insurance company.

96. The JACE Parties had a good faith basis to believe that their property had been damaged as a result of the construction at 477 Harrison's property.

97. In connection with a claim against Holland Construction, Arthur Leon consulted with Mr. Evan Hankin. Mr. Hankin is a structural engineer. Mr. Hankin observed the JACE Property and discussed his results with Arthur Leon. Mr. Hankin issued a report dated January 20, 2015, *see* **Exhibit 87**, in which among other things he noted "[t]he new cracks, the widening of the existing cracks and the settlement of the slab are directly related and caused by the construction activity at 477 Harrison."

98. The JACE Parties reasonably relied upon the findings of Mr. Hankin in connection with the JACE claim and therefore did not act willfully or knowingly in an unfair and deceitful manner.

99. After the insurer denied the claim, the JACE Parties did not file suit against Holland Construction.

Unfair Competition

100. To the extent 477 Harrison originally based its Chapter 93A claim on a theory of unfair competition, 477 Harrison was required to prove by a preponderance of the evidence that the JACE Parties' conduct caused "an injury to the marketplace," in the sense that consumers were prevented "from making an informed decision, [thereby] impair[ing] the ability of a competitor to compete fairly." *Katin*, 2009 U.S. Dist. LEXIS 31398, at *35 (internal quotations and citations omitted).

101. With respect to an unfair competition theory of liability under Mass. Gen. Laws ch. 93A, § 11, there must be injury not just to 477 Harrison, but to the marketplace caused by a pattern of conduct. *See Massachusetts Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 952 F. Supp. 884, 891 (D. Mass. 1997) (internal quotation mark and citation omitted); *see also Katin v. Nat'l Real Estate Info. Servs., Inc.*, 2009 U.S. Dist. LEXIS 31398, at *35 (D. Mass. Mar. 31, 2009); *Doliner v. Brown*, 21 Mass. App. Ct. 692, 696-97 (1986).

102. 477 Harrison failed to present any evidence in support of its alternative theory of liability – namely, the JACE Parties engaged in unfair competition – under Mass. Gen. Laws ch. 93A, § 11.

103. 477 Harrison presented no evidence that the JACE Parties engaged in any conduct which caused any injury to the marketplace, let alone an injury to the marketplace in the sense consumers were prevented from making informed decisions, thereby impairing 477 Harrison's ability to compete fairly.

104. 477 Harrison presented no evidence that the JACE Parties engaged in a pattern of conduct which caused any injury to the marketplace.

Chapter 93A – Loss of Money or Property Requirement

105. Under Mass. Gen. Laws ch. 93A, § 11, 477 Harrison was required to prove by a preponderance of the evidence that it suffered a loss of money or property. For purposes of Section 11, the term "money" means money, and it does not mean time or anything else. Lost time does not constitute a loss of money or property for purposes of chapter 93A. *Baldassari v. Pub. Fin. Trust,* 369 Mass. 33, 45 (1975), *superseded in part by statute*; *Tech Plus, Inc. v. Ansel*, 59 Mass. App. Ct. 12, 19 & n. 8 (2003) (applying *Baldassari* definition of money or property in context of claim under Mass. Gen. Laws ch. 93A, § 11).

106. Under Mass. Gen. Laws ch. 93A, § 11, "property" means the kind of property that is purchased or leased, not intangibles such as a right to a sense of security, peace of mind, or personal liberty. *See Baldassari,* 369 Mass. at 45.

107. 477 Harrison was required to prove that any damages it claims to have suffered were the "natural and probable consequences" of the filing of the 2012 Zoning Appeal, the Wall Case, and/or the 2015 Zoning Appeal. *Millennium Equity Holdings, LLC*, 456 Mass. at 645 (internal quotation marks and citation omitted).

108. 477 Harrison was required to prove its damages with a reasonable degree of certainty; damages cannot be speculative. *See Steele v. Kelley*, 46 Mass. App. Ct. 712, 741 n.28 (1999).

109. For 477 Harrison to meet its burden of proof, 477 Harrison was required to prove it suffered lost profits as a result of the JACE Parties' violation of Chapter 93A; that is, it is necessary to consider both 477 Harrison's alleged increased costs and any increased revenue and/or value it received. *See, e.g., Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 14

Mass. App. Ct. 396, 426 (1982); *see also Empire Today, LLC v. Nat'l Floors Direct, Inc.*, 788 F. Supp. 2d 7, 18-19 (D. Mass. 2011).

110. 477 Harrison failed to carry its burden to demonstrate that it suffered any loss of money or property as a result of any alleged unfair or deceptive act or practice by the JACE Parties.

111. 477 Harrison failed to carry its burden to establish that it suffered any lost profits as a result of the 2012 Zoning Appeal, Wall Case, or the 2015 Zoning Appeal.

112. I find credible John Holland's testimony that he was truthful in his communications with Rockland Trust and its appraiser, Blake.

113. The appraisals for the 477 Harrison Property as completed show that the fair market value of the 477 Harrison Property increased from the initial anticipated completion date to the actual sale of the residential units.

114. The owner-supplied information 477 Harrison supplied to Rockland Trust and Blake demonstrates that the fair market value of the 477 Harrison Property increased.

115. John Holland's testimony regarding his expectations that the residential units would have sold for $1,200 to $1,300 per square foot if they had been completed when 477 Harrison originally planned is speculative, self-serving, inconsistent with what he told his bank and its appraiser, and not credible. Moreover, Mr. Holland's testimony about his expectations of value is an insufficient basis to treat Mr. Holland's opinion as an owner's opinion of the fair market value of its property.

116. 477 Harrison's increased hard costs and soft costs allegedly resulting from the delay caused by the filing of the 2012 Zoning Appeal and the 2015 Zoning Appeal are not the correct measure of 477 Harrison's damages.

117. 477 Harrison suffered no damages because the increase in the revenue it received from the sale of the residential units as a result of selling them after 2013 exceeds the increased costs it incurred as a result of any delay in completing the construction of the units. 477 Harrison realized $37,885,000 from sales of the residential units on floors 3-5 and the two penthouse units.

118. Moreover, 477 Harrison's mistaken belief that it could proceed with an as of right project while the JACE Parties' challenges to the Board of Appeal's decision was pending was not caused by the JACE Parties. Therefore, any delay due to 477 Harrison's mistaken belief was not caused by any action of the JACE Parties.

119. 477 Harrison failed to mitigate the damages it claims to have suffered as a result of the 2012 Zoning Appeal by waiting approximately one year after the filing of the 2012 Zoning Appeal to abandon the zoning relief it had obtained so it could proceed with an as of right project. *See Brian v. B. Sopkin & Sons, Inc.*, 314 Mass. 180, 183 (1943) ("A party injured by a tort has a duty to use reasonable care to minimize the damages.").

120. 477 Harrison has not established any damages that are the natural and probable cause of the Wall Case. 477 Harrison's inability to demolish the wall at the second-floor level was the result of the terms of the easement in the Indenture and not the result of the JACE Parties' seeking a declaratory judgment about the Indenture; as such it has no claim for damages.

121. Still, 477 Harrison retained the right to convert the second floor into residential units at any time in the future. 477 Harrison has failed to account for the significant value of this retained right in the calculation of its damages.

122. For the past 10 years, and continuing into the future, 477 Harrison collects rent from the tenants of the commercial condominium units on the first two floors of the 477 Harrison

Property. Over the course of the past ten years, 477 Harrison has received approximately $3,886,000 net rent from the commercial units on the first two floors of the 477 Harrison Property. *See* **Exhibit 97**. 477 Harrison has failed to account for that rental income in the calculation of its damages.

123. The 2012 Zoning Appeal was filed on August 28, 2012, and ended when an Agreement for Judgment was filed on November 7, 2013.

124. After November 7, 2013, 477 Harrison was free to develop the project at the pace that it chose.

125. Thus, no increase in costs after the end of the 2012 Zoning Appeal was attributable to the JACE Parties.

126. Further, the record reveals that after the conclusion of the 2012 Zoning Appeal, 477 Harrison made significant changes to the project. In February and March 2014, the project called for 9 units of residential condominiums on floors 3-5. *See* **Exhibits 63, 64 and 67**. On December 30, 2014, 477 Harrison and Rockland Trust entered a loan modification that deleted the prior description of the project as involving 9 residential units and instead providing for 12 residential units and increasing the construction loan amount by $1,530,000. *See* **Exhibit 86**.

127. In March 2012, i.e. prior to filing of the 2012 Zoning Appeal, 477 Harrison projected its hard costs for constructing the commercial condominium would be $8,992,569.75. *See* **Exhibit 23** (Owner Supplied Information).

128. In April 2014, five months after the Agreement for Judgment entered in the 2012 ZBA appeal, 477 estimated that the cost of the "as of right" project was $8,769,598 and that the penthouses would cost an additional $1,409,175. **See Ex. 64**. This estimate was based on the

assumption that the Wall Case would be decided in favor of JACE, which it was. Thus, the total cost was projected to be $10,178,773.

129. The difference between the hard costs projected prior to the filing of the 2012 Zoning Appeal and after the 2012 Zoning Appeal in November 2013 was thus $10,178,773 minus $8,992,569.72, which is equal to $1,186,203.75. See table below:

Projected Hard Costs Pre and Post 2012 ZBA Appeal			
Hard Costs	**2012**	**2014**	**Increase in hard costs**
Project with Penthouses **Ex. 23 (Owner Supplied Information)**	$8,992,569.75		
As of Right Project **Ex. 63**		$8,769,598.00	
Penthouses **Ex. 63**		$1,409,175.00	
Total Hard Costs	$8,992,569.75	$10,178,773.00	$1,186,203.25

130. The increase in sales of the residential condominiums and the penthouses plus the value of the commercial condominium retained by 477 Harrison vastly exceeded the increased hard costs.

131. In 2012, prior to the filing of 2012 Zoning Appeal, 477 Harrison projected that the project as built would sell for a total of $24,410,000. *See* **Exhibit 23** (Owner Supplied Information Addendum to Appraisal).

132. In February 2014, after the 2012 Zoning Appeal ended in November 2013, 477 Harrison projected the "as of right" project consisting of a commercial unit and 9 residential

units would sell for $28,600,000 and the penthouses would sell for $6,150,000, for a total of $34,750,000. *See* **Exhibits 63 and 64**.

133. Attached to the original construction loan agreement between 477 Harrison and Rockland Trust dated March 27, 2014, **Exhibit 67**, is "Schedule A – Unit Appraised Retail Value." Schedule A incorrectly listed the project as having four unit types per floor and therefore overstated the value of the residential units by $8,650,000. The original construction loan agreement defined "Project" to mean "[t]he renovation and conversation of said Property into **nine residential (9) units** and two (2) commercial units ('each, a 'Unit') five (5) story condominium." Exhibit 67 (emphasis added). Schedule A identified 12, not 9, residential units. In particular, Schedule A listed both B and C unit types, when in fact, as of March 2014, 477 Harrison's plan was to combine the smaller B and C units into a single larger unit, as explained in the Blake appraisal prepared in February 2014. *See* **Exhibit 64**. At the time 477 Harrison and Rockland Trust entered into the modified construction loan dated December 30, 2014, the "Project" had been redefined to include 12 residential units. *See* **Exhibit 86**. Schedule A attached to the modified construction loan agreement correctly identified four unit types – A, B, C, and D – per floor. The total value of the residential and commercial units reflected on Schedule A to the modified construction loan agreement totaled $25,711,375.

134. Ultimately, the residential condominiums and the penthouses sold for a total of $37,885,000 and the retained commercial condominium was valued at $6,250,000. The total was thus $44,135,000. *See* **Exhibit 101** (Deeds from sale of residential condominiums and penthouses); **Exhibit 64** (Owner Supplied Information Addendum to Appraisal).

135. The increase between what 477 Harrison projected for the sale of the project in 2012 prior to the 2012 Zoning Appeal compared to what was achieved was an increase of $19,725,000. *See* chart below:

Projected Value pre 2012 ZBA Appeal vs. Actual Results				
	2012 **Ex. 23**	**2014** **Ex. 63**	**Actual** **Exs. 101 and 63**	**Increase 2012 to actual**
Commercial Condominium	$1,475,000	$6,250,000	$6,250,000	$4,775,000
Residential Condominiums	$18,685,000	$22,350,000	$28,285,000	$9,600,000
Penthouses	$4,250,000	$6,150,000	$9,600,000	$5,350,000
Total	$24,410,000	$34,750,000	$44,135,000	$19,725,000

136. Since the increase in the value of the project exceeded the increase in hard costs that happened during the pendency of the 2012 Zoning Appeal, 477 Harrison suffered no damages.

137. In 2014, prior to the filing of the 2015 Zoning Appeal, 477 Harrison projected the additional hard costs for the construction of the penthouses would be $1,409,175.00. *See* **Exhibit 63**.

138. The hard costs for construction of the penthouses were $1,045,990. *See* **Exhibit 113**. Thus, the hard costs for construction of the penthouses were less than projected before the 2015 Zoning Appeal.

139. Furthermore, the penthouses sold for millions of dollars more than projected prior to the filing of the 2015 Zoning Appeal. Thus, 477 Harrison has failed to show any lost profits.

140. In 2012, 477 Harrison projected the penthouses would sell for $4,250,000. *See* **Exhibit 23** (Owner Supplied Information Addendum to Appraisal).

141. In 2014, 477 Harrison projected the penthouses would sell for $6,150,000. *See* **Exhibit 63, 64**.

142. The penthouses sold for $9,600,000. *See* **Exhibit 104**.

143. 477 Harrison suffered no lost profits as a result of delay. The chart below compares 477 Harrison's projected profits in 2012 prior to the filing of any litigation with the profits achieved by 477 Harrison taking into account the additional expenses 477 Harrison attributes to JACE's litigation.

	2012 Projected profit vs. Profit after including damages claimed by 477					
		2012				Actual
1	Sales[1]	$24,410,000.00		1	Sales plus Value of Commercial Condo[2]	$44,135,000.00
2	Cost of Project[1]	$17,945,960.75		2	Cost of Project 2012[2]	$17,945,960.75
3	Profit (line 1 minus line 2)	$6,464,039.25		3	Increased Hard Costs Claimed by 477[3]	$5,100,000.00
				4	Increased interest cost claimed by 477[4]	$700,000.00
				5	Total Cost of Project (sum of lines 2-3)	$23,745,960.75
				6	Profit (line 1 minus line 5)	$20,389,039.25
	Footnotes to chart					
	1. Ex. 23 (owner supplied information addendum to Appraisal)					
	2. Ex. 101 (deeds from sale of residential condominums) and 64 (Owner supplied information Addendum to Appraisal)					
	3. John Holland, DE, April 24, 2025, page 116:15-17					
	4. John Holland, DE, April 24, 2025, page 118:9-14					

144. The chat below compares 477 Harrison's projected profits in 2014 after the conclusion of the 2012 Zoning Appeal with actual sales of the residential condominiums and penthouses together with valuable of the commercial condominium the profits achieved by 477 Harrison taking into account the additional expenses 477 Harrison attributes to JACE's litigation.

	2014 Projected profit vs. Profit after including damages claimed by 477					
		2014				Actual
1	Projected Sales[1] As of right project	$28,600,000.00		1	Sales plus Value of Commercial Condo[2]	$44,135,000.00
2	Projected sale Penthouses	$6,150,000.00		2	Projected Cost of Project 2014	$19,855,946.65
3	Total Projected Sales	$34,750,000.00		3	Increased Hard Costs Claimed by 477[3]	$5,100,000.00
4	Projected Cost of Project[1] as of right	$18,446,771.65		4	Increased interest cost claimed by 477[4]	$700,000.00
5	Projected Cost Penthouses[1]	$1,409,175.00		5	Total Cost of Project (sum of lines 2-4)	$25,655,946.65
6	Total Projected Costs	$19,855,946.65		6	Profit (line 1 minus line 5)	$18,479,053.35
7	Projected Profit (line 3 minus line 6)	$14,894,053.35				
	Footnotes to chart					
	1. Ex. 64 (owner supplied information addendum to Appraisal)					
	2. Ex. 101 (deeds from sale of residential condominums) and 64 (Owner supplied information Addendum to Appraisal)					
	3. John Holland, DE, April 24, 2025, page 116:15-17					
	4. John Holland, DE, April 24, 2025, page 118:9-14					

145. Even after taking into account 477 Harrison's claimed delay damages, 477 Harrison suffered no lost profits.

146. 477 Harrison did not incur any loss in connection with the application for criminal complaint other than the legal fees incurred in defending the matter for a total of $1,981. **See Exhibits 90, 91 and 92.**

147. 477 Harrison did not suffer any loss of money or property as a result of the JACE Parties' submission of insurance claims relating to damage to the floor and roof of the JACE Parties' property to Holland Construction's insurer.

Chapter 93A – Causation Requirement

148. As part of the proof of its claim under Mass. Gen. Laws ch. 93A, § 11, 477 Harrison also was required to prove by a preponderance of the evidence that the JACE Parties' violation of Section 11 caused the loss of money or property 477 Harrison claims it suffered. *See Halper v. Demeter*, 34 Mass. App. Ct. 299, 303-04 (1993).

149. 477 Harrison was required to show that it would not have suffered a loss but for the JACE Parties' unfair or deceptive act or practice. *See Hartford Cas. Ins. Co. v. New Hampshire Ins. Co.*, 417 Mass. 115, 125 (1994); *Mass. Farm Bureau Fed'n, Inc. v. Blue Cross of Mass., Inc.*, 403 Mass. 722, 730 (1989); *Kohl v. Silver Lake Motors, Inc.*, 369 Mass. 795, 800-01 (1976); *Martha's Vineyard Auto Vill. Inc. v. Newman*, 30 Mass. App. Ct. 363, 368 (1991); *Atwood v. Best Buick, Inc.*, 21 Mass. App. Ct. 70, 74 (1985).

150. In addition to proving that the JACE Parties' unfair or deceptive acts or practices were the actual cause of a loss of money or property, 477 Harrison was required to prove that the JACE Parties' alleged unfair or deceptive acts or practices were the proximate cause of 477 Harrison's loss of money or property. That is, was the plaintiff's loss the foreseeable result of the defendants' conduct? Even though a particular loss may have been caused by a particular act, the law treats that loss as being compensable only if the loss was reasonably foreseeable or, said another way, was a reasonably expected result of the act. *See Kohl*, 369 Mass. at 795; *see also Int'l Fid. Ins. Co. v. Wilson*, 387 Mass. 841, 850 (1983) (citing *Kohl*, 369 Mass. at 795); *Int'l Totalizing Sys., Inc. v. PepsiCo, Inc.*, 29 Mass. App. Ct. 424, 436 n.18 (1990).

151. I find that the 2012 Appeal was not the cause of any loss of money and/or profit of 477 Harrison in that 477 Harrison did not lose money due to 2012 Appeal.

152. I find that that the 2015 Appeal was not the cause of any loss of money and/or profit of 477 Harrison in that 477 Harrison did not lose money due to 2015 Appeal.

153. The owner of a property subject to an easement, while entitled to use its property, is not permitted to "engage in activities that are inconsistent or materially interfere with a dominant owner's easement. The right of use arising out of [the] easement is superior to [the servient estate owner's] property interest, and the [servient estate owner] must avoid activities

which are inconsistent with the [dominant estate owner's] use of the easement." *World Species List-Natural Features Registry Inst. v. Reading*, 75 Mass. App. Ct. 302, 310 (2009) (internal quotation marks and citations omitted) (alterations in the original); *see also Patterson v. Paul*, 448 Mass. 658, 663 (2007); *Florian v. Cooper*, 89 Mass. App. Ct. 1112 (2016) (unpublished decision).

154. The filing of the Wall Case was not the cause of any loss 477 Harrison incurred because it could not develop the second floor of its property into residential units with windows and balconies on the north wall.

155. Since the time 477 Harrison purchased its property, the property was burdened by an easement in the second floor of the north wall of 477 Harrison's property running in favor of the JACE Parties' property. *See* **Exhibits 1 and 2**; *see also* Wall Case Judgment at **Exhibit 135**.

156. The existence of an easement in the second floor of the north wall of 477 Harrison's property running in favor of the JACE Parties' property, not the JACE Parties' filing of the Wall Case, was the cause of 477 Harrison's inability to develop the second floor of its property into residential units with windows and balconies on the north wall.

No Willful or Kowing Violation

157. 477 Harrison has failed to demonstrate that the JACE Parties acted with the "'culpable state of mind' required for the imposition of [Section] 11's extraordinary damage penalty." *VMark Software, Inc. v. EMC Corp.*, 37 Mass. App. Ct. 610, 623 (1994). This is not an appropriate case to award double or treble damages, even assuming 477 Harrison had demonstrated it suffered a loss of money or property due to any alleged unfair or deceptive practice by the JACE Parties.

158. "The Supreme Judicial Court has recognized that only callous and intentional violations of c. 93A merit multiple damages, and has emphasized the need to place a limit on

punitive liability under ch.93A for relatively innocent violations." *VMark Software, Inc. v. EMC Corp.*, 37 Mass. App. Ct. 610, 623 (1994) (internal quotation marks and citations omitted).

159. "[A] c. 93A offense may even be 'grievous' without being knowing or willful." *VMark Software, Inc. v. EMC Corp.*, 37 Mass. App. Ct. 610, 623 (1994) (citations omitted).

160. Even if the court determined the JACE Parties filed the 2012 Zoning Appeal, the Wall Case, and the 2015 Zoning Appeal with an ulterior purpose, that finding does not automatically lead to the conclusion that the JACE Parties acted willfully or knowingly for purposes of Chapter 93A. *Cf. VMark Software, Inc. v. EMC Corp.*, 37 Mass. App. Ct. 610, 623 (1994) ("We do not read the c. 93A cases as mandating that the multiple damages bonus be automatically imposed for any and all forms of misrepresentation. Rather, it is only when the acts of misrepresentation amount to 'intentional fraud' that the severe sanction is appropriate.").

161. The JACE Parties' filing of the 2012 Zoning Appeal, the Wall Case, and the 2015 Zoning Appeal were not sufficiently "egregious to bring [the JACE Parties] within the statutory objective of punishing truly inequitable marketplace behavior." *VMark Software, Inc. v. EMC Corp.*, 37 Mass. App. Ct. 610, 624 (1994). Among other things, the 2012 Zoning Appeal, the Wall Case, and the 2015 Zoning Appeal were not groundless.

162. Indeed, imposing Chapter 93A's "extraordinary damage penalty" on the JACE Parties for the filing of the Wall Case would be particularly inappropriate given both the Superior Court and the Appeals Court affirmed JACE's easement under the Indenture.

163. More generally, the possibility that a person could be exposed to "punitive liability" under Chapter 93A for petitioning activity would have a severe chilling effect and would not further any legitimate punitive or deterrent purpose of the statute.

164. 477 Harrison has similarly failed to demonstrate that Arthur Leon acted with the necessary "culpable state of mind" to award double or treble damages for the filing of the application for criminal complaint.

Waiver

165. "Waiver may occur by an express and affirmative act, or may be inferred by a party's conduct, where the conduct is consistent with and indicative of an intent to relinquish voluntarily a particular right [such] that no other reasonable explanation of [the] conduct is possible." *KACT, Inc. v. Rubin,* 62 Mass. App. Ct. 689, 695 (2004) (internal quotations removed).

166. 477 Harrison's entering into the Agreement for Judgment to resolve the 2012 Zoning Appeal constitutes an affirmative act by 477 Harrison to voluntarily relinquish all relief sought under the ZBA decision at that time, November 7, 2013. As a result, 477 Harrison is barred from basing its Chapter 93A claim on the 2012 Zoning Appeal.

167. In entering into the Agreement for Judgment to resolve the 2012 Zoning Appeal, 477 Harrison agreed that JACE and 477 Harrison could continue to assert their respective claims in the Wall case, therefore 477 Harrison is barred from basing its Chapter 93A claim on the Wall Case.

168. In entering into the Agreement for Judgment to resolve the 2012 Zoning Appeal, 477 Harrison agreed that JACE retained the right to challenge any future zoning relief sought by 477 Harrison, therefore 477 Harrison is barred from basing its Chapter 93A claim on the 2015 Zoning Appeal.

Estoppel

169. "Quasi estoppel precludes a party from subsequently repudiating an action to which he had previously manifested his assent, and from which assent he thereby

benefited." *Uccello v. Gold'n Foods, Inc.*, 325 Mass. 319, 325, (1950), *see also* 31 C.J.S. Estoppel and Waiver § 123 (1996) ("Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he ratifies the transaction, is bound by it, and cannot avoid its obligation or effect by taking a position inconsistent with it.").

170. By entering into the Agreement for Judgment, 477 Harrison voluntarily resolved the 2012 Zoning Appeal and obtained the agreement of JACE not to contest the ground water recharge permit. As a result, 477 Harrison is barred from seeking damages from the JACE Parties for bringing the 2012 Zoning Appeal.

171. In the Agreement for Judgment, 477 Harrison acknowledged the JACE Parties' right to continue the Wall Case and/or to challenge any zoning relief 477 Harrison sought in the future. As a result, 477 Harrison is barred from seeking damages from the JACE Parties for bringing the Wall Case and the 2015 Zoning Appeal.

Respectfully submitted,

JACE BOSTON, LLC AND ARTHUR LEON
by their attorneys,

/s/ Mark S. Furman

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Dated: May 30, 2025

CERTIFICATE OF SERVICE

I, Mark S. Furman, hereby certify that on May 30, 2025, I caused a copy of the foregoing document to be served by email on Counsel for Plaintiff 477 Harrison Ave., LLC as follows:

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Date Filed 10/1/2025 3:21 PM
Superior Court - Suffolk
Docket Number 1584CV00829

ML

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 15-0829-B

477 HARRISON AVE., LLC
Plaintiff,

v.

JACE BOSTON, LLC
and ARTHUR LEON,
Defendants.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Pursuant to Mass. R. Civ. P. 50(b), Defendants JACE Boston, LLC ("JACE") and Arthur Leon ("Leon," and together with JACE, the "JACE Parties") respectfully request that the Court set aside the jury's verdict in favor of Plaintiff 477 Harrison Ave., LLC ("477 Harrison") on 477 Harrison's abuse of process claim based on the 2012 Zoning Appeal, the 2015 Zoning Appeal, and the application for criminal complaint and enter judgment in accordance with Defendants' Motion for Directed Verdict at the Close of All Evidence, which was previously denied.[1] As grounds for this motion, the JACE Parties state that (1) there was insufficient evidence from which the jury could enter a verdict in favor of 477 Harrison with respect to its claim for abuse

[1] Mass. R. Civ. P. 50(b) provides in relevant part that "[n]ot later than 10 days after entry of judgment, a party who has moved for a directed verdict may serve a motion to have the verdict and any judgment entered in accordance thereon set aside and to have judgment entered in accordance with the motion for a directed verdict."

On May 5, 2025, the JACE Parties brought a motion for directed verdict pursuant to Mass. R. Civ. P. 50(a) at the close of all evidence. The Court denied JACE Parties' Motion for Directed Verdict at the Close of All Evidence by an order dated May 5, 2025. The jury returned a verdict on 477 Harrison's abuse of process claim on May 6, 2025. As of the date of this motion, judgment has not been entered.

of process; (2) there was insufficient evidence from which the jury could award 477 Harrison damages for abuse of process; (3) the litigation privilege bars 477 Harrison from holding the JACE Parties liable based on, and/or to use as evidence of wrongdoing, statements made by the JACE Parties and/or their counsel in the contemplation of, institution of, and/or during litigation; and (4) the JACE Parties are entitled to judgment as a matter of law because 477 Harrison's claims are based on the JACE Parties' legitimate exercise of their right to petition the government and 477 Harrison failed to demonstrate that the JACE Parties' petitioning activity was objectively baseless.

A. STANDARD OF REVIEW.

Even viewing the evidence presented at trial in the light most favorable to 477 Harrison, the jury's verdict cannot be sustained because "a reasonable inference" cannot be "drawn in favor of [477 Harrison]." *Kiely v. Teradyne, Inc.*, 85 Mass. App. Ct. 431, 434 (2014); *DeSantis v. Commonwealth Energy Sys.*, 68 Mass. App. Ct. 759, 763 (2007) ("[W]e inquire . . . whether from the evidence it was possible to draw enough reasonable inferences to make out the elements of the plaintiff's case.") (internal quotation marks and citation omitted) (alteration in original). Here, the Court can be satisfied that "the jury failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law." *Kiely*, 85 Mass. App. Ct. at 434 (internal quotation marks and citations omitted); *DeSantis*, 68 Mass. App. Ct. at 762 (describing the Court's task in connection with deciding a motion for judgment notwithstanding the verdict is to determine "whether, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, the jury reasonably could return a verdict for the plaintiff"). 477 Harrison cannot "avoid entry of judgment n.o.v. if any essential element of [its] case rests on a 'mere scintilla' of evidence." *Kiely*, 85 Mass. App. Ct. at 434 (citation omitted).

B. THE EVIDENCE PRESENTED AT TRIAL IS INSUFFICIENT TO SUPPORT THE JURY'S VERDICT THAT EACH OF THE 2012 ZONING APPEAL, THE 2015 ZONING APPEAL, AND THE APPLICATION FOR CRIMINAL COMPLAINT CONSTITUTED AN ABUSE OF PROCESS.

With respect to its claim for abuse of process, 477 Harrison was required to prove by a preponderance of the evidence as to each of the 2012 Zoning Appeal, the 2015 Zoning Appeal, and the application for criminal complaint that the JACE Parties (a) used process (b) for an ulterior or illegitimate purpose and (c) caused damages to 477 Harrison. *See Psy-Ed Corp. v. Klein*, 459 Mass. 697, 713 (2011); *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 636 (2010); *Jones v. Brockton Pub. Mkts., Inc.*, 369 Mass. 387, 389-90 & n. 2 (1975).

1. Insufficient Evidence of Use of Process – Application for Criminal Complaint

While it is undisputed that process was issued against 477 Harrison in connection with the 2012 Zoning Appeal and the 2015 Zoning Appeal, it also is clear that no process was issued against 477 Harrison in connection with the application for criminal complaint. The application references "John Holland (John) Holland Construction," in the defendant section of the application. *See* **Exhibit 83**. The "Remarks" section begins, "Complainant alleges that the above listed defendant, owner of Holland Construction has approximately four people standing on his roof." *Id.* 477 Harrison is never mentioned in the application. Nor was 477 Harrison mentioned in the Police Report, which also refers to John Holland, owner of Holland Construction. *See* **Exhibit 79**. The Police Report, at page 2, states

> PO Horgan spoke to Mr. Arthur who states that since July 2, 2014 Holland Construction Company's workers continue to stand on his roof which is 1234 Washington Street Boston Ma to work on the building adjacent to his 477 Harrison Ave Boston Ma. Mr. Arthur reports that he has repeatedly instructed the Holland Construction Company not to stand on his roof to work. Mr. Arthur further states that they have left construction equipment on his roof, he has found nails, construction debris, and has used chemicals on the building and that the workers refuse to tell him what the chemical is. Mr. Arthur has also repeatedly instructed the Holland

> Construction Company to stop trespassing on his property which they refuse to comply. Holland Construction Company's owner is John Holland.
>
> PO Horgan advised Mr. Arthur to seek a trespass order in Boston Municipal Court.

Exhibit 79.

Because there was no evidence that the application for criminal complaint was sought against 477 Harrison, it was improper for the jury to find against the JACE Parties on 477 Harrison's abuse of process claim to the extent it was based on the application for criminal complaint.

2. Insufficient Evidence of Ulterior or Illegitimate Purpose

Even viewing the evidence presented at trial in a light most favorable to 477 Harrison, a reasonable inference cannot be drawn in 477 Harrison's favor that the JACE Parties brought the 2012 Zoning Appeal, the 2015 Zoning Appeal, and/or the application for criminal complaint for an ulterior or illegitimate purpose. The trial record does not include sufficient evidence to show with respect to the 2012 Zoning Appeal, the 2015 Zoning Appeal, and the application for criminal complaint that:

- The JACE Parties used the process to accomplish some ulterior purpose for which the process was not designed or intended or that was not a legitimate purpose for the process. *See Psy-Ed Corp.*, 459 Mass. at 713; *Ladd v. Polidoro*, 424 Mass. 196, 198 (1997); *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 775 (1986); *Beecy v. Pucciarelli*, 387 Mass. 589, 595 (1982); *Wodinsky v. Kettenbach*, 86 Mass. App. Ct. 825, 836 (2015).
- The stated objective of the process was not the actual objective. *See Jones*, 369 Mass. at 391; *Silvia*, 35 Mass. App. Ct. at 454-55; *see also Pan American*

Airways, Corp. v. Barnes, C.A. No. 04-10515-JLT, 2005 U. S. Dist. LEXIS 53723 at *9 (D. Mass. Oct. 19, 2005) ("[I]f process is employed for its intended legal purpose, there can be no abuse of process **even if the person also possessed an improper motive**.") (emphasis added).

- The JACE Parties used the process to gain some collateral advantage not properly involved in the proceeding itself; that is, they used the process as a form of extortion. *See Cohen v. Hurley*, 20 Mass. App. Ct. 439, 442 (1985).
- There were no grounds to file each use of process. *See Millennium Equity Holdings,* 456 Mass. at 637.
- The JACE Parties knew the use of process was groundless. *See Psy-Ed Corp.*, 459 Mass. at 713; *Beecy,* 387 Mass. at 596; *Wodinsky*, 86 Mass. App. Ct. at 836; *Bednarz v. Bednarz*, 27 Mass. App. Ct. 668, 673 (1989).

Because there was insufficient evidence from which the jury could conclude that the JACE Parties brought the 2012 Zoning Appeal, the 2015 Zoning Appeal, and/or the application for criminal complaint for an ulterior purpose, the JACE Parties are entitled to judgment as a matter of law.

3. Insufficient Evidence of Damages as to the 2012 Zoning Appeal and the 2015 Zoning Appeal

Even viewing the evidence presented at trial in a light most favorable to 477 Harrison, a reasonable inference cannot be drawn in 477 Harrison's favor that the JACE Parties' use of process caused 477 Harrison to suffer any damages. The trial record does not include sufficient evidence with respect to the 2012 Zoning Appeal and the 2015 Zoning Appeal that:

- 477 Harrison's alleged damages were the "natural and probable consequences" of each use of process. *Millennium Equity Holdings, LLC*, 456 Mass. at 645 (internal quotation marks and citation omitted).
- 477 Harrison's alleged damages were anything other than speculative. *See Steele v. Kelley*, 46 Mass. App. Ct. 712, 741 n.28 (1999) (noting that damages cannot be speculative).
- 477 Harrison suffered any lost profits or value as a result of each use of process. *See, e.g.*, *Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 14 Mass. App. Ct. 396, 426 (1982); *see also Empire Today, LLC v. Nat'l Floors Direct, Inc.*, 788 F. Supp. 2d 7, 18-19 (D. Mass. 2011).

The premise of 477 Harrison's damages claim was that the delay in construction resulting from the filing of the 2012 Zoning Appeal and/or the 2015 Zoning Appeal increased both its hard and soft costs of construction. Even assuming 477 Harrison submitted evidence of its alleged increased costs from the 2012 Zoning Appeal and the 2015 Zoning Appeal, 477 Harrison failed to submit sufficient evidence to support the inference that the alleged increase in 477 Harrison's construction costs exceeded the increased revenue it earned as a result of the delay in the construction of the project. Indeed, the evidence presented at trial established that the value of the residential and commercial units at 477 Harrison's property increased over the period between September 2013 and June 2019 and in an amount significantly greater than 477 Harrison's alleged increased costs. Because the evidence at trial demonstrated that 477 Harrison suffered no loss as a result of any alleged delay, the jury could not reasonably conclude that 477 Harrison suffered any damages as a result of 2012 Zoning Appeal and/or the 2015 Zoning Appeal, an essential element of its claim for abuse of process.

477 Harrison relied on John Holland's testimony regarding his expectations for the value of the residential units. Mr. Holland's testimony regarding his alleged expectations of the sales prices 477 Harrison would have received had the project been completed in 2013 was insufficient evidence that 477 Harrison suffered damages as a result of selling the residential units at a time later than originally planned.[2] This testimony, admitted over the JACE Parties' objections, *see* John Holland DE, 4/23/2025, Pg. 164, LL 2-8, was insufficient for 477 Harrison to make out a prima facie case for any damages resulting from construction delays allegedly caused by the JACE Parties given

- The sales prices provided by 477 Harrison to the bank and its appraiser from 2012-2014;

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[2] Contrary to the argument made by counsel for 477 Harrison during closing argument, Schedule A to Exhibit 67 does not provide support for Mr. Holland's testimony and/or show that "the units did exactly what Mr. Holland said they would do, he sold them for between 12 to 1300 [sic] square foot." 5/5/2025 at Pg. 100, LL 17, Pg. 101, LL 2.

Schedule A to Exhibit 67 is inaccurate and therefore cannot support the inference that the value of the residential units did not increase over time. Exhibit 67, the original construction loan agreement from March 2014, defined "Project" to mean "[t]he renovation and conversion of said Property into **nine residential (9) units** and two (2) commercial units ('each, a 'Unit') five (5) story condominium." Exhibit 67 (emphasis added). Schedule A mistakenly identified 12, not 9, residential units. Schedule A mistakenly listed both B and C unit types as separate units, when, in fact, as of March 2014, 477 Harrison's plan was to combine the smaller B and C units into a single larger unit, as explained in the Blake appraisal prepared in February 2014. *See* **Exhibit 64**. The owner supplied information 477 Harrison submitted in connection with the February 2014 appraisal reflected estimated sales prices for the A units ranging from $1,046.51 to $1,093.02, the combined B and C units ranging from $1,017.86 to $1,053.57, and the D units ranging from $1,041.67 to $1,087.96. Schedule A of Exhibit 67 incorrectly lists the B and C units as separate (instead of combined) units and assigns to each of them the value of the combined unit. At the time 477 Harrison and Rockland Trust entered into the modified construction loan dated December 30, 2014, the "Project" had been redefined to include 12 residential units. *See* **Exhibit 86**. Schedule A attached to the modified construction loan agreement correctly identified four unit types – A, B, C, and D – per floor and reflects appraisal values of the B and C units as separate units to be comparatively lower than the value of the other unit types given their smaller square footage, among other things. 477 Harrison's use of Schedule A to Exhibit 67 likely confused, if not misled, the jury.

- The appraisals prepared for 477 Harrison's bank from 2012-2014;
- The values in February 2014 of both the bank's appraiser and 477 Harrison were based on actual market sales at the time the project would have been completed but for the delay allegedly caused by the JACE Parties;
- Admissions by 477 Harrison; and
- The actual sales prices of the units at the Property.

Mr. Holland admitted that he was truthful in what he told the bank and its appraiser. *See* John Holland CE, 4/30/25, Pg. 36, LL 2-14. As of February 2014, Mr. Holland communicated to the bank's appraiser that the expected per square foot sales price, at the highest, would be $1,093.02 for the units on floors 3-5 and $1,200 for the penthouses. *See* **Exhibit 64** at 477H01000- 47701001, 477H01003-477H01004. Mr. Holland also testified that the estimates of the sale prices of the residential units he provided to the bank's appraiser in connection with its preparation of appraisals were the "most conservative estimates" and were based on "**what sales were in the past**." *See* John Holland DE, 4/23/2025, Pg. 161, LL 1-6 (emphasis added); *see also id.*, Pg. 160, LL 12-14 ("So when you look back in your rear view mirror, you're going to assess what the sales were in a neighborhood prior and use those as your sales value."). According to Mr. Holland, had there been no delay, 477 Harrison would have completed its project in 2013. As a result, 477 Harrison's estimates of sales prices as of February 2014 were based on "what sales were in the past," namely actual market sales as of the time 477 Harrison had expected to complete the project, and therefore represent the sales prices 477 Harrison would have received had there been no delay.[3] Instead, 477 Harrison received an enormous increase in sales prices

[3] As of February 2014, the bank's appraiser also had the benefit of the actual sales prices in the market as of the time 477 Harrison claimed the project would have been completed.

and profits from any delay in construction. Mr. Holland's convenient, after the fact and self-serving testimony that the estimates he provided to the bank's appraiser (although he testified they were truthful) were not consistent with what he asserted he *believed* 477 Harrison would sell the residential units for when they came to the market, *see* John Holland DE, 4/23/2025, Pg. 161, LL 19-22, and further that he "**expected** [his] sales were going to be far greater than – than what historical sales in this neighborhood were" *see* John Holland DE, 4/23/2025, Pg. 162, LL 8-10, is insufficient to provide the necessary basis to make out a prima face case for damages.

Massachusetts recognizes a rebuttable presumption that an owner of real estate may express an opinion of its value. *CBI Partners Ltd. P'ship v. Chatham*, 41 Mass. App. Ct. 923, 924 (1996). The ability of an owner to express an opinion is not based on "holding the legal title," but on the owner's demonstrated "familiarity with the characteristics of the property, his knowledge or acquaintance with its uses, and his experience in dealing with it."[4] *Id.* at 924-25 (assigning to the trial judge the responsibility to determine whether the owner "has the necessary knowledge and familiarity about his property to enable him to express his opinion about its market value"); *see also Blais-Porter, Inc. v. Simboli*, 402 Mass. 269, 272 (1988).

When an owner is permitted to testify regarding value, the owner offers an opinion on the actual fair market value of the property, real or personal, as of a particular point in time. *See, e.g.*, *von Henneberg v. Generazio*, 403 Mass. 519, 524 (1988) (affirming admission of owner's testimony regarding value of damaged property); *Spinosa v. Tufts*, 98 Mass. App. Ct. 1, 11 (2020) (affirming damages award on claim for breach of contract based on owner's opinion of value of company as of time of breach); *Clapp v. Haynes*, 11 Mass. App. Ct. 895, 897 (1980) (reversing

[4] The same standard applies to a corporate officer testifying regarding the value of corporate property. *Blais-Porter, Inc. v. Simboli*, 402 Mass. 269, 273 (1988); *CBI Partners Ltd. P'ship*, 41 Mass. App. Ct. at 925.

exclusion of owner's testimony of value of converted property, noting that "[f]air market value at the time and place of the conversion is the usual measure of damages for a wrongful seizure of property"). "A witness is competent to testify to the value of his own property if he is sufficiently familiar with it and if he can demonstrate an understanding of the relevant standard of value." *Clapp*, 11 Mass. App. Ct. at 897. In *Clapp*, the Court noted that the "definition of fair market value is the familiar one, i.e., the highest price which a hypothetical willing buyer would pay to a hypothetical willing seller in an assumed free and open market." *Id.* (permitting owner to testify regarding fair market value of personal property where owner's definition of market value . . . demonstrated an adequate understanding of the pertinent legal standard") (internal quotation marks and citation omitted).

Even assuming 477 Harrison established the necessary foundation for Mr. Holland's ability to offer a lay opinion as an owner regarding the fair market value of 477 Harrison's property, Mr. Holland did not purport to offer the type of opinion of fair market value about which owners are permitted to testify. Mr. Holland did not testify regarding his opinion of the fair market value of 477 Harrison's property as of a particular point of time. Instead, Mr. Holland testified about what his expectations were. For example, according to Mr. Holland, when 477 Harrison prepared its financial projections, 477 Harrison expected to sell the units for $1,200 to $1,300 a foot when they came to market. *See* John Holland DE, 4/23/2025, Pg. 164, LL 2-4, 8. Mr. Holland further testified that 477 Harrison sold the penthouse units in 2019 for the amount 477 Harrison originally anticipated in 2012. *See* John Holland DE, 4/24/2025, Pg. 106, LL 17-19, 22. This testimony is not an opinion of the residential units' fair market value and is insufficient to support 477 Harrison's claim it suffered any loss as a result of the JACE Parties' allegedly wrongful acts.

In addition, with respect to the application for criminal complaint, there is insufficient evidence in the trial record to show that 477 Harrison was responsible for or obligated to pay the $1,550 in legal fees incurred in connection with the application for criminal complaint.

Because there was insufficient evidence from which the jury could find 477 Harrison suffered any damages as a result of the 2012 Zoning Appeal, 2015 Zoning Appeal, and/or the application for criminal complaint, an essential element of 477 Harrison's claim for abuse of process, the JACE Parties are entitled to judgment in their favor as a matter of law.

C. THE LITIGATION PRIVILEGE PRECLUDES 477 HARRISON FROM SEEKING TO HOLD THE JACE PARTIES LIABLE FOR AND/OR TO USE AS EVIDENCE OF WRONGDOING STATEMENTS MADE IN CONTEMPLATION OF AND/OR IN CONNECTION WITH LITIGATION.

The litigation privilege precludes a party from being liable for "communications made by a party, witness, or attorney in connection with judicial proceedings or contemplated litigation." *Bassichis v. Flores*, 490 Mass. 143, 144 (2022). "[S]tatements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding are absolutely privileged provided such statements relate to that proceeding." *Sriberg v. Raymond*, 370 Mass. 105, 108 (1976). "The privilege applies regardless of malice, bad faith, or any nefarious motives . . . so long as the conduct complained of has some relation to the litigation." *Bassichis*, 490 Mass. at 150. Moreover, statements made in the preparation of and in the course of litigation may not be used as evidence of misconduct. *See Nnodim v. U.S. Bank Tr. Ass'n*, 703 F. Supp. 3d 296, 305-306 (D. Mass. 2023).

Any statements made by and/or actions taken by the JACE Parties or their attorneys in contemplation of or in connection with the 2012 Zoning Appeal are absolutely privileged by the litigation privilege and may not be a basis for liability. The same is true for the 2015 Zoning Appeal. Any statements made by and/or actions taken by the JACE Parties or their attorneys in

contemplation of or in connection with the 2015 Zoning Appeal, including, but not limited to, discovery sought from 477 Harrison in that action, are absolutely privileged by the litigation privilege and may not be a basis for liability. Arthur Leon, individually, is entitled to the protection of the litigation privilege. As such, any statements made by and/or actions taken by Arthur Leon in contemplation of or in connection with the application for a criminal complaint are absolutely privileged by the litigation privilege and may not be a basis for liability.

D. THE JACE PARTIES ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THEY ENGAGED IN CONSTITUTIONALLY PROTECTED PETITIONING ACTIVITY.

In *Bristol Asphalt Co., Inc. v. Rochester Bituminous Products, Inc.*, 493 Mass. 539 (2024), the SJC expressly recognized that the denial of a special motion to dismiss under the first stage of the analysis under the anti-SLAPP statute, Mass. Gen. Laws ch. 231, § 59H, would not foreclose the moving party's ability to assert constitutional defenses to claims based on the party's petitioning activity. Because the SJC eliminated the "parsing" of claims at the first stage of the anti-SLAPP analysis, claims that are based in part on a party's petitioning activity will not be dismissed under the anti-SLAPP statute. That does not mean, however, the party loses its ability to defend itself on the grounds that it engaged in constitutionally protected petitioning activity. Indeed, the SJC fully expects that the substantive issue of the legitimacy of the petitioning activity will be sorted out "in the ordinary course of litigation." *Bristol Asphalt Co., Inc.*, 493 Mass. at 556. The SJC explained the distinction between the "procedural protections of the special motion to dismiss" and the "substantive law" and the "ordinary course of litigation" as the vehicles to "sort[] out rights and responsibilities bound up in any surviving counts." *Bristol Asphalt Co., Inc.*, 493 Mass. at 556-57 (emphasis in original). Whether assessed at the special motion to dismiss stage or later in the "ordinary course of litigation," the standard for

determining whether a party's petitioning activity is constitutionally protected remains the same: Was there a reasonable basis in fact and law for the petitioning activity?

This is because the focus of the inquiry, whether at the special motion to dismiss stage under the anti-SLAPP statute or during "the ordinary course of litigation," is on the legitimacy of the petitioning activity on which the claim is based. The analysis does not take into consideration or turn on the nature or type of claim which is based on the petitioning activity. Rather, the assessment of whether the petitioning activity was legitimate is entirely independent of the elements of the claim which is based on the petitioning activity. Here, 477 Harrison has sought to confuse the analysis by asserting that the legitimacy of the JACE Parties' petitioning activity has to be viewed through the elements of 477 Harrison's abuse of process claim, arguing that the JACE Parties' petitioning activity cannot be assessed against an objective standard because, 477 Harrison maintains, the claim for abuse of process only considers the subjective motive of the JACE Parties. This is simply incorrect.

The JACE Parties are entitled to judgment as a matter of law to the extent 477 Harrison's abuse of process claim is based on the 2012 Zoning Appeal and the 2015 Zoning Appeal. The SJC previously found that 477 Harrison failed to carry its burden to show that these uses of process did not have a reasonable basis in fact or law. *See 477 Harrison Ave., LLC v. JACE Boston, LLC*, 477 Mass. 162, 173 (2017). In making this determination, the SJC had before it, among other things, the JACE Parties' arguments in support of their standing to appeal the zoning relief at issue in the 2012 Zoning Appeal and the trial court's decision on 477 Harrison's motion for summary judgment based on standing in the 2015 Zoning Appeal. That is, the 2012 Zoning Appeal and the 2105 Zoning Appeal are constitutionally protected exercises of the JACE Parties' right to petition and therefore cannot be the basis for civil liability. *See, e.g., Sahli v. Bull*

HN Information Systems, Inc., 437 Mass. 696, 702 (2002) (explaining that the "United States Supreme Court has recognized the right to petition the government, including the courts, as one of the most precious of the liberties safeguarded by the Bill of Rights," but noting that "[t]he right to petition is not, however, an absolute right. For example, baseless or sham litigation is not protected by the First Amendment") (internal quotation marks and citations omitted).

The United States Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), articulated a test to assess when petitioning activity loses its constitutional protection, *i.e.*, immunity from liability; only "sham" litigation is not constitutionally protected. Under the test set forth in *Professional Real Estate Investors, Inc.*, 477 Harrison had the burden to show that the JACE Parties' petitioning activity was objectively baseless. *See Professional Real Estate Investors, Inc.*, 508 U.S. at 60-61; *see also Sahli*, 437 Mass. at 696 (holding "a lawsuit filed by an employer against a former employee who has lodged a charge of discrimination is not an act of retaliation or interference in violation of the State's antidiscrimination laws where the lawsuit had a legitimate basis in law and in fact"). The evidence in the trial record is insufficient to satisfy 477 Harrison's burden.

Under *Professional Real Estate Investors, Inc.*, the two-part test first requires 477 Harrison to show that each of the JACE Parties' acts of petitioning "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized" and the sham exception must fail. *Professional Real Estate Investors, Inc.*, 508 U.S. at 60. "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id.* The Supreme Court further made clear that "[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore

not a sham." *Id.* at 60, n. 5. The Supreme Court expressly cautioned that courts must "resist the understandable temptation to engage in *post hoc* reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation." *Id.* (internal quotation marks and citations omitted). Rather, the Supreme Court expressly acknowledged that a party may have "reasonable grounds for bringing suit" even when "the law or the facts appear questionable or unfavorable at the outset." *Id.* (internal quotation marks and citation omitted).

Because the JACE Parties' petitioning activity which formed the basis of the jury's verdict is constitutionally protected, the JACE Parties are entitled to judgment in their favor as a matter of law.

Conclusion

WHEREFORE, Defendants JACE Boston, LLC and Arthur Leon respectfully request that the Court, pursuant to Mass. R. Civ. P. 50(b), set aside the jury's verdict in favor of Plaintiff 477 Harrison Ave., LLC on its abuse of process claim based on the 2012 Zoning Appeal, the 2015 Zoning Appeal, and the application for criminal complaint and enter judgment in favor of the JACE Parties.

Respectfully submitted,

JACE BOSTON, LLC and
ARTHUR LEON,
By their attorneys,

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Dated: August 21, 2025

CERTIFICATE OF SERVICE

I, Mark S. Furman, hereby certify that on August 21, 2025, I caused a copy of the foregoing document to be served by email on counsel for Plaintiff 477 Harrison Ave., LLC as set forth below:

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Date Filed 10/1/2025 3:49 PM
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Docket Number 1584CV00829

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COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 15-0829-B

171

477 HARRISON AVE., LLC
Plaintiff,

v.

JACE BOSTON, LLC
and ARTHUR LEON,
Defendants.

DEFENDANTS' MOTION FOR NEW TRIAL AND REQUEST FOR HEARING

Pursuant to Mass. R. Civ. P. 59(a), Defendants JACE Boston, LLC ("JACE") and Arthur Leon ("Leon," and together with JACE, the "JACE Parties") respectfully request that in the event the Court denies the JACE Parties' motion for judgment notwithstanding the verdict, the Court grant them a new trial for the reasons set forth in this motion.

The amount of damages the jury awarded to Plaintiff 477 Harrison Ave., LLC ("477 Harrison") was against the weight of the evidence and excessive.[1] While 477 Harrison argued, and the jury accepted, that 477 Harrison's increased construction costs totaled $5.1 million, and that it incurred an additional $700,000 in interest, the weight of the evidence was that 477 Harrison did not suffer any damages as a result of the 2012 Zoning Appeal and/or the 2015 Zoning Appeal. Rather, the clear weight of the evidence presented at trial demonstrated that the value of the 477 Harrison Property increased over time and in an amount in excess of any alleged

[1] Under Mass. R. Civ. P. 59(b), a motion for a new trial must be served "not later than 10 days after the entry of judgment." This motion is timely because judgment has not entered on the jury's verdict on 477 Harrison's claim for abuse of process as of the date of service of this motion.

increase in 477 Harrison's costs. To avoid a new trial, 477 Harrison should be required to agree to remit $5.8 million of the $5,801,550 in damages awarded by the jury on 477 Harrison's claim for abuse of process. At a minimum, on the issue of damages, 477 Harrison should be required to agree to remit $3,483,226 of the $5,801,550 in damages awarded by the jury because the weight of the evidence, even accepting as true 477 Harrison's claim regarding its increased interest costs, was that its increased construction costs were no more than $1,616,774. *See* Mass. R. Civ. P. 59(a).

Further, the jury failed to come to a reasonable conclusion with respect to its judgment holding the JACE Parties liable for abuse of process based on the 2012 Zoning Appeal and the 2015 Zoning Appeal. The JACE Parties should be granted a new trial for these reasons as well.

I. DAMAGES

A. Standard Of Review.

Here, the Court should grant the JACE Parties a new trial on damages in connection with 477 Harrison's abuse of process claim based on the 2012 Zoning Appeal and the 2015 Zoning Appeal because the jury's verdict awarding 477 Harrison $5.8 million in damages "is so markedly against the weight of the evidence as to suggest that the jurors allowed themselves to be misled, were swept away by bias or prejudice, or for a combination of reasons, including misunderstanding of applicable law, failed to come to a reasonable conclusion." *See W. Oliver Trip Co. v. American Hoescht Corp.*, 34 Mass. App. Ct. 744, 748 (1993).

B. Sources Of Error In Jury's Damages Award.

With respect to damages, the Court instructed the jury to consider any "pecuniary loss suffered by the plaintiff which it would not have incurred but for the wrongful claim." *See* Jury Instructions, 5/5/25, Pg. 75, LL 3-10. By awarding 477 Harrison $5.8 million in damages for its

abuse of process claim based on the 2012 Zoning Appeal and the 2015 Zoning Appeal, the jury made one or more of the following errors:

1. Even if the jury understood that the Court's damages instructions required them to consider both the increased costs and the increase in value 477 Harrison realized as a result of any delay, the jury accepted John Holland's testimony that 477 Harrison did not experience any increase in value because it sold the units for the same per square price which he expected to sell them for at the outset of the project, which testimony was against the clear weight of the evidence;

2. Even if the jury understood that the Court's damages instructions required them to consider both the increased costs and the increase in value 477 Harrison realized as a result of delay, the jury's calculation of 477 Harrison's damages, even without crediting John Holland's testimony, was against the clear weight of the evidence;

3. The jury incorrectly understood the Court's damages instructions to mean they could determine 477 Harrison's damages by considering **only** what 477 Harrison claimed as its increased costs resulting from delay without considering the corresponding increase in value 477 Harrison realized as a result of the same delay; or

4. The jury failed to come to a reasonable conclusion because they were not expressly instructed that lost profits was the appropriate measure of 477 Harrison's damages.

C. The Weight Of The Evidence Presented At Trial Demonstrated That The Value Of The 477 Harrison Property Increased Over Time.

The evidence presented at trial overwhelmingly demonstrated that the value of the residential and commercial units at the 477 Harrison Property increased over the period between September 2013 and June 2019. Because the jury's award of damages failed to account for the

increase in the value of the 477 Harrison Property, the JACE Parties are entitled to a new trial on damages in connection with the 2012 Zoning Appeal and the 2015 Zoning Appeal.

In an attempt to support its damages claim, 477 Harrison relied on John Holland's testimony regarding his expectations for the value of the residential units. Mr. Holland's testimony, however, was not a sufficient basis for the jury's award of $5.8 million in damages because it (a) was not an admissible opinion of value by an owner and (b) was against the weight of the evidence.

Massachusetts recognizes a rebuttable presumption that an owner of real estate may express an opinion of its value. *CBI Partners Ltd. P'ship v. Chatham*, 41 Mass. App. Ct. 923, 924 (1996). When an owner is permitted to testify regarding value, the owner offers an opinion on the actual fair market value of the property, real or personal, as of a particular point in time. *See, e.g.*, *von Henneberg v. Generazio*, 403 Mass. 519, 524 (1988) (affirming admission of owner's testimony regarding value of damaged property); *Spinosa v. Tufts*, 98 Mass. App. Ct. 1, 11 (2020) (affirming damages award on claim for breach of contract based on owner's opinion of value of company as of time of breach); *Clapp v. Haynes*, 11 Mass. App. Ct. 895, 897 (1980) (reversing exclusion of owner's testimony of value of converted property, noting that "[f]air market value at the time and place of the conversion is the usual measure of damages for a wrongful seizure of property"). "A witness is competent to testify to the value of his own property if he is sufficiently familiar with it and if he can demonstrate an understanding of the relevant standard of value." *Clapp*, 11 Mass. App. Ct. at 897. In *Clapp*, the Court noted that the "definition of fair market value is the familiar one, i.e., the highest price which a hypothetical willing buyer would pay to a hypothetical willing seller in an assumed free and open market." *Id.* (permitting owner to testify regarding fair market value of personal property where owner's

definition of market value . . . demonstrated an adequate understanding of the pertinent legal standard") (internal quotation marks and citation omitted).

Even assuming 477 Harrison established the necessary foundation for Mr. Holland's ability to offer a lay opinion as an owner regarding the fair market value of 477 Harrison's property, which it did not do and as to which the JACE Parties objected, Mr. Holland did not purport to offer the type of opinion of fair market value about which owners are permitted to testify. Mr. Holland did not testify regarding his opinion of the fair market value of 477 Harrison's property as of a particular point of time. Instead, Mr. Holland testified, over the objection of the JACE Parties, about what his personal expectations were. For example, according to Mr. Holland, when 477 Harrison prepared its financial projections, 477 Harrison expected to sell the units for $1,200 to $1,300 a foot when they came to market. *See* John Holland DE, 4/23/2025, Pg. 164, LL 2-4, 8. Mr. Holland further testified that 477 Harrison sold the penthouse units in 2019 for the amount 477 Harrison originally anticipated in 2012. *See* John Holland DE, 4/24/2025, Pg. 106, LL 17-19, 22. This testimony, even if it was admissible evidence, is not an opinion of the residential units' fair market value and is insufficient to support 477 Harrison's claim that the value it received from selling the residential units at a later time than originally planned did not increase. At a minimum, it was against the weight of the evidence. Mr. Holland's testimony is merely a self-serving statement made after the fact and not supported by any contemporaneous evidence.

Moreover, Mr. Holland's testimony was against the clear weight of the evidence which demonstrated that the fair market value of the residential and commercial units of the 477 Harrison Property increased over time. The evidence of the increasing value of 477 Harrison's project presented at trial included:

- The sales prices provided by 477 Harrison to the bank and its appraiser from 2012-2014;
- The appraisals prepared for 477 Harrison's bank from 2012-2014;
- The values in February 2014 of both the bank's appraiser and 477 Harrison which were based on actual market sales at the time the project would have been completed but for the delay allegedly caused by the JACE Parties;
- Admissions by 477 Harrison; and
- The actual sales prices of the units at the Property.

Mr. Holland admitted that he was truthful in what he told the bank and its appraiser. *See* John Holland CE, 4/30/25, Pg. 36, LL 2-14. Mr. Holland testified that the information he provided to the bank and its appraiser was truthful because he knew the bank and the appraiser were relying on his statements. *See* John Holland CE, 4/30/25, Pg. 36, LL 2-14. Nonetheless, at trial, Mr. Holland sought to distance himself from the information about sales prices he provided to the bank and its appraiser, contending that the estimates he provided to the bank and its appraiser were not consistent with what he believed 477 Harrison would sell the residential units for when they came to the market. *See* John Holland DE, 4/23/2025, Pg. 161, LL 19-22. There was no evidence Mr. Holland ever communicated to the bank or anyone else his alleged expectations that the sales prices he would in fact receive from sales of the residential units were greater than what he communicated to the bank regarding his estimate of the selling prices of the residential units.

As of February 2014, Mr. Holland told the bank's appraiser that the expected per square foot sales price, at the highest, would be $1,093.02 for the units on floors 3-5 and $1,200 for the penthouses. *See* **Exhibit 64** at 477H01003-477H01004 (Excerpts from Exhibit 64 are attached

hereto as **Exhibit A**). Mr. Holland also testified that the estimates of the sale prices of the residential units he provided to the bank's appraiser in connection with its preparation of appraisals were the "most conservative estimates" and were based on "**what sales were in the past**." *See* John Holland DE, 4/23/2025, Pg. 161, LL 1-6 (emphasis added); *see also id.*, Pg. 160, LL 12-14 ("So when you look back in your rear view mirror, you're going to assess what the sales were in a neighborhood prior and use those as your sales value."). According to Mr. Holland, had there been no delay, 477 Harrison would have completed its project in 2013. As a result, 477 Harrison's estimates of sales prices as of February 2014 were based on "what sales were in the past," namely actual market sales as of the time 477 Harrison had expected to complete the project, and therefore represent the sales prices 477 Harrison would have received had there been no delay.[2] Mr. Holland's convenient, after the fact and self-serving testimony that the estimates he provided to the bank's appraiser were not consistent with what he asserted he *believed* 477 Harrison would sell the residential units for when they came to the market, *see* John Holland DE, 4/23/2025, Pg. 161, LL 19-22, and further that he "**expected** [his] sales were going to be far greater than – than what historical sales in this neighborhood were" *see* John Holland DE, 4/23/2025, Pg. 162, LL 8-10, even if sufficient to provide prima facie evidence, was clearly against the weight of the evidence, which demonstrated that 477 Harrison received an enormous increase in sales prices and profits from any delay in construction.

The appraisals prepared for the bank and the owner-supplied information 477 Harrison provided to the appraiser demonstrate that the fair market value of the residential units was not fixed, but increased over time. They also indicate that 477 Harrison worked with at least two

[2] As of February 2014, the bank's appraiser also had the benefit of the actual sales prices in the market as of the time 477 Harrison claimed the project would have been completed.

real estate agencies, Otis & Ahern and CityLife Real Estate, to develop the pricing it provided to the bank's appraiser. *See*, *e.g.*, **Exhibit 64** at 477H00965 ("Prior to concluding to price point indicators for the subject units, we have also considered the subject property developer's **prospective** unit pricing. The developer has been discussing the subject property development with real estate agencies including Otis & Ahern and Citylife Real Estate. Their current pricing is based on discussions with these groups.") (emphasis added). Indeed, by the time the February 2014 appraisal was prepared, the appraiser, in arriving at an opinion of value as of an as-completed date of January 1, 2015, would have had the benefit of actual sales in the relevant area during 2012 and 2013, that is, the period during which 477 Harrison claims it would have brought its residential units to the market but for the delay caused by the 2012 Zoning Appeal. Both the appraiser's opinions of value and 477 Harrison's own estimates of projected selling prices demonstrate that 477 Harrison could not have sold (or reasonably expected to sell) its residential units for $1,200 to $1,300 per square foot in 2013.

The chart on the following page demonstrates the increase in the value of the overall project and the residential units over time.

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Appraisal Date	Project	As Completed Date	Appraised As Completed Value	Owner Supplied Info. -- Total Value	Appraised As Completed Value -- Non-PH Residential Units ($PSF)	Owner Supplied Info. -- Non-PH Residential Units ($PSF)	Appraised As Completed Value -- PH Units ($PSF)	Owner Supplied Info. -- PH Units ($PSF)
4/9/2012 (Ex. 23)	One floor of commercial; 16 residential units on floors 2-5; 2 PH units	8/1/2013	$19,300,000	$24,410,000	$600 to $700	$576.92 to $888.45	$850.00	$850.00
9/30/2013 (Ex. 55)	One floor of commercial; 16 residential units on floors 2-5; no PH units	1/1/2015	$25,000,000	$31,875,000	$900 to $925	$988 to $1,031	n/a	n/a
2/18/2014 (Ex. 64)	One floor of commercial; 12 residential units on floors 2-5; no PH units ("Scenario 1")	1/1/2015	$25,000,000	$31,900,000	$900 to $925	$982.14 to $1,093.02	n/a	$1,197.72 to $1,200
2/18/2014 (Ex. 64)	Two floors of commercial; 9 residential units on floors 3-5; no PH units ("Scenario 2")	1/1/2015	$21,000,000	$28,600,000	$900 to $925	$982.14 to $1,093.02	n/a	$1,197.72 to $1,200

As ultimately redeveloped, 477 Harrison, in addition to retaining the significantly valuable ownership of the two floors of the commercial condominium, and the yearly rental payments derived from them, sold the residential units (floors 3-5 and the penthouses) for a total of $37,885,0000, with sales price per square foot ranging from $1,253.37 to $1,387.08 for the residential units on floors 3-5, and the penthouse units selling for $1,818.18 per square foot and $1,831.86 per square foot. *See* **Exhibit 104** (deeds from sale of each residential unit); **Exhibit 100, Exhibit B** (Exhibit B to Master Deed with square footage for residential units of floors 3-5); **Exhibit 114, Exhibit B** (Exhibit B to First Phasing Amendment to Master Deed with square footage for penthouse units).

Obviously concerned that throughout the trial it had relied exclusively on Mr. Holland's testimony regarding the value of the residential units, 477 Harrison, in its counsel's closing argument, for the first time sought to buttress Mr. Holland's testimony by referring to Schedule A to Exhibit 67, arguing it showed that "the units did exactly what Mr. Holland said they would do, he sold them for between 12 to 1300 [sic] square foot." 5/5/2025 at Pg. 100, LL 17, Pg. 101, LL 2. Given the inaccuracies in Schedule A to Exhibit 67, 477 Harrison's use of that document in its closing likely confused, if not misled, the jury.

Exhibit 67 is the original construction loan from March 2014 ("Loan Document"). That document defined "Project" to mean "[t]he renovation and conversion of said Property into **nine residential (9) units** and two (2) commercial units ('each, a 'Unit') five (5) story condominium." Exhibit 67 (emphasis added). Notwithstanding the definition of "Project" in the Loan Document, Schedule A to Exhibit 67 mistakenly identified 12, not 9, residential units. In doing so, Schedule A incorrectly listed both B and C unit types as separate units, when, in fact, as of March 2014, 477 Harrison's plan was to combine the smaller B and C units into a single larger unit, as explained in the Blake appraisal prepared in February 2014, a month earlier than the Loan Document. *See* **Exhibit 64**. The owner supplied information 477 Harrison submitted in connection with the February 2014 appraisal reflected estimated sales prices for the A units ranging from $1,046.51 to $1,093.02, the combined B and C units ranging from $1,017.86 to $1,053.57, and the D units ranging from $1,041.67 to $1,087.96. Contrary to this owner supplied information, Schedule A of Exhibit 67 incorrectly lists the B and C units as separate (instead of combined) units and assigns to each of them the value of the combined unit. At the time 477 Harrison and Rockland Trust entered into the modified construction loan dated December 30, 2014, the "Project" had been redefined to include 12 residential units. *See*

Exhibit 86. Schedule A attached to the modified construction loan agreement correctly identified four unit types – A, B, C, and D – per floor and reflects appraisal values of the B and C units as separate units to be comparatively lower than the value of the other unit types given their smaller square footage, among other things.

Because the weight of the evidence presented at trial demonstrated that the value of the 477 Harrison Property increased over time, the JACE Parties are entitled to a new trial on damages.

D. The Jury's Verdict That 477 Harrison Suffered Damages Is Against The Weight Of The Evidence.

The weight of the evidence further demonstrated that the increase in the value of the residential and commercial units over the period 2013 to June 2019 was significantly greater than 477 Harrison's alleged increased costs. Because the evidence at trial affirmatively demonstrated that 477 Harrison actually suffered no loss as a result of any alleged delay (instead, it realized a significant gain), the jury's award of $5.8 million in damages to 477 Harrison as a result of the 2012 Zoning Appeal and/or the 2015 Zoning Appeal was "so markedly against the weight of the evidence" that the JACE Parties are entitled to a new trial on damages.

The increase between what 477 Harrison projected for the sale of the project in 2012 prior to the 2012 Zoning Appeal compared to what was achieved was an increase of $19,725,000, as illustrated by the chart on the following page.

[Remainder of page intentionally blank]

Projected Value pre 2012 ZBA Appeal vs. Actual Results				
	2012 Ex. 23	2014 Ex. 64	Actual	Increase 2012 to actual
Commercial Condominium	$1,475,000	$6,250,000	$6,250,000	$4,775,000
Residential Condominiums	$18,685,000	$22,350,000	$28,285,000	$9,600,000
Penthouses	$4,250,000	$6,150,000	$9,600,000	$5,350,000
Total	$24,410,000	$34,750,000	$44,135,000	$19,725,000

477 Harrison suffered no lost profits as a result of any delay. The chart on the following page compares 477 Harrison's projected profits in 2012 prior to the filing of any litigation with the profits achieved by 477 Harrison taking into account solely for purposes of illustration the additional expenses 477 Harrison attributes to the 2012 Zoning Appeal and/or the 2015 Zoning Appeal.[3]

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[3] In the version of this chart included in paragraph 143 of the JACE Parties' proposed conclusions of law on 477 Harrison's Chapter 93A claim, line 5 incorrectly refers to the "Total Cost of Project" as the sum of lines 2-3 rather than the sum of lines 2-4.

2012 Projected profit vs. Profit after including damages claimed by 477 Harrison				
2012 Projected Profits			**Actual Results**	
1. Sales[1]	$24,410,000.00		1. Sales plus Value of Commercial Condo[2]	$44,135,000.00
2. Cost of Project[1]	$17,945,960.75		2. Cost of Project 2012[1]	$17,945,960.75
3. Profit (line 1 minus line 2)	$6,464,039.25		3. Increased Hard Costs claimed by 477[3]	$5,100,000.00
			4. Increased Interest Cost claimed by 477[4]	$700,000.00
			5. Total Cost of Project (sum of lines 2-4)	$23,745,960.75
			6. Profit (line 1 minus line 5)	$20,389,039.25
Footnotes to chart				
1. Ex. 23 (Owner supplied information addendum to Appraisal)				
2. Ex. 104 (Deeds from sale of residential condominums) and Ex. 64 (Owner supplied information addendum to Appraisal)				
3. John Holland, Trial Testimony, April 24, 2025, page 116:15-17				
4. John Holland, Trial Testimony, April 24, 2025, page 118:9-14				

The chart below compares 477 Harrison's projected profits in 2014 after the conclusion of the 2012 Zoning Appeal with actual sales of the residential condominiums and penthouses, together with the value of the commercial condominium, demonstrating the profits achieved by 477 Harrison even accounting for, again, solely for purposes of illustration, the additional expenses 477 Harrison attributes to the 2012 Zoning Appeal and/or the 2015 Zoning Appeal.

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2014 Projected profit vs. Profit after including damages claimed by 477 Harrison				
2014 Projected Profits			**Actual Results**	
1. Projected Sales[1] As of right project	$28,600,000.00		1. Sales plus Value of Commercial Condo[2]	$44,885,000.00
2. Projected sale Penthouses	$6,150,000.00		2. Projected Cost of Project 2014	$19,855,946.65
3. Total Projected Sales	$34,750,000.00		3. Increased Hard Costs Claimed by 477[3]	$5,100,000.00
4. Projected Cost of Project[1] as of right	$18,446,771.65		4. Increased interest cost claimed by 477[4]	$700,000.00
5. Projected Cost Penthouses[1]	$1,409,175.00		5. Total Cost of Project (sum of lines 2-4)	$25,655,946.65
6. Total Projected Costs	$19,855,946.65		6. Profit (line 1 minus line 5)	$19,229,053.35
7. Projected Profit (line 3 minus line 6)	$14,894,053.35			

Footnotes to chart

1. Ex. 64 (Owner supplied information addendum to Appraisal)

2. Ex. 104 (Deeds from sale of residential condominums) and Ex. 64 (Owner supplied information addendum to Appraisal)

3. John Holland, Trial Testimony, April 24, 2025, page 116:15-17

4. John Holland, Trial Testimony, April 24, 2025, page 118:9-14

Because the jury's verdict awarding 477 Harrison damages was clearly against the weight of the evidence, which demonstrated that 477 Harrison suffered no damages due to any delay caused by the 2012 Zoning Appeal and/or the 2015 Zoning Appeal, but in fact experienced significant gain, the JACE Parties are entitled to a new trial on damages.

E. The Jury Arrived At An Incorrect Conclusion Because they Did Not Understand That The Determination Of 477 Harrison's Damages Had To Be Based On 477 Harrison's Lost Profits.

Whether as a result of a misunderstanding of the meaning of "pecuniary loss" or the absence of an instruction regarding lost profits, the jury incorrectly concluded that 477 Harrison's damages could be calculated without accounting for both the increased costs and value it realized as a result of bringing its project to the market later than originally planned. As

the Court instructed the jury, "[i]f there were no damages, then the plaintiff does not have a claim, even if the process was for an ulterior motive." *See* Jury Instructions, 5/5/25, Pg. 74, LL 23-25. To prove that it had suffered damages, 477 Harrison had to prove that it suffered lost profits as a result of each use of process. *See, e.g.*, *Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 14 Mass. App. Ct. 396, 426 (1982); *see also Empire Today, LLC v. Nat'l Floors Direct, Inc.*, 788 F. Supp. 2d 7, 18-19 (D. Mass. 2011). The weight of the evidence clearly demonstrates that 477 Harrison suffered no lost profits, and instead experienced a significant gain.

Because the weight of the evidence presented at trial demonstrated that 477 Harrison suffered no lost profits, the JACE Parties are entitled to a new trial on damages.

F. In The Alternative, The Court Should Order 477 Harrison To Remit $5.8 Million, But No Less Than $3,483,226, Of The Jury's Award Of $5,801,550 In Damages.

If the Court determines a new trial is required solely because the jury's award of damages was excessive, under Rule 59(a), 477 Harrison first must be given the opportunity "to remit so much thereof as the court adjudges is excessive." *See D'Annolfo v. Stoneham Housing Auth.*, 375 Mass. 650, 661 (1978). Under the Massachusetts rule, the Court has greater discretion in determining the amount of the remittitur and is not limited to reducing the verdict "to the highest amount that the jury could properly have awarded." *Id.* Here, the jury's award of $5,801,550 in damages to 477 Harrison was excessive. The Court should exercise its discretion and order 477 Harrison to remit $5.8 million of the jury's damages award to avoid a new trial on damages.

In the event the Court is not inclined to order a remittitur of $5.8 million, 477 Harrison, at a minimum, should be required to remit $3,483,226 of the jury's damages award to avoid a new trial on damages. 477 Harrison argued that its damages caused by the 2012 Zoning Appeal and the 2015 Zoning Appeal were the increased construction costs and interest costs above what it

had told the bank and the bank's appraiser in 2012 would be spent in connection with the project.[4] 477 Harrison argued that its increased construction costs totaled $5.1 million and that it incurred an additional almost $700,000 in interest. The weight of the evidence was that, at the very outside, 477 Harrison incurred increased construction costs of no more than $1,186,213 as a result of any delay caused by the 2012 Zoning Appeal and $430,561 in increased construction costs as a result of the 2015 Zoning Appeal. Even accepting as true that 477 Harrison paid $700,000 more in interest as a result of any delay resulting from the 2012 Zoning Appeal and the 2015 Zoning Appeal, 477 Harrison's damages, at most, were $2,316,774.[5]

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[4] In contrast to 477 Harrison's dismissal of what it told the bank and the bank's appraiser about the sales prices it expected to receive, 477 Harrison bases its entire claim of increased construction and interest costs on what 477 Harrison told the bank and the bank's appraiser in 2012.

[5] The jury's award of $700,000 in increased interest was against the weight of the evidence. 477 Harrison rounded up its increased interest costs to $700,000. 477 Harrison relied upon Mr. Holland's testimony about Exhibits 110 and 115 for its interest claim. The sum of Exhibits 100 and 115 clearly shows that 477 Harrison could claim, at most, $658,592.52 in increased interest costs. As a result, the jury's award of $700,000 in interest was overstated by at least $41,407.48.

Moreover, Exhibits 110 and 115 demonstrate other ways in which 477 Harrison overstated its alleged increased interest costs. For example, Exhibit 115, which 477 Harrison claimed represented "Penthouse interest" from January 2018 through March 2019 in the amount of $139,304.55, assumed no interest attributable to the construction of the penthouses would have been incurred if the penthouses had been built as initially proposed. This makes no sense. Exhibit 110, which purports to reflect interest paid in connection with the constructions of floors 1-5, in fact includes payments other than interest payments, including appraisal fees of $4,000 and $5,800, and a payment to Holland Construction in the amount of $112,341.41.

Furthermore, as of April 2012, 477 Harrison told the Bank and its appraiser that the projected interest costs were $1,200,000. *See* **Exhibit 23**. As of February 2014, after the 2012 Zoning Appeal was concluded, Mr. Holland, again told the bank and the bank's appraiser that its projected interest costs remained $1,200,000. *See* **Exhibit 64**. 477 Harrison also listed as a soft cost of the project "2012-2014 interest carry" in the amount of $284,173. *See id.* The weight of the evidence was that 477 Harrison's increased interest costs were no more than $284,173.

As of April 2012, 477 Harrison projected that the hard costs of redeveloping the 477 Harrison Property, which at that time included one floor of commercial space, four floors of residential units (4 units per floor), and two penthouse units, totaled $8,992,561.[6] *See* **Exhibit 23** (Excerpts from Exhibit 23 are attached hereto as **Exhibit B**). Because 477 Harrison did not complete construction as of the fall of 2013 as it had originally planned, 477 Harrison projected in February 2014 that the hard construction costs for the redevelopment of the 477 Harrison Property into two floors of commercial space and three floors of residential units (3 units per floor) would total $8,769,599, and that the projected cost of constructing the penthouses in a second phase would be $1,409,175, for a total of $10,178,774. *See* **Exhibit 64**. In 2012 and 2104, The Holland Companies, which included 477 Harrison and Holland Construction, were experienced developers and builders. By February 2014, they knew the 2012 Zoning Appeal had concluded in November 2013 and further knew the project would be bifurcated; that is, the penthouses would be built in a separate phase after the construction of the first five floors of the 477 Harrison Property. 477 Harrison also knew that JACE had reserved its right to oppose the variances required to build the penthouses in the Agreement for Judgment. Mr. Holland testified that he provided the bank and the bank's appraiser with truthful information. The additional expenses from building the penthouses would have been known to him as of February 2014, and he accounted for those increased expenses when he represented to the bank that the costs would be $1,186,213 higher than they were projected to be in 2012.

Any delay caused by the 2012 Zoning Appeal increased 477 Harrison's construction costs by no more than $1,186,213 between April 2012 and February 2014. Moreover, the weight of

[6] Mr. Holland testified at trial that in 2012 the estimated cost of construction was $8.7 million. *See* Holland DE, 4/24/2025, Pg. 114, LL 22-24. Mr. Holland's testimony failed to account for the 2.5% construction contingency of $219,330.75. *See* Exhibit 23.

the evidence is that the actual cost to build the penthouse units was no more than $1,839,736.[7] *See* **Exhibits 112 and 113**. As a result, any delay caused by the 2015 Zoning Appeal increased 477 Harrison's construction costs of the penthouses at most by $430,561 as compared to the projected cost of constructing the penthouses as of February 2014.[8] Even viewing the evidence in the light most favorable to 477 Harrison, its increased construction costs allegedly caused by the 2012 Zoning Appeal and the 2015 Zoning appeal were no more than $1,616,774. As a result, the jury's award of $5.8 million in damages, even accepting 477 Harrison's claim that it incurred increased interest costs of $700,000, is against the clear weight of the evidence. Accordingly, 477 Harrison should be required to remit at least $3,483,226.

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[7] To calculate this amount, the JACE Parties assumed for purposes of this motion only, that every construction cost reflected on Exhibit 112 and Exhibit 113 from and after February 2, 2017, *i.e.*, when the decision granting 477 Harrison summary judgment in the 2015 Zoning Appeal was issued, was attributable to the cost of constructing the penthouses.

[8] Paragraph 138 of the JACE Parties' proposed conclusions of law in connection with 477 Harrison's 93A claim incorrectly identified the total cost of constructing the penthouses as $1,045,990. The amount set forth in paragraph 138 did not take into account the costs reflected in Exhibit 112. Even accounting for those additional costs, 477 Harrison still did not suffer any damages as a result of any delay allegedly caused by the 2015 Zoning Appeal.

Summary of Calculation of Alternative Remittitur Amount			
INCREASED COST DUE TO ALLEGED DELAY FROM 2012 ZONING APPEAL			
February 2014 Projected Cost of Project [Exhibit 64]			
2 Floors Commercial & 3 Floors Residential	$8,769,599		
Penthouses	$1,409,175		
Total		$10,178,774	(a)
April 2012 Projected Cost of Project (Including PHs) [Exhibit 23]		$8,992,561	(b)
Increase Due to Alleged Delay from 2012 Zoning Appeal		**$1,186,213**	(a) - (b) = (c)
INCREASED COST DUE TO ALLEGED DELAY FROM 2015 ZONING APPEAL			
Maximum Actual Cost of Constructing Penthouses			
Exhibit 112	$789,746		
Exhibit 113	$1,049,990		
Total		$1,839,736	(d)
Projected Cost of Constructing Penthouses as of February 2014 [Exhibit 64]		$1,409,175	(e)
Increase Due to Alleged Delay from 2015 Zoning Appeal		**$430,561**	(d) - (e) = (f)
Total Increased Cost Due to Alleged Delay from 2012 and 2015 Zoning Appeals		**$1,616,774**	(c) + (f) = (g)
Alleged Increased Interest Costs		$700,000	(h)
Total Increased Costs		**$2,316,774**	(g) + (h) = (i)
Amount of Damages Awarded by Jury for 2012 and 2015 Zoning Appeal		$5,800,000	(j)
Amount of Damages Award to be Remitted		**$3,483,226**	(j) - (i)

II. ADDITIONAL GROUNDS FOR NEW TRIAL.

The JACE Parties should be granted a new trial, including, but not limited to, for any one or more of the following additional, and independent, reasons:

- The denial of the JACE Parties' Motion in Limine regarding Constitutional Defenses and the failure to instruct the jury regarding the JACE Parties' constitutional right to petition and their constitutional defenses.

- Precluding the JACE Parties from presenting to the jury evidence that there was a reasonable basis in fact and law for the 2012 Zoning Appeal and the 2015 Zoning Appeal.

- The exclusion from evidence of the SJC's holding that 477 Harrison failed to establish that the 2012 Zoning Appeal and 2015 Zoning Appeal did not have a reasonable basis in fact or law.

- The admission into evidence of portions of the summary judgment decision in the 2015 Zoning Appeal, over the objection of the JACE Parties, which 477 Harrison then used to argue that the 2012 and 2015 Zoning Appeals were meritless.

- The admission of John Holland's testimony regarding his expectation of the prices for which 477 Harrison would sell the residential units.

- The allowance of 477 Harrison's Daubert/Lanigan Motion to Preclude and/or Limit the Testimony of Martin R. Healy, Esq., and the failure to allow the JACE Parties to put into evidence relevant opinions of Martin R. Healy, Esq.

- The allowance of 477 Harrison's Dubert/Lanigan Motion to Preclude and/or Limit the Testimony of Evan Hankin, PE, and the failure to allow the JACE Parties to put into evidence relevant opinions of Evan Hankin, PE.

- The instructions given to the jury to which the JACE Parties objected and the failure to give instructions requested by the JACE Parties.

- The admission of Exhibit 150 into evidence, over the objections of the JACE Parties, even though there was no evidence the JACE Parties authorized, saw, or approved of the statements set forth in Exhibit 150.

- The allowance of 477 Harrison's Motion in Limine to Preclude the Admission of Contested Exhibits JJJJ-TTTT (contested exhibit Tabs 88-98), any reference to these documents, Rick Leon's missed deposition, his signed and unsigned affidavit, and/or 477 Harrison's privilege logs.

Conclusion

WHEREFORE, Defendants JACE Boston, LLC and Arthur Leon respectfully request that in the event the Court denies the JACE Parties' motion for judgment notwithstanding the verdict, the Court grant them a new trial pursuant to Mass. R. Civ. P. 59(a).

REQUEST FOR HEARING

Defendants JACE Boston, LLC and Arthur Leon respectfully request pursuant to Superior Court Rule 9A(c)(2) a hearing on this motion.

Date Filed 10/1/2025 3:49 PM
Superior Court - Suffolk
Docket Number 1584CV00829

Respectfully submitted,

JACE BOSTON, LLC and
ARTHUR LEON,
By their attorneys,

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Dated: August 21, 2025

CERTIFICATE OF SERVICE

I, Mark S. Furman, hereby certify that on August 21, 2025, I caused a copy of the foregoing document to be served by email on counsel for Plaintiff 477 Harrison Ave., LLC as set forth below:

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Mark S. Furman (BBO# 181680)

NOTIFY Notified by email 14 January 2026

175

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 15-0829

477 HARRISON AVE, LLC

vs.

JACE BOSTON, LLC & another[1]

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOR JUDGMENT ON PLAINTIFF'S CHAPTER 93A CLAIM

This Court presided over a civil trial between plaintiff, 477 Harrison Ave, LLC ("477 Harrison"), and defendants, Jace Boston, LLC ("JACE") and Arthur Leon ("Leon"). A Suffolk County jury returned a verdict in favor of 477 Harrison and against both defendants on all counts submitted to them including an abuse of process claim. Plaintiff's G. L. c. 93A, § 11, claim was reserved for the Court and not tried. The jury's verdict included damages for plaintiff in the amount of $5,801,550 to be paid jointly and severally by both defendants. This Court must now determine whether plaintiff proved by a preponderance of the evidence that defendants violated G. L. c. 93A and, if so, what damages should be imposed, including the possibility of treble damages and attorney's fees.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence, with others reserved for the discussion section:

I. Defendants Were Real Estate/Business Developers

Leon has been engaged in real estate or business development in the city of Boston at

[1] Arthur Leon

various times since at least 1999. Leon owned, managed and/or controlled several real estate entities including JACE, which owns and is situated on the 1234 Washington Street property ("Washington St. property").[2] The certificates of organization for these real estate entities state that "the business of the company is to own, manage, rent, buy sell and develop real property and to engage in any lawful activity for which a limited liability company may be formed under the laws of Massachusetts."

John Holland ("Holland") is a manager of Holland Development, LLC ("Holland Development"), which develops real estate projects in Massachusetts.[3] Holland Development managed a project at 477 Harrison's property located at 477 Harrison Avenue at all relevant times. The 477 Harrison property and the Washington St. property abutted each other.

While Leon testified that he was not involved in real estate development, the evidence at trial overwhelmingly contradicted this assertion. The court does not credit Leon's testimony in this regard and finds that he was involved in real estate development. In fact, Leon and his agents admitted that he was a real estate/business developer in Boston for almost thirty years. His son, James Leon, who worked alongside Leon, submitted a letter to the Boston zoning board of appeal ("ZBA") on May 21, 2012, stating "30 years ago we were the ones who started developing in the area, adding retail store fronts in our own building on Washington Street. 10 Years [*sic*] ago we built the first successful restaurant in the area on Washington St. . . ." The next day, May 22, 2012, Leon also referred to himself as a developer during a ZBA meeting.

Beyond the above admissions that occurred contemporaneous with the facts of the instant case, Leon had a long history of real estate/business development in Boston. On December 20,

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[2] Leon, through George's Market, LLC, owns real estate located at 1222 Washington Street. This property had a restaurant owned, operated and renovated by George's Market, LLC.

[3] I find Holland's trial testimony be credible in all respects.

1999, Leon or his agents sent a letter to developers of an abutting property located at 485-495 Harrison Avenue stating that he planned on developing his Washington St. property and that the windows installed by his abutting neighbor's development would be blocked by the increased size of his own development. By 2005, Leon had decided to develop that property into residential units. In 2010, he met with the Boston Redevelopment Association ("BRA") and the Old Dover Neighborhood Association and presented plans to redevelop the Washington St. property as a mixed business/residential project. His plans depicted the development of hundreds of residential units and the current building, which houses the land JACE sits on, being torn down. Leon consulted with his cousin, Richard Leon ("cousin" or "Richard"), in January 2012 about offers and proposed developments for his Washington St. property. By May of 2012, Leon and his agents told the BRA and the ZBA that he was working on a mixed residential/business development project on the Washinton Street/JACE property.

II. Defendants' Practice of Appealing Zoning Decisions with Improper Ulterior Motive

Not only did Leon admit that he was a developer of commercial real estate property, but he actively sought to undermine plaintiff's 477 Harrison project so that he could develop the Washington St. property. Throughout May of 2012, Leon and his agents told the Boston Redevelopment Authority ("BRA") and the ZBA that he was working on a mixed residential business development on the Washington St. property and that the 477 Harrison development project would interfere, prevent and adversely affect these plans. On May 10, 2012, Leon's agents, Kamran Zahedi ("Zahedi") of Urbanica, Inc. ("Urbanica") and attorney Kevin Joyce ("Joyce"), sent an e-mail message that stated they wanted to delay the 477 Harrison project for years in court while Leon's development project went forward.

In 2012, Leon told Holland, who was the developer of the 477 Harrison project, that he was moving JACE and would be developing that site (the Washington St. property) with a residential building that would be as tall as eighty feet. Leon demanded that Holland delay the development of the 477 Harrison project so that Leon's could be developed first. Leon also demanded that Holland remove all windows and balconies from the 477 Harrison project plans facing his property. Leon and his son James wrote a letter to Holland in March 2012 stating that they were concerned about the impact to the 477 Harrison condominium unit owners facing his property from his plan to build a wall on his property line, which would block those condominium units' windows.

In May 2012, Leon and his agents sent six separate letters to the BRA and the ZBA admitting that he was developing his Washington St. property and intended to convert that property into a mixed business/residential property. He also admitted that he was working with Urbanica to submit a "Large Project Review." In a May 21, 2012, letter to the BRA, Leon stated that "if the Harrison Avenue project is approved it will prohibit me from proceeding with my plans to convert the existing manufacturing facility into a mixed-use development."

Despite all the evidence that Leon was seeking to develop his own Washington St. property into a large mixed residential/business project, he denied doing so at trial under oath. I do not find Mr. Leon's denials to be credible.

By January 2012, which was the early development stages of the 477 Harrison project, Leon revealed his ulterior motives for his later opposition to Holland's project when he asked his cousin, Richard, to investigate Holland's financing as he was under the belief that he had overpaid for the property and would go bankrupt. Leon told Richard that he would then swoop in and purchase the property for "half the price." Prior to Leon's conference with his cousin, the

realtor for 477 Harrison had told Leon's son, James, that there was a developer with funding who was interested in purchasing the 477 Harrison Avenue property. Leon's admissions to his cousin were an omen of what was to come. I find Richard Leon's testimony in this regard to be credible.

In early March 2012, Holland's application for a building permit for 477 Harrison Avenue was denied by Boston Inspectional Services Department ("ISD") as a matter of course because the project did not comply with a number of Boston zoning codes. Holland filed an appeal of this decision with the ZBA seeking relief from the Boston zoning code on March 16, 2012. Additionally, Holland submitted an Application for Small Project Review to the BRA on April 10, 2012.

In reaction, Leon hired Zahedi, Joyce, who was a permitting specialist, and Edward O'Donnell from Waypoint, in 2012 to both develop his own mixed residential/business project and to throw up roadblocks to the competing 477 Harrison project being managed by Holland Development. As he testified, Leon knew that 477 Harrison needed "to get into construction in August 2012 and be completed by September 2013." Leon decided he would appeal any variance granted by the ZBA for the 477 Harrison project in an effort to stall its development so he could get his own Washington St. property project approved first. Leon's agent, Zahedi, said as much when he sent an e-mail message to Leon's attorney on May 10, 2012, stating that "[i]n case you meet Mr. Fitzgerald or any one from the BRA. Please relay the message that if the BRA and ZBA approve the abutter's plan Mr. leon will appeal and the case will end up in court for years. We strongly recommend the BRA delay approval till leon shows good progress on his part." Leon voiced similar reasons for opposing the 477 Harrison project in a May 21, 2012, letter to the ZBA when he stated that "if the Harrison Avenue Project is approved it will prohibit

me from proceeding with my plans to convert the existing manufacturing facility into a mixed-use development."

In July 2012, 477 Harrison closed on the 477 Harrison Avenue property, which sold for $6,350,000 dollars. Holland Development secured a loan for approximately $4.7 million, which was personally guaranteed by Holland and his brothers, who were also managers of Holland Development. This was public record. The original loan for this purchase was slated to mature on November 30, 2012. Mr. Holland informed Leon by e-mail message in late July 2012 that he had in fact closed on that property.

Despite Leon's opposition to the 477 Harrison project, the ZBA granted zoning variances for 477 Harrison Avenue so Holland could redevelop that property. On August 29, 2012, JACE filed an appeal in Suffolk Superior Court (civil action no. 12-3241) of that decision granting 477 Harrison's requested variances ("2012 Zoning Appeal"). I find that but for this 2012 Zoning Appeal, 477 Harrison would have obtained the permit from ISD for the construction of the project for eighteen luxury residential units on floors two through six and commercial space on the first floor.

JACE's 2012 Zoning Appeal did not allege any harm to the defendants' easement rights or that their proposed removal of a wall on the northeasterly side of the 477 Harrison Ave property would harm or violate defendants' easement rights. Leon knew that Boston could not issue a building permit to 477 Harrison as a result of the 2012 Zoning Appeal. The 2012 Zoning Appeal contradicted Leon's own goals of developing the Washington St. property to the maximum height and dimensions permitted. JACE filed the 2012 Zoning Appeal as part of defendants' improper and illegitimate plan to advance their own ulterior purposes described earlier and as found by the jury in this case.

As part of Leon's improper campaign to undermine and/or stall the 477 Harrison project, his agents also appealed 477 Harrison's conditional use permit for a ground water recharge system. This appeal lacked any merit and was filed despite their experts' failure to identify any basis to allege that this system impacted their own development plans on the abutting Washington St. property project.

As a result of the 2012 Zoning Appeal and, later, the declaratory action filed by JACE in Suffolk Superior Court (civil action no. 13-2167-H) (the "Wall case"), in June 2013, 477 Harrison abandoned the zoning relief in September 2013 that had previously been obtained in 2012 from the ZBA. This 2012 Zoning Appeal not only delayed the development of 477 Harrison but forced the manager to redevelop its plans and remove at least two penthouses from the original design and to lose the low-income housing units. This appeal also caused Holland Development and the loan guarantors (Holland and his brothers) to seek an extension on their loan for this development on multiple occasions and to incur other expenses. The costs incurred as a result were significant.

Defendants appealed 477 Harrison's short form permit to frame floor decks and construct its groundwater recharge system in late 2013. 477 Harrison's plans, in fact, complied with all requirements for these permits. The appeal lacked merit and was filed with as part of defendants' ongoing illegitimate campaign and ulterior motive to delay and improperly gain an advantage over the 477 Harrison project development. I do not find Lean's denial that he was seeking to achieve these improper goals to be credible.

III. The 2015 Appeal Was Pursued Based Upon Improper Motive

Holland and 477 Harrison again sought to obtain permits for their penthouses in 2014 despite the prior interference from defendants. Holland approached Leon in February 2014 with this proposal and Leon responded that he could not let that happen because penthouse owners would have the resources to oppose his development of the Washington St. property.

477 Harrison obtained additional financing from its bank, Rockland Trust, on February 5, 2015, for approximately $15 million. This loan was again personally guaranteed by Holland and his brothers. This information was part of the public record. This additional financing was provided despite the fact that none of the residential units for the 477 Harrison project had yet been completed. Given the lack of progress in building these units, 477 Harrison and the Holland brothers were unable to make any payments on the loans provided by Rockland Trust. On that same day, Leon sent a letter to the ZBA stating that any work performed on 477 Harrison "remains subject to appeal" since November 2013.

On March 24, 2015, the ZBA approved the zoning relief requested by 477 Harrison, which was recorded by ISD on May 12, 2015. JACE filed an appeal of this relief on May 28, 2015, in Suffolk Superior Court (civil action no. 15-1585-H) ("2015 Appeal"). Leon knew that the city of Boston would not issue any building permits to 477 Harrison during the pendency of his 2015 Appeal. He also knew that this appeal would interfere with the progress of the 477 Harrison project and potentially impact the financial stability of that project.

Despite having filed the 2015 Appeal, Leon had not reviewed any structural plan for the 477 Harrison project. The complaint for the 2015 Appeal expressly stated that Leon perceived the 477 Harrison project as being "hostile to JACE's redevelopment of its property." Leon also attempted to use the 2015 Appeal as a vehicle to obtain via motion financial information

regarding the construction of 477 Harrison's penthouses and other units. This motion lacked merit and was denied.

The lack of merit to the 2015 Zoning Appeal is revealed in the Court's 2017 summary judgment decision, which found that "JACE has offered no evidence of the impacts of density alleged in the Complaint, i.e., traffic, waste, noise, and shadows consist entirely of speculation and inadmissible opinions." The Court also found that "JACE had failed to present any evidence that 'demonstrate[s] a reasonable likelihood of any tangible, as opposed to speculative, harm to [its] property.'"

As a result of the 2015 Zoning Appeal filed by defendants, ISD was prohibited from issuing a building permit to 477 Harrison. This appeal achieved at least one of defendants' ulterior motives, which was to stall and financial destabilize the 477 Harrison development project so that they could gain an unfair advantage in advancing their own Washington St. property project development. The fact that the 2015 appeal was inconsistent with the defendants' own goals of developing the Washington St. property to its maximum height and dimensions as permitted by the laws, building codes and regulations in the city of Boston illuminates their improper motive in filing this appeal. I do not find Lean's denial of these improper goals to be credible.

IV. The Criminal Complaint Was Filed with Improper Motive

In 2014, Leon knowingly applied for a criminal complaint against Holland for allegedly trespassing on his Washington St. property. When Leon applied for this criminal complaint, he was aware that a 2014 court order in the Wall case existed that allowed agents and employees of the 477 Harrison project, including Holland, to access the roof of the building of the Washington St. property to perform work on the northwesterly wall.

A criminal clerk's hearing was held on Leon's complaint against Holland and no probable cause was found by the court on December 17, 2014. As a consequence, no complaint was issued. Prior to the hearing, Leon was aware that the work on his property by the agents and employees of 477 Harrison had been completed.

Leon used this criminal complaint to gain an unfair commercial advantage against Holland and 477 Harrison by interfering with their access rights to the Washington St. property as permitted by the 2014 court order in the Wall case and further stall the completion of the 477 Harrison project. I find Leon's denials that (a) he knew the complaint was criminal in nature and (b) he filed it with an improper motive to lack credibility.

V. The Insurance Claims Lacked Support in the Record

While visiting JACE on May 2, 2014, Holland observed cracks in the floor slab of that property. These cracks were not just in the area of the northwesterly wall, which is adjacent to 477 Harrison Avenue, but extended in other areas. Holland observed JACE employees cleaning old cracks in the area of the northwesterly wall in an effort to make them appear new. In that wall area, defendants stored steel and other materials weighing thousands of pounds.

In a January 20, 2015, letter, defendants' engineer, Evan Hankin, alleged that cracks on JACE's floors were caused by 477 Harrison driving helical piles. He did not mention any damage to the northwesterly wall itself. The reality is that no helical piles were driven for the construction project at 477 Harrison Avenue.

Holland Construction's insurer hired an engineer, Christopher Basile from Rimkus Engineering, who investigated these claims by Leon. He interviewed Leon and viewed the alleged cracks. He observed that the cracks sloped away from the wall. Basile concluded that if the cracks had been caused by the 477 Harrison construction they would have sloped in the

opposite direction. Furthermore, Basile observed that the cracks at issue were old and that there were no cracks in the northwesterly wall. As a result, Basile and Holland Construction rejected Leon's claims that 477 Harrison's construction work had damaged his floor.

Leon also submitted an insurance claim for damage to JACE's roof. This was submitted on the same day that Leon filed for a criminal complaint against Holland for trespassing. The damage claim was also rejected by Holland Construction's insurer.

I find the conclusions reached by Basile and Holland Construction's insurer to both be supported by the record and credible, while Leon's claims of damages were neither credible nor supported by the evidence in the record. I find that defendants filed these false insurance claims as part of their ongoing campaign to delay and interfere with the progress of the 477 Harrison project through unfounded allegations that the development was harming defendants' abutting property.

VI. Damages at Trial

A jury concluded that defendants engaged in abuses of process that caused plaintiff to suffer $5,801,550 in damages. These damages are broken down as follows: (1) $5,100,000 in additional costs for construction; (2) at least $700,000 in additional interest incurred on its loans with Rockland Trust; and (3) $1,550 dollars in attorney's fees. I find that these damages are supported by the record and reasonable.

RULINGS OF LAW

General Laws c. 93A prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ." G. L. c. 93A, § 2(a). General Laws c. 93A, § 11, applies to "a commercial transaction between a person engaged in trade or commerce [and] another person engaged in trade or commerce" (citation and quotations

omitted). *Linkage Corp.* v. *Trustees of Boston Univ.*, 425 Mass. 1, 23, cert. denied, 522 U.S. 1015 (1997). To prevail on a claim under G. L. c. 93A, § 11, a plaintiff must establish "(1) that the defendant engaged in an unfair method of competition or committed an unfair or deceptive trade act or practice, as defined by G. L. c. 93A, § 2, or the regulations promulgated thereunder; (2) a loss of money or property suffered as a result; and (3) a causal connection between the loss suffered and the defendant's unfair or deceptive method, act, or practice" (footnote omitted). *Auto Flat Car Crushers, Inc.* v. *Hanover Ins. Co.*, 469 Mass. 813, 820 (2014).

I. Defendants Engaged in Trade and Commerce

Based upon the record, I find by a preponderance of the evidence that both JACE and Leon were involved in a trade and commerce. Leon not only owns and/or controls significant real estate or properties through multiple single-purpose entities, such as JACE, but many of these entities, including JACE, have the same business purpose as 477 Harrison. Despite Leon's fallacious denials of this, the record supports and is replete with evidence that supports plaintiff's assertion to this effect.

Leon and his agents, including but not limited to Urbanica and his son James, sought to develop his own Washington St. property. Leon and JACE interfered with commerce and the development of 477 Harrison project by abuse of process on multiple fronts including filing the 2012 and 2015 Zoning Appeals as discussed in detail in the fact section as well as by filing a criminal complaint against Holland. Leon's demands that (1) 477 Harrison delay its plans by a year so his development project could go first and (2) that 477 Harrison redesign its proposed project so that no penthouse windows or balconies overlooked his own property interfered with trade and commerce. There is also no question, based upon these demands and Leon's representations over the last decade and moving forward, that he was engaged in the

development, rental and ownership of real estate in Boston.

Leon filed the 2012 Zoning Appeal for the specific purpose of delaying and interfering with plaintiff's development of its adjacent luxury condominium project and intentionally causing 477 Harrison to abandon the zoning relief it obtained from the ZBA in 2012. This improper conduct and trade/commerce interference by defendants continued in 2015 when Leon intentionally filed his 2015 Zoning Appeal to ensure that Boston could not issue building permits for the penthouses during the appeal. Leon knew this appeal would block the development of 477 Harrison's proposed penthouses that Leon feared would obstruct defendants' own development plans on the Washington St. property. This appeal also effected trade and commerce by negating the development of low-income housing as part of the 477 Harrison project.

Defendants' improper and meritless Zoning Appeals in 2012 and 2015 intentionally sought to stall the development of 477 Harrison and cause redesigns that would advance and benefit defendants' development plans for the Washington St. property. Even though there was no direct transaction between 477 Harrison and defendants, Leon and JACE engaged in and interfered in trade and commerce with 477 Harrison by their actions as evidenced in the record and defined by G. L. c. 93A, §§ 1(b), 11. See *First Enters, Ltd.* v. *Cooper*, 425 Mass. 344, 347 (1997). See also *Gillette Company* v. *Provost*, 2017 WL 2292748 at *9-*10 (Mass. Super. Ct. 2017) (Salinger, J.) (court denied summary judgment after finding that a fact finder could conclude that the litigation was brought in a business context despite no direct business relationship between the parties).

II. Defendants Violated G. L. c. 93A

Based upon the totality of evidence from trial, I find that defendants engaged in trade or commerce and willfully and knowingly committed unfair trade practices through abuse of process and other means all in violation of G. L. c. 93A. As described throughout, defendants' ulterior motive was to (1) delay the development of the 477 Harrison project so that defendants could either build their Washington St. property development first, (2) coerce redesigns from plaintiff for the 477 Harrison development that would benefit any future development of defendants' property, and/or (3) push 477 Harrison into bankruptcy so defendants could buy it at a discount. While Leon testified that he was not a developer and did not have these ulterior motives, the weight of the evidence compellingly contradicts him. I do not find Leon's denials to be credible. The above factual chronology together with Leon's fallacious denials illustrate the willful and knowing nature of Leon's unfair trade and commercial practices.

Before I further elaborate on defendants' conduct and make additional findings, I acknowledge that the jury unanimously rejected Leon's denials that he had ulterior motives or abused process as described herein when it returned a verdict in favor of plaintiff on the abuse of process count. The record clearly supports this verdict, and I find that these facts also apply to the G. L. c. 93A violation as discussed below.

A. Defendants Interfered with Trade and Commerce

As an initial matter, the preponderance of the evidence supports a finding that defendants interfered with trade and commerce as defined by G. L. c. 93A. The defendants' 2012 and 2015 Zoning Appeals filed against the 477 Harrison development and the criminal complaint filed against Holland personally, together with Leon's demands that 477 Harrison delay its development so defendants' development could go first and that 477 Harrison redesign its

project so 477 Harrison's development would not overlook its property, support this conclusion. This conduct was specifically designed by defendants to delay 477 Harrison's development and destabilize the project financially so that defendants could gain an unfair advantage in developing their own property. Leon's protestations to the oppositive not only lack credibility but are simply contradicted by the weight of the evidence. Defendants interfered with trade and or commerce pursuant to G. L. c. 93A.

B. Violations of G. L. c. 93A

"It is established that the scope of 'unfair and deceptive acts or practices' actionable under G.L. c. 93A is broader than common law or other statutory bases of recovery." *Medford Co-op. Bank* v. *Skerry*, 2004 Mass. App. Div. 120, No. 0010-CV-0828, 2004 WL 1853343 at *5 (Dist. Ct. Aug. 12, 2004), citing *U.S. Funding, Inc. of Am.* v. *Bank of Bos. Corp.*, 28 Mass. App. Ct. 404, 407 (1990). Since there is no statutory definition of what constitutes an unfair and deceptive act or practice pursuant to G. L. c. 93A, this Court looks to "(1) whether the practice . . . is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury" to make that determination. *PMP Assocs., Inc.* v. *Globe Newspaper Co.*, 366 Mass. 593, 596 (1975). "To be held unfair or deceptive under c. 93A, practices involving even worldly-wise business people do not have to attain the antiheroic proportions of immoral, unethical, oppressive, or unscrupulous conduct, but need only be within any recognized or established common law or statutory concept of unfairness." *VMark Software, Inc.* v. *EMC Corp.*, 37 Mass. App. Ct. 610, 620 (1994).

Whether a defendant's conduct was unfair is determined by an examination of all the relevant facts. See *Duclersaint* v. *Federal Nat. Mortg. Ass'n*, 427 Mass. 809, 814 (1998). It is

the context of the conduct that controls, not some definition of unfairness. See *Kattar* v. *Demoulas*, 433 Mass. 1, 14 (2000).

This Court notes from the outset that conduct supporting an abuse of process claim may also "constitute a violation of G.L c. 93A and serve as the basis for recovery under that statute." *Medford Co-op Bank*, 2004 WL 1853343 at *5, citing *Wyler* v. *Bonnell Motors, Inc.*, 35 Mass. App. Ct. 563 (1993). See *477 Harrison Ave., LLC* v. *JACE Boston, LLC*, 483 Mass. 514, 528 (2019). This Court agrees with the jury's verdict and finds that the facts supporting that jury finding also support my conclusion that defendants engaged in unfair and deceptive trade practices in violation of G. L. c. 93A. See *G.S. Enterprises, Inc.* v. *Falmouth Marine*, 410 Mass. 262, 273-275, 277 (1991) (bringing a lawsuit with intent to block purchase by plaintiffs may violate G. L. c. 93A.) The defendants' conduct was clearly unfair, improper and motivated by ulterior motives as described at length in the fact section contained herein. While defendants' abuse of process was the core of this unfair campaign and does support a finding of unfair and deceptive trade and commercial practices by itself, Leon and/or JACE also engaged in other unfair tactics such as filing the fraudulent insurance claims against plaintiff and demanding and coercing plaintiff into redesigning their project windows and balconies so they would not look over Leon's property. Defendants and their agents perpetuated this scheme in an effort to redesign, delay, financially destabilize and interfere with the completion of the 477 Harrison development. Leon also sought to force 477 Harrison into bankruptcy through this campaign so he could buy the property at a discount. The totality of defendants' conduct toward plaintiff, when taken in context, was not only unfair, but unethical, unscrupulous and oppressive. See *Ross* v. *Continental Resources, Inc.*, 73 Mass. App. Ct. 497, 514-515 (2009).

C. Damages

There is no question that defendants' unethical, unscrupulous and unfair trade practices injured plaintiff and caused it to substantially delay and redesign the 477 Harrison development to its financial detriment. The jury found damages for the abuse of process in the amount of $5,801,550 and, after review, I find that amount to be reasonable and appropriate based upon the evidence at trial. As the facts supporting the abuse of process claim also support the G. L. c. 93A claim,[4] I find that amount of damages to be reasonable and adequate pursuant to G. L. c. 93A also. I also find that there is a causal connection between the G. L. c. 93A violations and the amount of damages found by the jury.

D. Defendants' Conduct Was a Willful and Knowing Violation of G. L. c. 93A

Pursuant to G. L. c. 93A, § 11, plaintiffs may be awarded multiple damages under if the violation is "willful or knowing." A defendant's conduct is a willful and knowing violation of G. L. c. 93A when the evidence demonstrates that the defendants had a subjectively culpable state of mind. See *Anthony's Pier Four, Inc.* v. *HBC Assoc.*, 411 Mass. 451, 475 (1991).

The coercive conduct of defendants together with their intentional campaign to abuse process for the improper purposes against plaintiff as described throughout this opinion is more than enough evidence for this Court to conclude that defendants' unscrupulous, unethical and/or unfair trade practices was willful and knowing. The other non-abuse-of-process conduct as described herein also reveals the extent of defendants' willfulness and knowledge in committing these G. L. c. 93A violations.

[4] Although there are numerous facts that support the c. 93A violation that would not constitute an abuse of process, i.e., filing false claims with plaintiff's insurance carrier, such damages are not sufficiently quantifiable to warrant an increase to the base award for G. L. c. 93A damages. The additional facts are, however, relevant to the analysis of defendants' culpability.

Based upon these willful violations, I find G. L. c. 93A damages in the amount of $5,801,550. Based upon the defendants' willful and knowing c. 93A violations, those damages are hereby doubled and plaintiff is awarded $11,603,100 in total.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that judgment shall enter on the plaintiff's G. L. c. 93A claim in favor of the plaintiff, and the defendants shall pay jointly and severally $11,603,100.00[5] in damages plus statutory interest and attorneys' fees. If plaintiff is seeking attorneys' fees, filings should comply with the procedures set out in Superior Court Rule 9A.

Dated: 1/13/26

/s/ James Budreau
James Budreau
Associate Justice
Superior Court

[5] As the G. L. c. 93A damages are largely based upon the abuse of process facts and damages, the jury's award is duplicative. The total damages suffered by plaintiff is, therefore, $5,801,550, which has been doubled to $11,603,100 pursuant to G. L. c. 93A.

01/20/2026	Endorsement on Motion for Judgment Notwithstanding the Verdict (#167.0): DENIED After review, motion is denied. Dated: 1/20/26 Notice sent 2/11/26

NOTIFY 177

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 15CV0829

477 HARRISON AVE., LLC

vs.

JACE BOSTON, LLC & another[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR A NEW TRIAL

This Court presided over a civil trial between plaintiff, 477 Harrison Ave., LLC ("477 Harrison" or "plaintiff"), and defendants Jace Boston, LLC ("JACE") and Arthur Leon ("Leon" and, together with JACE, "defendants"). A Suffolk County jury returned a verdict in favor of 477 Harrison on its abuse of process claim, with damages in the amount of $5,801,550 to be paid jointly and severally by both defendants. Plaintiff's G. L. c. 93A, § 11, claim was reserved for the Court, which affirmed the jury's damages, found that defendants violated G. L.c. 93A, and doubled the damages to $11,603,100 for the reasons stated in this Court's Finding of Facts, Rulings of Law and Order of Judgment on Plaintiff's Chapter 93A Claim.

Defendants have now filed a Motion for a New Trial contending that the record does not support the jury's damages award and asking this Court to find that: (a) the damages issued by the jury for the abuse of process count were erroneous; and (b) no damages should have been awarded; or (c) this Court should grant defendants' request for a remittitur on damages. Defendants allege that the jury misunderstood or misapplied this Court's instructions, and their decision in issuing such an award was unsound or was swayed by bias or prejudice.

[1] Arthur Leon

After review of the parties' pleadings, defendants' motion[2] is **DENIED** for the following reasons.

DISCUSSION

I. New Trial Standard

"Rule 59(a) allows the court to grant a new trial as to any or all of the parties or as to any or all of the issues. . . . This provision seeks to limit the issue on retrial to those which the court considers were not properly adjudicated in the first trial." Reporter's Notes (1973) to Mass. R. Civ. P. 59 (a). Rule 59 (a) also includes remittitur as a consideration.

"The standard that a trial judge is to apply on a motion for a new trial in a civil case is whether the verdict is so markedly against the weight of the evidence as to suggest that the jurors allowed themselves to be misled, were swept away by bias or prejudice, or for a combination of reasons, including misunderstanding of applicable law, failed to come to a reasonable conclusion." *W. Oliver Tripp Co.* v. *American Hoechst Corp.*, 34 Mass. App. Ct. 744, 748 (1993), citing *Scannell* v. *Boston Elev. Ry.*, 208 Mass. 513, 514-515 (1911). "The decision to grant or deny a motion for a new trial rests in the discretion of the trial judge, and an appellate court will not vacate such an order unless the judge has abused that discretion." *W. Oliver Tripp Co.*, 34 Mass. App. Ct. at 748. The Supreme Judicial Court has routinely held that "the allowance of a motion for a new trial based upon an inadequate or excessive award of damages, and the direction of an addition or remittitur, rests in the sound discretion of the judge." *Loschi*

[2] Defendants assert, in a conclusory fashion, that a new trial is warranted for several other reasons, which were presented before, during and after the evidence was taken and denied by this Court. As defendants do not argue these points in their brief, I find them waived for purposes of this motion. In any event, these issues were previously ruled on at trial and denied, and defendants have not presented any additional grounds here for this Court to reconsider those decisions.

v. *Massachusetts Port Auth.*, 361 Mass. 714, 715 (1972). See *D'Annolfo* v. *Stoneham Hous. Auth.*, 375 Mass. 650, 659-662 (1978). See also Mass. R. Civ. P. 59 (a).

II. Analysis

The jury awarded plaintiff $5,801,550, which is the amount requested by plaintiff. Plaintiff presented three categories of damages: (1) increased loan interest costs ($700,000); (2) increased costs for the actual construction and material costs ($5.1 million); and (3) attorneys' fees attributable to representing plaintiff during a criminal complaint hearing ($1,550).[3] Defendants essentially seek remittitur as the remedy for their allegation that the jury misunderstood or misapplied the jury instructions, etc. Defendants argue that, given the increased value of 477 Harrison's condominium units between 2013 and the date of actual sale, plaintiff profited dearly and has no damages as a result. Defendants also argue that, even if the plaintiff did suffer some damages, the damages were far less than the $5.8 million awarded by the jury. Consequently, defendants move this Court, in the alternative, to grant their remittitur request and reduce the verdict by approximately $3.5 million. Defendants do not contest the soundness of the jury instructions themselves.

A. Interest as a Portion of Damages

Plaintiff's presentation of damages was clear and unambiguous that the interest costs on its construction loan increased by $700,000 as a result of the delay caused by defendants' abuse of process. Defendants presented no witnesses or records to contradict plaintiff's evidence on this issue. The jury's decision to include this as part of the damages suffered by plaintiff was rational, sound and supported by the trial record. Defendants do not dispute that the record

[3] Plaintiff appears to round down the request for damages related to increased construction costs.

supports this amount of damages for increased interest costs.[4]

Consequently, there is no basis to find that the jury acted erroneously, disregarded or misapplied my instructions, was swayed by prejudice or failed to reach a reasonable conclusion or reached a verdict that was not supported by the trial record.

B. Increased Construction and Materials Cost

Plaintiff argued in its closing that it was also entitled to $5.1 million in increased construction costs. In plaintiff's opposition, counsel refers to the trial record which showed that the actual construction cost increase was $5,185,606.80,[5] which is approximately $85,000 more than what counsel requested for this category of damages in his closing.

Defendants calculate the damages in a different method and contend that plaintiff was not entitled to any damages because the delay allegedly caused by their abuse of process resulted in a higher profit margin than there would have been if the delay had not occurred. Plaintiff summarized this as the "thank you" defense, as it suggests that plaintiff should thank Leon and JACE since these delays generated millions of dollars in additional profits for plaintiff that would not have occurred but for defendants' misconduct.

The problem with this "thank you" defense is that the hard construction costs increased also, which is a loss attributable only to the delay caused by their abuse of process irrespective of any price increases for the condominium units. Holland testified in detail about how he reached $15,458,836.80 as the final figure for hard building costs for completion of the 477 Harrison development. Holland testified that his original estimated cost of construction was $8,773,230,

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[4] Defendants do not contest the attorneys' fees ($1,550) or increased interest costs ($700,000) for purposes of their motion for remittitur.

[5] John Holland ("Holland"), who was a general contractor for and one of the principals of 477 Harrison, testified in depth about how he reached these figures. Defendants cross-examined him effectively in an effort to show bias and demonstrate lack of a reasonable basis for these figures. The jury was not swayed by defendants' tactics and found for plaintiff.

which when subtracted from the final construction costs leaves $6,685,606.80. Holland then testified that another $1.5 million in construction overruns was normal and not caused by the delays associated with the abuse of process. Holland concluded, after deducting this $1.5 million from the $6,685,606.80 construction cost increase, the final damages amount caused by defendants' delays for hard construction cost increases was $5,185,606.80.

Although defendants now argue the record does not support these claims by Holland, counsel does not persuasively undermine plaintiff's calculations. While defendants thoroughly and effectively cross-examined Holland, they did not call their own expert to contradict Holland's testimony. Since the record supported plaintiff's damages request, defendants' strategy during trial focused on undermining Holland's credibility and the source of his calculations. While defendants' trial tactic was reasonable and sound, it was also unsuccessful.

Defendants also contend, alternatively, that remittitur is appropriate on the grounds that the award was excessive. Defendants attempt to persuade this Court through convoluted mathematical gymnastics that its damages calculation is more persuasive than plaintiff's calculations. Defendants ask this Court to reduce the damages to $2,316,774, which includes the $700,000 in interest costs and $1,550 in attorneys' fees.

Defendants' arguments miss the point. In a motion for a new trial, the moving party must show that the "verdict is so markedly against the weight of the evidence as to suggest that the jurors allowed themselves to be misled, were swept away by bias or prejudice, or for a combination of reasons, including misunderstanding of applicable law, failed to come to a reasonable conclusion." *W. Oliver Tripp Co.*, 34 Mass. App. Ct. at 748. The weight of the evidence supports the jury verdict and there is no evidence that the jury was misled or misapplied the law or were somehow swept away by prejudice or bias. The fact that defendants may have

had a working theory on damages that was different than plaintiff's does not shift the weight of the evidence away from the plaintiff or persuade this Court that the award was excessive or not in the interests of justice. The verdict was just and reasonable.

Defendants have failed to persuade this Court that the jury acted erroneously, was swayed by prejudice or bias, disregarded or misapplied my instructions or failed to reach a reasonable or just award on damages. Defendants' motion for a new trial or, in the alternative, a remittitur is **DENIED**.

ORDER

Wherefore, it is hereby **ORDERED** that Defendants' Motion for a New Trial is **DENIED** for the reasons stated above.

Dated: 12/30/26
11/30/26

/s/ James Budreau
James Budreau
Associate Justice
Superior Court

original 181

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPT.
CIVIL ACTION NO. 2015-0829-B

477 HARRISON AVE., LLC,
Plaintiff

v.

JACE BOSTON, LLC and
and ARTHUR LEON
Defendants.

SPECIAL VERDICT FORM

1. Did the Defendants file any of the following process with an ulterior or illegitimate purpose?

   a. The 2012 Zoning Appeal

   Yes ✓

   No _____

   b. The Wall Case

   Yes _____

   No ✓

c. The 2015 Zoning Appeal

Yes ✓

No _____

d. The Application for a Criminal Complaint

Yes ✓

No _____

If you answer "Yes" to any portion of question 1, go to question 2.
If you answer "No" to question 1, go to the end and sign and date.

2. Did the Plaintiff suffer any damages as a result of the Defendants' abuse of process?

Yes ✓

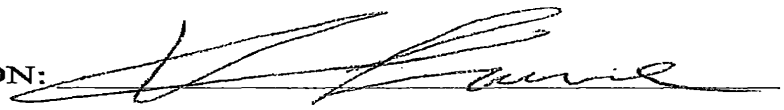
No _____

If you answer "Yes" to question 2, go to question 3.
If you answer "No" to question 2, go to the end and sign and date.

3. What damages did 477 Harrison Ave., LLC suffer?

$ 5,801,550.00

Write in words: five million eight hundred one thousand five hundred fifty dollars and zero cents

FOREPERSON: 

Dated: 5/01/2025

JUDGMENT ON JURY VERDICT

NOTIFY

Trial Court of Massachusetts
The Superior Court

DOCKET NUMBER	
1584CV00829	John E Powers, III Suffolk County Civil
CASE NAME 477 Harrison Ave LLC vs. Jace Boston LLC et al	**COURT NAME & ADDRESS** Suffolk County Superior Court - Civil Suffolk County Courthouse, 12th Floor Three Pemberton Square Boston, MA 02108

JUDGMENT FOR THE FOLLOWING PLAINTIFF(S)

477 Harrison Ave LLC

JUDGMENT AGAINST THE FOLLOWING DEFENDANT(S)

Jace Boston LLC
Arthur Leon

This action came on for trial before the Court, Hon. James Budreau, presiding, the issues having been duly tried and the jury having rendered its verdict,

After Jury Verdict, it is **ORDERED AND ADJUDGED**:

That the plaintiff(s) named above recover of the defendant(s) named above, Jointly & Severally the "Judgment Total" with interest thereon as outlined below as provided by law, and the statutory costs of action.

1. Date of Breach, Demand or Complaint	03/23/2015
2. Date Judgment Entered	07/13/2026
3. Number of Days of Prejudgment Interest *(line 2 - Line1)*	4130
4. Annual Interest Rate of 0.12/365.25 = Daily Interest rate	.000329
5. Single Damages	$5,801,550.00
6. Prejudgment Interest *(lines 3x4x5)*	$7,882,972.09
7. Double or Treble Damages Awarded by Court *(where authorized by law)*	$5,801,550.00
8. Statutory Costs	$37,675.15
9. Attorney Fees Awarded by Court (where authorized by law)	$598,103.50
10. **JUDGMENT TOTAL PAYABLE TO PLAINTIFF(S)** *(Lines 5+6+7+8+9)*	$20,121,850.74

DATE JUDGMENT ENTERED	~~CLERK OF COURTS~~/ ASST. CLERK
07/13/2026	X Christine M. Hays

JUDGMENT ENTERED ON DOCKET 7/14/26
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SEND TO PARTIES PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

Date/Time Printed: 07-13-2026 14:06:48

CD

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 1584CV00829-B

477 HARRISON AVE., LLC
Plaintiff,

v.

JACE BOSTON, LLC
and ARTHUR LEON,
Defendants.

NOTICE OF APPEAL OF JACE BOSTON, LLC AND ARTHUR LEON

Pursuant to Rules 3 and 4 of the Massachusetts Rules of Appellate Procedure, JACE Boston, LLC and Arthur Leon (together, "Defendants") hereby appeal from the following:

1. The judgment entitled, "Judgment on Jury Verdict," in the total amount of $20,121,850.74, which was entered on July 13, 2026, and docketed on July 14, 2026 (the "Judgment") (Docket No. 182);

2. The Findings of Fact, Rulings of Law, and Order for Judgment on Plaintiff's Chapter 93A Claim, dated January 13, 2026, and docketed on January 16, 2026 (Docket No. 175);

3. The Jury Verdict dated May 6, 2025, docketed on July 14, 2026 (Docket No. 181);

4. The Order, endorsed on Docket No. 167, dated and docketed on January 20, 2026, denying Defendants' Motion for Judgment Notwithstanding the Verdict (Docket No. 167).

5. The Memorandum of Decision and Order on Defendants' Motion for New Trial, dated and docketed on January 30, 2026 (Docket No. 177);

6. The Order, endorsed on Docket No. 101, dated and docketed on April 23, 2024, denying JACE Boston, LLC and Arthur Leon's Motion for Reconsideration of their special

motion to dismiss pursuant to Mass. General Laws ch. 231, § 59H following remand from the Supreme Judicial Court (Docket No. 101);

7. The (Corrected) Memorandum and Order on Defendant's [sic] Special Motion to Dismiss Pursuant to G.L. c. 231, § 59H Upon Remand from the Supreme Judicial Court, dated and docketed on December 21, 2017 (Docket No. 73);[1] and

8. Each and every part of the Judgment, as well as all interlocutory rulings, orders, and decisions merged into or underlying said Judgment.

Respectfully submitted,

JACE BOSTON, LLC AND ARTHUR LEON,
By their attorneys,

/s/ Mark S. Furman

Mark S. Furman (BBO# 181680)
Albert A. DeNapoli (BBO# 543850)
Shipman & Goodwin, LLP
101 Huntington Avenue, Suite 500
Boston, MA 02199
Telephone: (617) 218-2000
mfurman@tbhr-law.com
adenapoli@tbhr-law.com

Date August 11, 2026

[1] The docket identifies two different orders as Docket No. 73. For the avoidance of doubt, Defendants do **not** appeal from the order identified as Docket No. 73 which was entered on the docket on January 18, 2018.

CERTIFICATE OF SERVICE

I, Mark S. Furman, hereby certify that on August 11, 2026, I caused a copy of the foregoing document to be served by email on counsel for Plaintiff 477 Harrison Ave., LLC as set forth below:

Andrew E. Goloboy, Esq.
Goloboy Law LLC
900 Cummings Center
Suite 207V
Beverly, MA 01915
goloboy@goloboylaw.com

Ronald W. Dunbar, Jr.
Dunbar Law, P.C.
10 Post Office Square
Boston, MA 02109
dunbar@dunbarlawpc.com

/s/ Mark S. Furman
Mark S. Furman

Exhibit

18

BOSTON INSPECTIONAL SERVICES DEPARTMENT

THOMAS M. MENINO
Mayor

March 9, 2012

Robert McCarthy
1126 Main Street
Weymouth, MA 02190

Re: **Application No.** ALT118831; **Zone:** South End N.D. NDA, GCOD, Restricted Parking
Date Filed: February 9, 2012; **Location:** 477-481 Harrison Av; **Ward:** 03
Purpose: Change occupancy from Furniture Manufacturing/upholstering/Repair(DBA Decore Upholstering Company Inc) (Doc#20059/1993) to 2 Commercial Space (office and retail)and 18 Residential Units. Sixth story addition and rear addition, parking garage on basement level. Applying for a preliminary plan review in anticipation of zoning rejections. Requesting payment of a nominal fee for initial review.*

YOUR APPLICATION REQUIRES RELIEF FROM THE BOARD OF APPEAL AS SAME WOULD BE IN VIOLATION OF THE BOSTON ZONING CODE TO WIT: CHAPTER 665, ACTS OF 1956 AS AMENDED:

South End Neighborhood District
Neighborhood Development Areas

Article 64, Section 19	(64-9) Floor Area Ratio Excessive
Article 64, Section 19	(64-9) Usable Open Space Insufficient
Article 64, Section 19	(64-9) Height Excessive
Article 64, Section 19	(64-9) Rear Yard Insufficient

Miscellaneous Provisions

Article 64, Section 34	Restricted Roof Structure Regulations
Article 32, Section 9	GCOD Enforcement

*IBC review pending and subject to complete sets of construction documents
**Article 80 Development Review and Approval required.

THIS DECISION MAY BE APPEALED TO THE BOARD OF APPEAL WITHIN FORTY-FIVE (45) DAYS PURSUANT TO CHAPTER 665 OF THE ACTS OF 1956, AS AMENDED. APPLICATIONS NOT APPEALED WITHIN THAT TIME PERIOD WILL BE DEEMED ABANDONED. COMMUNITY PARTICIPATION IS AN INTEGRAL PART OF THE BOARD OF APPEAL PROCESS. WE STRONGLY SUGGEST THAT YOU READ THE ENCLOSED MATERIAL AND YOU MUST CONTACT THE MAYOR'S OFFICE OF NEIGHBORHOOD SERVICES AT 617-635-3485 TO ENSURE THAT YOU TAKE THE NECESSARY STEPS TO ENSURE ANY REQUIRED COMMUNITY PARTICIPATION IN THE BOARD OF APPEAL PROCESS FOR YOUR APPLICATION.

Luis Santana
For the Commissioner
617-635-5312

Exhibit

31

E.G. LEON & CO., INC.

Specialists in Power Equipment

1234 WASHINGTON STREET, BOSTON, MA 02118
TEL: (617) 482-8383 FAX: (617) 482-8384

VIA HAND DELIVERY AND FIRST CLASS MAIL

May 17, 2012

Robert Shortsleeve, Chairman
City of Boston Board of Appeal
1010 Massachusetts Avenue
Boston, MA 02118

Re: BZC 31857: 477-481 Harrison Avenue, Boston, MA

Dear Mr. Chairman:

I am writing to respectfully request that the Board of Appeal (the "BOA") deny the variances and other relief as requested by The Holland Companies for a proposed residential development project at 477-481 Harrison Avenue (the "Harrison Avenue Project"). The BOA is currently scheduled to hear the appeal of this matter on May 22, 2012. For the following three key reasons, the BOA should deny the relief as requested for the Harrison Avenue Project. First, The Holland Companies cannot point to any practical difficulty or demonstrate any substantial hardship that it would suffer if the BOA were to deny the variances. Second, if the Harrison Avenue Project were allowed to proceed as proposed, it will substantially interfere with my ability to use my property as a manufacturing facility. I will undoubtedly incur significant expenses associated with added congestion that the Harrison Avenue Project will necessarily bring to the area. Third, if the Harrison Avenue Project is approved, it will prohibit me from proceeding with my plans to convert the existing manufacturing facility into a residential development. Based on my personal knowledge, the Harrison Avenue Project, as proposed, will be injurious to not only my property interests, but also those of the other abutters to the project, and will be detrimental to the overall welfare of the South End neighborhood.

I am a direct abutter to the Harrison Avenue Project and own the property located at 1234 Washington Street (the "Property"). The Property is a single story building measuring approximately 61,000 square feet that wraps around the parcel where the Harrison Avenue Project is proposed to be built. The majority of the Property is being utilized as a manufacturing facility for Leon Electric. Leon Electric has been based at this location since 1975 and has over seventy-five (75) employees working at the facility. The Property also houses seven retail stores and offices that serve the South End community.

As an abutter to the Harrison Avenue Project, I have a number of concerns relating to how the Harrison Avenue Project, as currently proposed, will negatively impact not only the use of my Property but the surrounding neighborhood, as well. As a practical matter, I do not understand why BOA would grant variances for the Harrison Avenue Project in light of the fact that the South End Neighborhood Zoning District (the "SENZD") has recently been rezoned and earmarked for residential use. It is not as if The Holland Companies are trying to preserve an existing use of the parcel by virtue of the Harrison Avenue Project. Rather, The Holland Companies have proposed a new residential development that fails to comply with the new zoning regulations of the SENZD. Moreover, the proposed Harrison Avenue Project does not consider the harmony and greater context of the South End neighborhood. Accordingly, for these reasons and those that follow, I ask that the BOA deny approval of the Harrison Avenue Project at this time.

As I have mentioned, the Property is currently is being utilized as a manufacturing facility, as well as retail and office space. Please note, however, that I am in the process of working with my development manager, Urbanica Inc., to prepare a submission to the Boston Redevelopment Authority (the "BRA") and to request Large Project Review under Article 80 of the Zoning Code for a residential development project related to the Property. I intend to convert the Property—and the existing manufacturing facility—into a residential development in line with the new zoning requirements of the SENZD.

Notwithstanding my plans to convert the Property into a residential development, if the BOA were to allow the Harrison Avenue Project to proceed as proposed, I would not be able to continue to utilize the Property as a manufacturing facility. As a practical matter, history demonstrates that industrial uses are not suitable in residential areas, and I will be forced to incur expenses associated with complaints from residents of the Harrison Avenue Project as a result of the noise and traffic that is typical of a manufacturing facility.

By way of background, the Harrison Avenue Project had been undergoing Small Project Review under Article 80 of the Zoning Code by the BRA. On the evening of May 15, 2012, following notice of a public hearing, the BRA entertained a presentation prepared by The Holland Companies regarding the Harrison Avenue Project. Despite having filed with the BRA letters from myself and several abutting property owners who have also expressed opposition to the Harrison Avenue Project (the "Opposition Letters"),[1] the BRA voted to approve the project, over the written objections of the abutting property owners. It is worth noting that, at the BRA hearing, the BRA refused to allow either my attorney, Kevin J. Joyce, Esq., or me an opportunity to address the Board regarding our opposition to the project. Further, the BRA failed to acknowledge that the Opposition Letters were included on the record—or that the BRA had even reviewed the letters.

[1] The Opposition Letters had been filed with the BRA well prior to the public hearing. Copies of the letter from Attorney Joyce, dated May 14, 2012, and the Opposition Letters provided therewith are enclosed for your reference.

The plans that have been provided to for the Harrison Avenue Project thus far lack a well thought out design and appear to be devoid of numerous critical details. I have retained the services of Edward C. O'Donnell, who is the Pre-development director for Waypoint Construction Consultants, Inc., to review the plans for the Harrison Avenue Project Mr. O'Donnell prepared a report, dated May 8, 2012 (a copy of which is enclosed for the Board of Appeal's reference), which further underscores the insufficiency of the plans on file for the Harrison Avenue Project. Based on our review of the existing plans for the Harrison Avenue Project, we note the following:

- The design, as proposed, would expand the building envelope on the Property. As such, the design needs significant zoning variances from density limits (FAR), height limits, minimum rear yard setback and minimum open space, even though the zoning for the SENZD is the product of a recent and extensive community process. The BOA should deny the requested variances, for which the Holland Companies can demonstrate no hardship.

- The design incorrectly assumes there will be nothing built on the adjacent site that would block the light and view of the new balconies and windows proposed by Holland Companies. We do plan to develop the Property, and it is in the interest of the City and the neighborhood that we be able to do so. The Holland Companies should not appropriate space above our Property for their exclusive benefit—to the detriment of the surrounding abutters and the neighborhood, in general.

- The Harrison Avenue Project does not include a commercial storefront to contribute to the activity of the street.

- The proposed entrance to the basement will interrupt traffic.

- The addition of new windows at the side of the building will break up the firewall between the properties.

- Some areas of the building may be in violation of building codes including, but not limited to, the addition of new windows so close to the Property line.

- The design does not account for mechanical, utility or garbage rooms in the basement. These necessary common areas will reduce the amount of parking shown. These areas should be shown on the drawing.

- Parking spots numbers 01, 02, and 03 seem very difficult to access. There is no indication of parking sizes.

- This area is a Ground Water Overlay District, yet there is not enough land for discharging storm water to the subsurface.

- No garage exhaust is shown.

- The building will require a substantial amount of mechanical equipment located on the roof. A noise and visual study should be conducted to assess the negative impacts resulting from such mechanical equipment, and drawings should show where the equipment would be located.

- There should be a traffic study to assess the negative impact of additional cars and traffic in the area.

- This building will require a generator, as it will be considered a high-rise building. Generator noise and visual should be considered, and drawings should show where the generator would be located.

- A utilities study should be completed to verify the addition and location of a new transformer, etc. These areas should be specified on the drawing.

- The project will require new excavation. No environmental study has been offered.

- A study of the City of Boston's Green Building Code should be completed.

- There are no provisions for garbage removal/dumpsters.

- There is no construction plan included in the existing report to address the means, method, staging, and transportation issues that will arise during construction.

- There is no indication of sidewalk improvement and landscaping plans.

In light of all of the foregoing, the development of the proposed Harrison Avenue Project, as currently proposed, will have significant adverse effects on the abutting parcels, including but not limited to my Property, as well as the surrounding neighborhood. Moreover, it is customary under Article 80 of the Zoning Code for a project to create a public benefit, including but not limited to the provision of affordable housing. The type and location of affordable units should be specified. Thus far, the Holland Companies have failed to provide any indicia of the Harrison Avenue Project being of any benefit to the public.

It would be preferable that any proposed project related to 477-481 Harrison Avenue be pursued in amicable and cooperative manner to ensure that neighborhood derives the full benefit from any such project. However, at this juncture, I urge the BOA to deny the relief as requested, require the redesign, additional information, and further study of the Harrison Avenue Project, and to inform the BRA of the same.

Thank you for your time and kind consideration of this matter.

Very truly yours,

Arthur Leon

Encls.

cc: City Council President Stephen Murphy
District 2 City Councilor William Linehan
City Councilor At Large Felix Arroyo
City Councilor At Large Ayanna Pressley
City Councilor At Large John Connolly

Exhibit

50

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPT.
CIVIL ACTION NO.

JACE BOSTON, LLC,
Plaintiff,

v.

HOLLAND DEVELOPMENT, LLC;
and 477 HARRISON AVE., LLC,
Defendants.

13-2167 H

RECEIVED
JUN 13 2013
SUPERIOR COURT-CIVIL
MICHAEL JOSEPH DONOVAN
CLERK/MAGISTRATE

COMPLAINT

Introduction

1. Plaintiff JACE Boston, LLC ("JACE Boston") brings this action to declare its rights under an Indenture and Agreement recorded in the Suffolk Registry of Deeds at Book 4863, Pages 165-167 to tie unto and obtain support from the wall of the building now owned by Holland Development, LLC ("Holland Development"). A copy of the Indenture and Agreement is attached hereto as **Exhibit A**. An actual controversy exists between JACE Boston, Holland Development and 477 Harrison Ave. LLC, as Holland Development and/or 477 Harrison Ave., LLC propose to demolish a ninety (90) foot long section of the wall that JACE Boston has a right to tie unto and obtain support.

Parties

2. Plaintiff JACE Boston is a limited liability company with a usual place of business at 1234 Washington Street, Boston, Suffolk County, Massachusetts.

3. Defendant Holland Development is a limited liability company with a usual place of business at 519 Albany Street, Suffolk County, Boston, MA 02190.

2. Defendant 477 Harrison Avenue, LLC is a limited liability company with a usual place of business at 519 Albany Street, Suffolk County, Boston, MA 02190. The manager of 477 Harrison Avenue, LLC is Holland Development.

Statement of Facts

3. The Indenture and Agreement is dated June 28, 1926, and was recorded on December 28, 1926, in Book 4863, Pages 165-167 of the Suffolk Registry of Deeds. *See* **Exhibit A.**

4. The Indenture and Agreement is by and between Robert Jordan, William O. Taylor and Edward J. McClennen, as trustees under the will of Eben D. Jordan, (the "Jordan Trustees") and Joseph Pearlstein, Joseph A. Levin, David Pearlstein, Harry Zanditon, Isaac Glaser, Nathan Ullian, and Henry I. Morrison as trustees of the Savoy Realty Trust (the "Savoy Trustees"). *See* **Exhibit A.**

5. Under the Indenture and Agreement, the Jordan Trustees granted the Savoy Trustees and their heirs, successors and assigns "the right and easement, which shall endure so long as the garage building now in process of erection on said land of said 'Trustees of the Savoy Realty Trust' shall stand; to tie unto and to use for the support of said garage building the northeasterly wall (including the foundation thereof) of the stable now standing on said land of said 'Jordan Trustees' to a height not exceeding two stories nor more than thirty four feet above the line of the present curbstone at the westerly corner of Harrison Avenue and Perry Street." *See* **Exhibit A.**

6. In addition to the monetary consideration paid for this easement, the Savoy Trustees granted permission to the Jordan Trustees to "continue to use, as a part thereof, and so long as said wall and foundation shall stand, the portion of said

foundation of said wall which now stands upon said land of said Trustees of the Savoy Realty Trust, but this covenant and agreement shall not be construed as a grant to said Jordan Trustees of any interest or title to the said land of said Trustees of the Savoy Realty Trust." *See* **Exhibit A.**

7. Defendant Holland Development is the successor in interest to the Jordan Trustees.

8. The real estate owned by Holland Development known as, and located at, 477-481 Harrison Avenue, Boston, MA, includes the same property of the Jordan Trustees referenced in the Indenture and Agreement. A copy of the City of Boston's Assessor's Map showing the location of Holland Development's property is attached as **Exhibit B.**

9. Plaintiff JACE Boston is the successor in interest to the Savoy Trustees.

10. The real estate owned by JACE Boston known as, and located at, 1230 Washington Street, Boston, MA, includes the same property of the Savoy Trustees referenced in the Indenture and Agreement. A copy of the City of Boston's Assessor's Map showing the location of JACE Boston's property is attached as **Exhibit C.**

11. The garage referenced in the Indenture and Agreement remains standing today.

12. The wall of the Jordan Trustees referenced in the Indenture and Agreement remains standing today.

13. The Indenture and Agreement creates a private property right and easement for the benefit of JACE Boston's property to tie unto and use for support the northeasterly wall of the building of the Holland Development to a height not exceeding

two stories or more than thirty-four feet. This right and easement continues to encumber the title to the property of the Holland Development.

14. The wall of Holland Development's building that is the subject of the Indenture and Agreement abuts the building of JACE Boston for approximately 150 feet along the property line between the two properties. Copies of photographs attached hereto as **Exhibits D** and **E** show the two buildings abutting each other, the pictures are facing the property on Harrison Avenue, Holland Development's building is on the left side of the pictures and JACE Boston's building is on the right side of the picture.

15. The wall of Holland Development's building that abuts the wall of JACE Boston's building and/or property line is a 5 story solid brick wall with no windows. A copy of a photograph showing the brick wall and its relationship to JACE Boston's building is attached as **Exhibit F**.

16. Holland Development is proposing to convert the building to 18 residential units, 2 commercial units and a 20 car underground garage. Holland Development's right to convert the building is the subject of a separate zoning appeal, *JACE Boston, LLC, v. Board of Appeal of the City of Boston, Vincent M. Pergola and Joseph J. Pergola, in their capacity as trustees of Pergola Nominee Trust, Holland Development, LLC, and 477 Harrison Ave., LLC*, Civil Action No. 2012-CV-03241-C (Suffolk Superior Court) (the "Zoning Litigation").

17. Holland Development and 477 Harrison Ave., LLC, propose to demolish the brick wall that is the subject of the Indenture and Agreement from a height of approximately 15 feet above grade level to the top of its building. The length of the brick

wall being demolished is approximately 90 feet and is over 50% of the total length of the wall that abuts JACE Boston's building.

18. The brick wall that Holland Development and/or 477 Harrison Ave., LLC propose to demolish is the same wall that JACE Boston has a right to tie unto and obtain support from as provided in the Indenture and Agreement.

19. The demolition will deprive JACE Boston of its right to tie unto and obtain support from the brick wall between 15 feet and 34 feet above grade and for the entire length of the areas of the wall being demolished.

20. After the wall is demolished, Holland Development intends to build a new wall set back five to ten feet back from the property line and to install windows in the newly constructed wall.

21. Holland Development and 477 Harrison Ave., LLC have asserted that they have the right to demolish the brick wall and have disputed JACE Boston's rights under the Indenture and Agreement to tie unto and obtain support from the wall. JACE Boston disputes the assertions of Holland Development and 477 Harrison Ave., LLC.

22. The demolition of the wall will deprive JACE Boston of its right to tie unto and obtain support from the wall of Holland Development's building and deprive JACE Boston of its rights under the Indenture and Agreement.

23. The demolition of the wall will further harm JACE Boston as the demolition of the wall may weaken the support provided by the two remaining portions of the wall.

24. Furthermore, when the brick wall is demolished and relocated, a large load including the brick masonry, the floor system, the roof and their live loads will no longer

be present on the remaining portion of the wall. The remaining wall and structure will move upward in response to the loss of load. The upward motion poses a risk of harm to the abutting wall of JACE Boston's building

25. In addition to the loss of its rights to tie unto and obtain support from the wall under the Indenture and Agreement, the demolition of the wall poses a risk of harm to JACE Boston as the portion of the brick wall that is proposed to be demolished is directly on the property line between the property of Holland Development and the property of JACE Boston.

26. The demolition of the wall will expose JACE Boston to potential harm from falling construction debris, dust and noise. Falling construction debris could cause damage to the roof of JACE Boston's building.

27. JACE Boston will suffer irreparable harm if Holland Development demolishes the wall.

CLAIMS FOR RELIEF

COUNT I
CLAIM FOR DECLARATORY RELIEF

28. JACE Boston re-states and re-alleges as if fully set forth herein the allegations from the paragraphs set forth above.

29. An actual controversy exists between JACE Boston and Holland Development and 477 Harrison Ave., LLC as to (A) the rights of JACE Boston under the Indenture and Agreement; and (B) the obligations and duties of Holland Development and 477 Harrison Ave., LLC under the Indenture and Agreement.

30. JACE Boston requests that the Court declare the rights of JACE Boston under the Indenture and Agreement recorded in the Suffolk Registry of Deeds at Book 4863, Page 165.

31. JACE Boston requests that the Court declare that JACE Boston has a right to tie unto and obtain support from the northeasterly wall of the Holland Development's building to a height not exceeding two stories nor more than thirty four feet above the line of the present curbstone at the westerly corner of Harrison Avenue and Perry Street.

32. JACE Boston requests that the Court declare that Holland Development and 477 Harrison Ave., LLC may not demolish the brick wall abutting the building of JACE Boston below a height of the lesser of two stories or thirty-four feet so long as the garage referenced in the Indenture and Agreement remains standing.

Wherefore, JACE Boston requests that the Court grant it the following relief:

1. that the Court enter a declaratory judgment determining the rights of JACE Boston under the Indenture and Agreement recorded in the Suffolk Registry of Deeds at Book 4863, Page 165;

2. that the Court declare that JACE Boston has a right to tie unto and obtain support from the northeasterly wall of the Holland Development's building to a height not exceeding two stories nor more than thirty four feet above the line of the present curbstone at the westerly corner of Harrison Avenue and Perry Street;

3. that the Court declare that Holland Development and/or 477 Harrison Ave., LLC or any other person or entity acting by, through, or on their behalf or as a successor thereto may not demolish the brick wall abutting the building of JACE

Boston at a height of the lesser of two stories or thirty-four feet so long as the garage referenced in the Indenture and Agreement remains standing;

4. that the Court enter a preliminary injunction enjoining Holland Development and 477 Harrison Ave., LLC and any other person or entity acting by, through, or on their behalf, or as a successor thereto, from demolishing the brick wall of its building that abuts JACE Boston's building at a height below the lesser of two stories or thirty four feet above the line of the present curbstone at the westerly corner of Harrison Avenue and Perry Street;

5. that the Court entered a permanent injunction enjoining Holland Development and 477 Harrison Ave., LLC and any other person or entity acting by, through, or on their behalf, or as successor thereto, from demolishing the brick wall of its building that abuts JACE Boston's building at a height below the lesser of two stories or thirty four feet above the line of the present curbstone at the westerly corner of Harrison Avenue and Perry Street;

6. that the Court award JACE Boston its costs and attorneys fees; and

7. that the Court grant such other and further relief to which JACE Boston, LLC may be entitled.

JACE BOSTON, LLC,
by its attorneys,

Mark S. Furman (BBO # 181680)
John D. Stuebing (BBO# 483800)
TARLOW, BREED, HART & RODGERS, P.C.
101 Huntington Avenue
Prudential Center
Boston, MA 02199
Telephone: (617) 218-2000
Facsimile: (617) 261-7673
mfurman@tbhr-law.com
jstuebing@tbhr-law.com

Dated: June 13, 2013

Exhibit

82

Boston Inspectional Services Department

Planning and Zoning Division

1010 Massachusetts Avenue Boston, MA 02118 Telephone (617) 635-5300

Martin J. Walsh
Mayor

ZONING CODE REFUSAL

Gary P. Moccia
Inspector of Buildings

ROBERT MCCARTHY
519 ALBANY ST.
BOSTON, MA 02118

December 16, 2014

Location:	477-481 HARRISON AV ROXBURY MA 02118
Ward:	03
Zoning District:	South End
Zoning Subdistrict:	NDA
Appl. # :	ALT429735
Date Filed:	November 24, 2014
Purpose:	LPR
	Change occupancy to include 3 unit penthouse addition at 477 Harrison Ave.

YOUR APPLICATION REQUIRES RELIEF FROM THE BOARD OF APPEAL AS SAME WOULD BE IN VIOLATION OF THE BOSTON ZONING CODE TO WIT: CHAPTER 665, ACTS OF 1956 AS AMENDED:

Violation	Violation Description	Violation Comments
Article 64 Section 9	Dimensional Regulations	Usable Open Space insufficient (64-19, Table F, Note #3)
Article 64, Section 19 **	Dimensional Regulations	Floor Area Ratio excessive
Article 64, Section 19 **	Dimensional Regulations	Height excessive
Article 64, Section 34 **	Restricted Roof Structure Regulations	

THIS DECISION MAY BE APPEALED TO THE BOARD OF APPEAL WITHIN FORTY-FIVE (45) DAYS PURSUANT TO CHAPTER 665 OF THE ACTS OF 1956, AS AMENDED. APPLICATIONS NOT APPEALED WITHIN THAT TIME PERIOD WILL BE DEEMED ABANDONED. IF YOU HAVE INQUIRIES REGARDING THE NEIGHBORHOOD PROCESS AND PUBLIC PARTICIPATION, PLEASE CONTACT THE MAYOR'S OFFICE OF NEIGHBORHOOD SERVICES AT 617-635-3485.

Luis Santana
(617)961-3256
for the Commissioner

Refusal of a permit may be appealed to the Board of Appeal within 45 days. Chapter 802, Acts of 1972, and Chapter 656, Acts of 1956, Section 19.

JL00204

Exhibit

117



Site Plan

Jordan Lofts
477 Harrison Avenue, Boston MA 02118

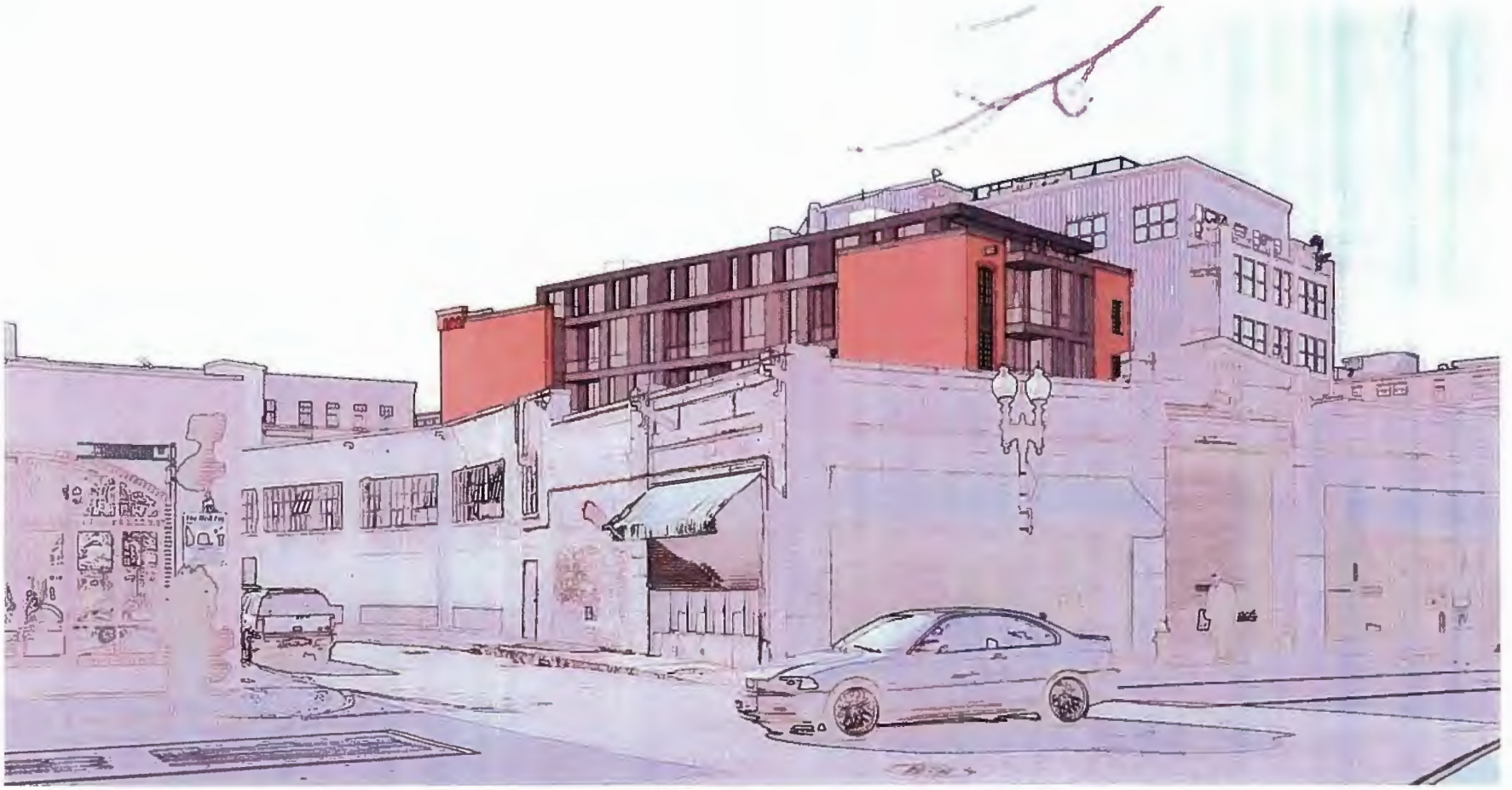
H+A



View Down Harrison Ave

Jordan Lofts
477 Harrison Avenue, Boston MA 02118

H+A



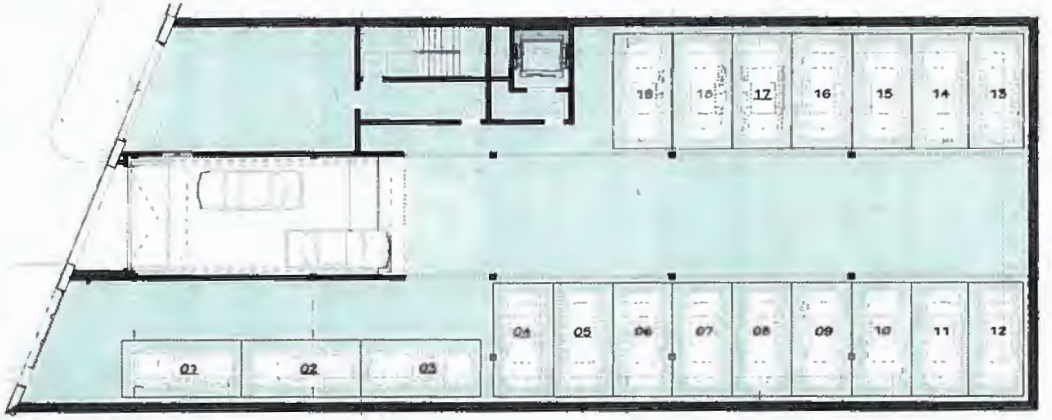
View Down Washington St

Jordan Lofts
477 Harrison Avenue, Boston MA 02118

H+A



Roof Plan



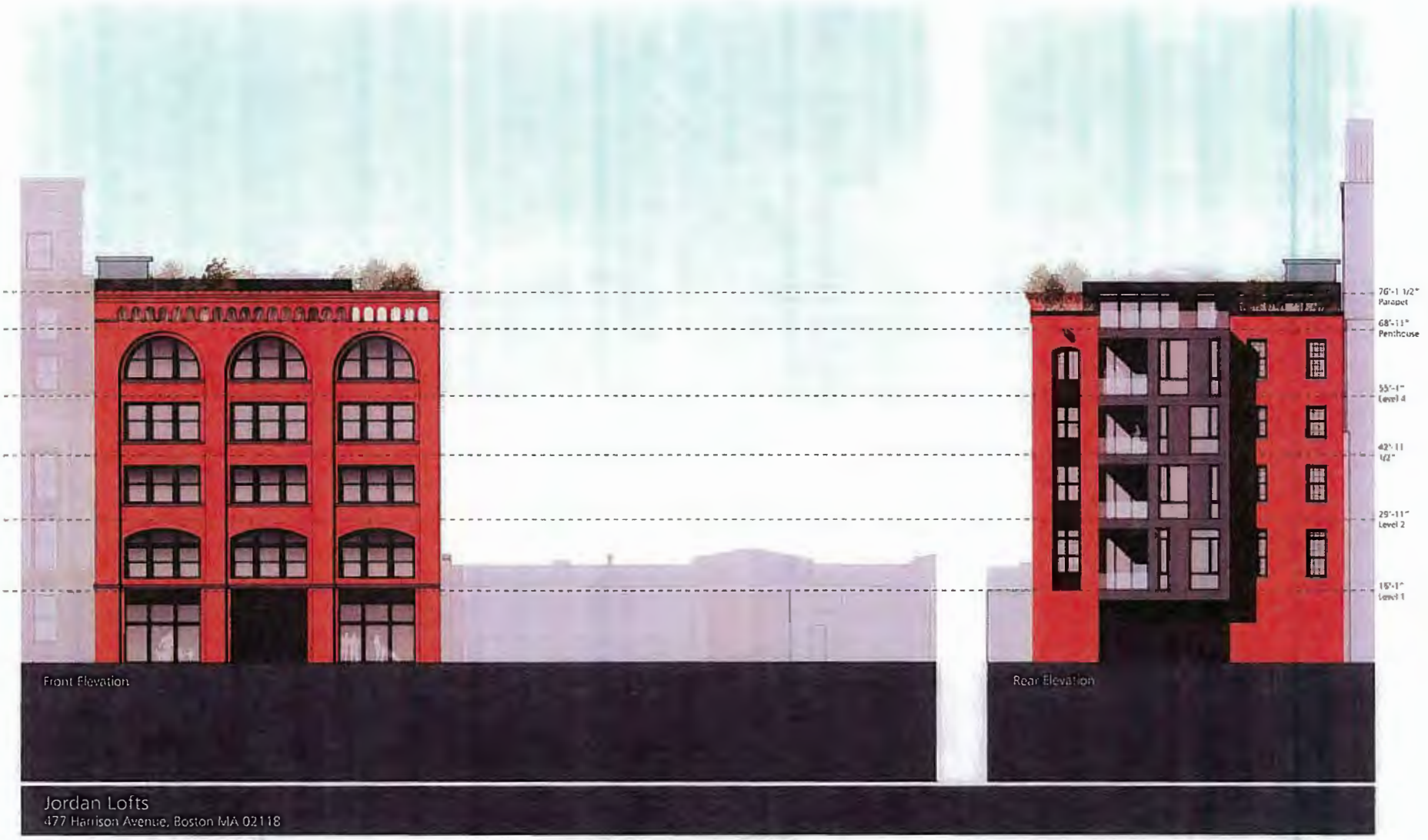
Parking Plan

Jordan Lofts
477 Harrison Avenue, Boston MA 02118

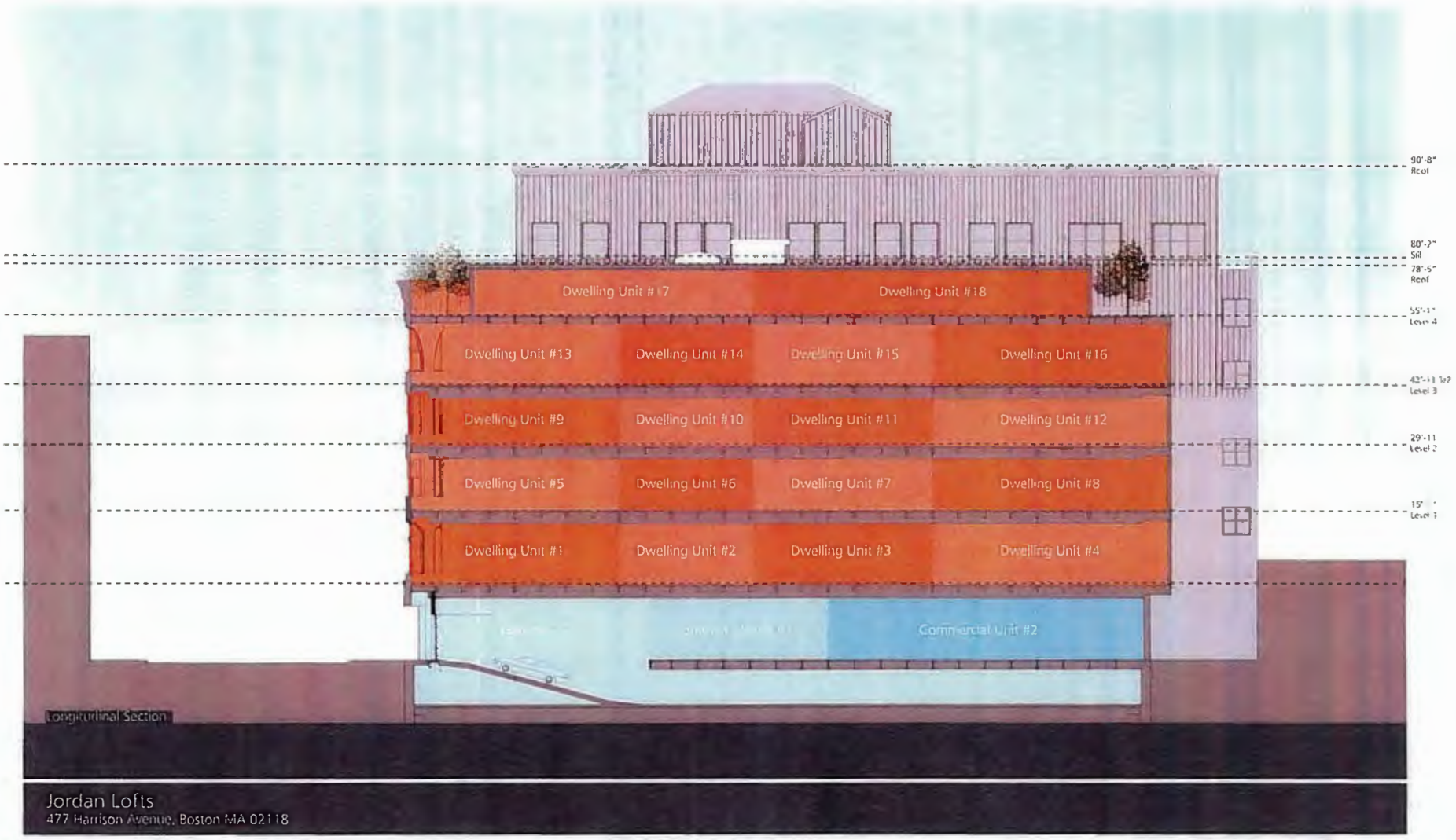
H+A

App.394

477H03195


76'-1 1/2"
Parapet
68'-11"
Penthouse
55'-1"
Level 4
42'-11
1/2"
29'-11"
Level 2
15'-1"
Level 1
Front Elevation
Rear Elevation
Jordan Lofts
477 Harrison Avenue, Boston MA 02118
H+A


90'-8"
Roof
80'-2"
Sill
78'-5"
Roof
68'-11"
Penthouse
55'-1"
Level 4
42'-11
1/2"
29'-11"
Level 2
Leon Electric
15'-1"
Level 1
Side Elevation
Jordan Lofts
477 Harrison Avenue, Boston MA 02118
H+A


90'-8"
Roof
80'-2"
Sill
78'-5"
Roof
55'-1"
Level 4
42'-11 1/2
Level 3
29'-11
Level 2
15'
Level 1
Dwelling Unit #17
Dwelling Unit #18
Dwelling Unit #13
Dwelling Unit #14
Dwelling Unit #15
Dwelling Unit #16
Dwelling Unit #9
Dwelling Unit #10
Dwelling Unit #11
Dwelling Unit #12
Dwelling Unit #5
Dwelling Unit #6
Dwelling Unit #7
Dwelling Unit #8
Dwelling Unit #1
Dwelling Unit #2
Dwelling Unit #3
Dwelling Unit #4
Commercial Unit #2
Longitudinal Section
Jordan Lofts
477 Harrison Avenue, Boston MA 02118
H+A



Existing Conditions

Jordan Lofts
477 Harrison Avenue, Boston MA 02118

H+A

EXHIBIT
129

City of Boston
Board of Appeal

Inspectional Services Department
1010 Massachusetts Avenue, 4th Fl.
Boston, MA 02118
617-635-4775

Members

Christine Araujo - Secretary
Bruce Bickerstaff
Angelo Buonopane
Peter Chin
Michael Monahan
Anthony Pisani, AIA
Robert Shortsleeve - Chairman

NOTICE OF DECISION
BZC -31857
PERMIT # ALT118631
APPEAL SUSTAINED
WITH PROVISOS

In reference to appeal of

Pergola Nominee Trust

concerning premises

477-481 Harrison Avenue, Ward 3

to vary the application of the Zoning Act, Ch. 665, Acts of 1956, as amended, in this specific case, I beg to advise that the petition has been granted with provisos.

Decision has been filed in the office of the Commissioner of the Inspectional Services Department, 1010 Massachusetts Avenue, fifth floor, Boston, MA 02118, and is open for public inspection. Date of entry of decision in the Inspectional Services Department was August 14, 2012

FOR THE BOARD OF APPEAL

Derric Small
Principal Administrative Assistant

A1057

CITY OF BOSTON

BOARD OF APPEAL

OFFICE OF THE BOARD OF APPEAL

May 22, 2012
DATE

Decision of the Board of Appeal on the Appeal of

Pergola Nominee Trust

to vary the terms of the Boston Zoning Code, under Statute 1956, Chapter 665, as amended, Section 8, at premises:

477-481 Harrison Avenue, Ward 3

in the following respect: Variance & GCOD

Article(s): 64(64-19: Floor Area Ratio & Height Excessive; Usable Open Space & Rear Year Insufficient)
64(64-34) 32(32-9)

Change the legal occupancy from furniture manufacturing / repair to eighteen (18) residential units, two commercial spaces, erect a sixth story addition and rear addition, and parking on basement level.

In his formal appeal, the Appellant states briefly in writing the grounds of and the reasons for his appeal from the refusal of the Building Commissioner, as set forth in papers on file numbered BZC-31857 made a part of this record.

In conformity with the law, the Board mailed reasonable notice of the public hearing to the petitioner and to the owners of all property deemed by the Board to be affected thereby, as they appeared on the then most recent local tax lists, which notice of public hearing was duly advertised in a daily newspaper published in the City of Boston, namely:

THE BOSTON HERALD on Tuesday, May 1, 2012

The Board took a view of the petitioner's land, examined its location, layout and other characteristics.

The Boston Redevelopment Authority was sent notice of the appeal by the Building Department and the legal required period of time was allotted to enable the BRA to render a recommendation to the Board, as prescribed in the Code.

After hearing all the facts and evidence presented at the public hearing held on Tuesday, May 22, 2012 in accordance with notice and advertisement aforementioned; the Board finds as follows:

The Appellant appeals to be relieved of complying with the aforementioned section of the Boston Zoning Code, all as per Application for Permit ALT118831 and dated February 9, 2012 and plans submitted to the Board at its hearing and now on file in the Building Department.

sh

CITY OF BOSTON
BOARD OF APPEAL
OFFICE OF THE BOARD OF APPEAL

Decision of the Board of Appeal on the Appeal of

477-481 Harrison Avenue, Ward 3
BZC-31857
Date of Hearing: May 22, 2012
Permit: # ALT118831
Page: # 2

This appeal seeks permission to convert an existing industrial warehouse into 18 residential units and 2 commercial units together with accessory parking on the basement level. The proposal is consistent with the Harrison Albany Corridor Strategic Plan, which has been approved by the Boston Zoning Commission and the Board of Directors of the Boston Redevelopment Authority. Specifically, the proposal follows the principles of the SoWa sub-district vision articulated in the Plan which characterizes the area as "a lively and eclectic mix of former industrial loft buildings, many now converted into artists' work space and housing." Further, the vision for the SoWa area provides that "existing historic resources and industrial character should be preserved while fostering a diverse range of uses including housing, commercial, artist space and strategically located retail."

This appeal also seeks to change the occupancy from furniture manufacturing, upholstering and repair to residential and office and retail.

The proposal for 477-481 Harrison Avenue will preserve the historic former Jordan Marsh stables and warehouse by adaptively reusing the building and converting it to residential use. The building has been largely vacant and otherwise underutilized for many decades. The new residential and commercial uses will enhance the neighborhood by increasing the number of residents and activating the street level commercial spaces.

At the hearing, the petitioner stated that the highest and best use for the property is multi-family residential, which is an allowed use in the Neighborhood Development Area [NDA] of the South End under Article 64-17, Table B and Map 1P. Similarly, the commercial uses proposed for the ground floor are allowed uses under Article 64.

The proposed project was the subject of review and approval under Article 80E, Small Project Review, by the Boston Redevelopment Authority. This process included a public meeting on May 1; a 30 day public comment period; and a unanimous vote of approval by the Board of Directors of the Boston Redevelopment Authority on May 15, 2012, which included a recommendation that the requested zoning relief be approved.

The proposal seeks relief from the Boston Zoning Code as follows: under Article 64-19, floor area ratio excessive [the proposed penthouse addition increases the floor area ratio of the existing building]; usable open space insufficient; height excessive [the proposed

CITY OF BOSTON
BOARD OF APPEAL
OFFICE OF THE BOARD OF APPEAL

Decision of the Board of Appeal on the Appeal of

477-481 Harrison Avenue, Ward 3
BZC-31857
Date of Hearing: May 22, 2012
Permit: # ALT118831
Page: # 3

penthouse addition adds 2 feet, 3 ½ inches to the maximum building height]; and rear yard insufficient. For these violations set forth in the denial letter dated March 9, 2012, the applicant seeks variances from the provisions of the zoning code.

At the Board of Appeal hearing, the following City and elected officials spoke in favor of this proposal: John Fitzgerald, Project Manager from the Boston Redevelopment Authority; the Mayor's Office of Neighborhood Services South End liaison; City Councilor at Large John Connolly and City Councilor at Large Ayanna Pressley. Additionally, representatives of the carpenter's and electrical workers' unions spoke in favor of the proposal.

The Board of Appeal finds that all of the following conditions are met justifying the granting of the requested variances:

(a) That there are special circumstances or conditions, fully described in these findings, applying to the land or structure for which the variances are sought (such as, but not limited to, the exceptional narrowness, shallowness or shape of the lot, or exceptional topographical conditions thereof), which circumstances or conditions are peculiar to such land or structure but not the neighborhood, and that said circumstances or conditions are such that the application of the provisions of this Code would deprive the appellant of the reasonable use of such land or structure. Specifically, that the lot size is 9,735 square feet and the building footprint occupies 8,725 square feet; and

(b) That for reasons of practical difficulty and demonstrable and substantial hardship fully described in the findings, the granting of the variances for excessive floor area ratio [FAR], usable open space, height and rear yard are necessary for the reasonable use of the land or structure and that the variances as granted by the Board are the minimum variances that will accomplish this purpose; and

(c) That the granting of the variances will be in harmony with the general purposes and intent of this Code and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

CITY OF BOSTON
BOARD OF APPEAL
OFFICE OF THE BOARD OF APPEAL

Decision of the Board of Appeal on the Appeal of

477-481 Harrison Avenue, Ward 3
BZC-31857
Date of Hearing: May 22, 2012
Permit: # ALT118831
Page: # 4

In determining its findings, the Board of Appeal has taken into account: (1) the number of persons residing or working upon such land or in such structure; (2) the character and use of adjoining lots and those in the neighborhood; and (3) traffic conditions in the neighborhood.

The Board of Appeal makes the following findings on the conditional use permits:

a) The specific site is an appropriate location for such use;
b) The use will not adversely affect the neighborhood;
c) There will be no serious hazard to vehicles or pedestrians from the use;
d) No nuisance will be created by the use; and
e) Adequate and appropriate facilities will be provided for the proper operation of the use.

Pursuant to Section 32-5 of Article 32 of the Boston Zoning Code, the Board is of the opinion and finds that all of the conditions for the grant of a conditional use permit have been met. Specifically, the Board finds that the Proposed Project complies with the following standards as set forth in Section 32-6, applicable to Groundwater Conservation Overlay Districts, in addition to the standards set forth in Article 6 of the Boston Zoning Code:

(a) The Proposed Project promotes infiltration of rainwater into the ground by capturing within a suitably-designed system a volume of rainfall on the lot equivalent to no less than 1.0 inches across that portion of the surface area of the lot to be occupied by the Proposed Project (or, in the case of a Proposed Project for a Substantial Rehabilitation, the lot area occupied by the structure to be Substantially Rehabilitated); and

(b) The Proposed Project will result in no negative impact on groundwater levels within the lot in question or adjacent lots, subject to the terms of any (I) dewatering permit or (ii) cooperation agreement entered into by the Proponent and the Boston Redevelopment Authority, to the extent that such agreement provides standards for groundwater protection during construction.

CITY OF BOSTON

BOARD OF APPEAL

OFFICE OF THE BOARD OF APPEAL

Decision of the Board of Appeal on the Appeal of

477-481 Harrison Avenue, Ward 3
BZC-31857
Date of Hearing: May 22, 2012
Permit: # ALT118831
Page: # 5

The Board is of the opinion that all conditions required for the granting of a Variance under Article 7, Section 7-3, and a Permit under Article 32, Section 32-6 of the Zoning Code have been met and that the varying of the terms of the Zoning Code as outlined above will not conflict with the intent and spirit of the Zoning Code.

Pursuant to Article 64-34, the restricted roof structure regulations, the Board has determined that the penthouse addition does not have the potential to damage the uniformity of height or the architectural character of the immediate vicinity.

CITY OF BOSTON

BOARD OF APPEAL

OFFICE OF THE BOARD OF APPEAL

Decision of the Board of Appeal on the Appeal of

477-481 Harrison Avenue, Ward 3
BZC-31857
Date of Hearing: May 22, 2012
Permit: # ALT118831
Page: # 6

Therefore, acting under its discretionary power, the Board (the members and/or substitute members sitting on this appeal) unanimously voted to grant the requested variances and conditional use permits as described above, annuls the refusal of the Building Commissioner and orders him to grant a permit, in accordance with this decision with the following proviso(s), which if not complied with, shall render this decision null and void.

APPROVED AS TO FORM:

Assistant Corporation Counsel

PROVISOS:
1. Continuing BRA Design Review.

SIGNED JUL 24 2012

CHRISTINE ARAUJO-SECRETARY

ANGELO BUONOPANE

PETER CHIN

BRUCE BICKERSTAFF

MICHAEL MONAHAN

ANTHONY PISANI, AIA

ROBERT SHORTSLEEVE-CHAIRMAN

A True Copy;
Attest

DERRIC SMALL
Principal Administrative Asst.



COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPT.
CIVIL ACTION NO.

12-3241 C

JACE BOSTON, LLC,
Plaintiff,

v.

BOARD OF APPEAL OF THE CITY OF BOSTON; VINCENT M. PERGOLA and JOSEPH J. PERGOLA, in their capacity as trustees of PERGOLA NOMINEE TRUST; HOLLAND DEVELOPMENT, LLC; and 477 HARRISON AVE., LLC,
Defendants.



COMPLAINT

Introduction

1. Plaintiff JACE Boston, LLC ("JACE") appeals from a decision of the Board of Appeal of the City of Boston (the "Board of Appeal") granting the defendant Vincent M. Pergola and Joseph J. Pergola, in their capacity as trustees of Pergola Nominee Trust ("Pergola") and Holland Development, LLC ("Holland Development") variances from floor area ratio, height, open space and rear yard requirements of the Boston Zoning Code and granting two conditional use permits allowing the creation of 18 residential condominiums, 2 commercial spaces and 20 underground parking spaces in a building located at 477 Harrison Avenue, Boston, MA that abuts plaintiff's real estate.

2. The decision of the Board of Appeal is in error procedurally as the decision of the Board of Appeal failed to contain findings required by St. 1956, c. 665, § 8 and Boston Zoning Code § 7-3 showing that Pergola and Holland Development satisfied the requirements for issuance of the variances as set forth in St. 1956, c. 665, § 9 and Boston Zoning Code § 7-3. Copies of St. 1956, c. 665, § 8 and Boston Zoning Code §7-3 as appearing on the Boston Redevelopment Authority's website are attached as **Exhibits A** and **B**, respectively. Instead of the statutorily required findings, the decision of the Board of Appeals only repeated in conclusory fashion the provisions of Boston Zoning Code § 7-3.

3. The decision of the Board of Appeal is in error substantively as Pergola and Holland Development fail to satisfy the requirements for the variances as set forth in St. 1956, c. 665, § 9 and Boston Zoning Code § 7-3. A copy of St. 1956, c.665, § 9 as appearing on the Boston Redevelopment Authority's website is attached as **Exhibit C**.

4. The decision of the Board of Appeal granting a conditional use permit to allow use of a roof top structure for residential condominiums is in error as the conditional use permit is based on the granting of variances for which Pergola and Holland Development do not satisfy the requirements of St. 1956, c. 665 and the Boston Zoning Code.

5. The Board of Appeal's decision granting the variances and conditional use permit constitutes an error of law, an abuse of discretion, and is arbitrary and capricious and should be set aside and annulled.

PARTIES

6. Plaintiff JACE is a limited liability company with a usual place of business at 1234 Washington Street, Boston, Suffolk County, Massachusetts.

7. Defendant Board of Appeal is established by St. 1956, c. 665, § 8 with a usual places of business at 1010 Massachusetts Avenue, Boston, Suffolk County, Massachusetts and at Boston City Hall, Boston, Suffolk County, Massachusetts.

8. Defendant Vincent M. Pergola is a trustee of Pergola Nominee Trust ("Pergola"); he has a usual place of business and a usual place of residence at 185 Washington Street, Wellesley, Middlesex County, Massachusetts.

9. Defendant Joseph J. Pergola is a trustee of Pergola Nominee Trust ("Pergola") and has a usual place of business and a usual place of residence at 467 Lakeside Circle, Sunrise, Florida 33326-4104.

10. Defendant Holland Development is a limited liability company with a usual place of business at 1126 Main Street, Weymouth, MA 02190.

11. Defendant 477 Harrison Avenue, LLC is a limited liability company with a usual place of business at 1126 Main Street, Weymouth, MA 02190. The manager of 477 Harrison Avenue, LLC is Holland Development.

STATEMENT OF FACTS

The Defendant Pergola's Property

12. At the time the variances were sought, Defendant Pergola owned the real estate located at 477-481 Harrison Avenue in Boston, Massachusetts ("Pergola's Property"). On or about July 30, 2012, Pergola sold Pergola's Property to 477 Harrison Avenue, LLC for $6,350,000.

13. Pergola's Property consists of approximately 9,735 square feet of land improved by a five story brick building with a footprint of approximately 8,725 square feet and a gross floor area of 46,050 square feet.

14. Pergola's Property is located approximately in the center of the block on Harrison Avenue between Perry Street and Savoy Street. Copies of the City of Boston's Assessor's maps showing the location of the Plaintiff's property and the Pergola Property are attached as **Exhibit D**.

15. Pergola's Property is a rectangular shaped lot with approximately 62.73 feet of frontage on Harrison Avenue, side lot lines approximately 147 feet long and 170.99 feet long and a rear lot line approximately 61.18 feet long.

16. Pergola's Property abuts the Plaintiff's property along the entire length of the 170.99 foot side lot line and on the entire length of the 61.18 foot rear lot line. *See* **Exhibit D**.

17. Facing Pergola's Property from Harrison Avenue, the right side of Pergola's building is built to the Property line shared with Plaintiff JACE and abuts JACE's building. Two photographs showing Pergola's building abutting Plaintiff's building are attached as **Exhibit E** and **F**. The side of Pergola's building abutting Plaintiff's property consists of a five story brick wall with no windows. Photographs showing the brick wall of Pergola's building are attached as **Exhibits G, H,** and **I**.

18. Pergola's Property along the side lot line that abuts Plaintiff's Property is subject to a party wall agreement for the benefit of Plaintiff's Property.

19. Again, facing Pergola's Property from Harrison Avenue, the left side of Pergola's building is built to the Property line and abuts an adjoining brick building that reaches to the top of Pergola's building.

20. On information and belief, the occupancy use for Pergola's Property was and had been for more than thirty years "furniture manufacturing, upholstering and repair." On information and belief, until July, 2012, Pergola's Property was occupied by Decore Upholstering Company, Inc., whose president is Vincent M. Pergola, who is also one of the trustees of Defendant Pergola.

Plaintiff's Property

21. Plaintiff owns the real estate located at 1234 Washington Street, Boston, Massachusetts, which consists of approximately 61,000 square feet of land improved by a reinforced concrete building. The building occupies substantially all of the land except for a yard area fronting on Savoy Street.

22. Plaintiff's real estate has frontage on Washington Street between Savoy and Perry Street, frontage on Perry Street for the entire length of Perry Street between Washington Street and Harrison Avenue, frontage on Harrison Avenue from the corner of Perry Street and Harrison Avenue to the Pergola building and frontage on Savoy Street between Washington Street and Harrison Avenue. *See* **Exhibit D**, City of Boston Assessor's Map of 1234 Washington Street, Boston, MA.

23. As noted above, Plaintiff's real estate abuts Pergola's Property on two sides: the entire 170.99 foot length of the one side of Pergola's Property and the entire 61.18 foot rear property line of Pergola's Property. *See* **Exhibit D**.

24. The portion of the Plaintiff's property fronting on Washington Street is leased for commercial purposes including a doctor's office, temporary employment agency, a furniture store, a sandwich shop, a sign company, and two barbershops. The remainder of the property is used for manufacturing activities by E.G. Leon & Co., Inc. and American Crane and Hoist, Corp. The Plaintiff's property has been used in the same or a similar manner since about 1975 and, upon information and belief, has been similarly used before that.

25. Plaintiff's real estate is a prime location for redevelopment including redevelopment into mixed used residential, retail and office space. Plaintiff is investigating the re-development of its property for mixed use residential, retail and/or office space.

Holland Development's Proposal
to Change the Use of and Expand Pergola's Property

26. Holland Development proposes to change the use of Pergola's Property from furniture manufacturing, upholstering and repair to 18 residential condominiums, 2 commercial condominiums and twenty underground parking spaces.

27. Eight of the newly created residential condominiums would be created along the brick side wall of the Pergola building that abuts Plaintiff's property in locations which presently have no windows.

28. To provide windows for the eight new units configured by Holland Development which otherwise would be without windows, Holland Development proposes to penetrate the brick wall of the Pergola building that runs the length of the property line between Pergola's Property and Plaintiff's Property. *See* **Exhibits E-I** (showing the brick wall of Pergola's Property and its relation to Plaintiff's property. The

only windows for these eight condominium units would be along, but slightly recessed, from the property line between the Pergola Property and Plaintiff's property.

29. Holland Development also proposes to enlarge the building and materially increase the height of the building above the zoning height limit of height of 70 feet by adding an additional floor with two roof top penthouse condominiums. The only windows for several of the rooms of the penthouse condominiums would be along the property line with Plaintiff's property and would be set back from the Plaintiff's property line by approximately 10 feet.

30. Furthermore, the bedroom window in eight other residential condominiums may not conform to the requirements of the building code.

31. Holland Development further proposes to expand the building by extending the rear wall of the building 3.5 feet to 4.0 feet into the rear yard setback.

32. Holland Development further proposes to enlarge the building by creating a 20 car underground parking garage in the Pergola building that initially would be accessed from Harrison Avenue through the center of the Pergola building.

33. Holland Development made a presentation to Old Dover Neighborhood Association on the development of the Pergola Property that showed a street running on Plaintiff's property abutting Pergola's Property. The proposed street would deprive plaintiff of its property and appeared to be designed to (a) protect the access to light, air and views for the new residential condominiums units, the windows of which would be a mere six feet from plaintiff's property line; and (b) allow Holland Development to access the parking garage on the Pergola Property from Plaintiff's property. This would allow Holland Development to add a third commercial unit in the front of the Pergola Property

on Harrison Avenue where the parking entrance is currently located on the proposed plan. Upon information and belief, Holland Development's plan for the first floor of the Pergola building is designed to facilitate the conversion of the parking entrance to the rear of the Pergola Property by a road through Plaintiff's property. Holland Development made a presentation to Plaintiff similar to the presentation made to Old Dover Neighborhood Association.

34. Plaintiff notified Holland Development, the Boston Redevelopment Authority and the Board of Appeal of Plaintiff's objections to Holland Development's proposal to develop Pergola's Property into residential condominiums, commercial space and underground parking.

35. Holland Development has not disclosed many aspects of the proposed project that would affect plaintiff and its property including, but not limited to:

A. The location of the vents for the basement garage;

B. The location of the generator for the project and the location of any venting for the generator; and

C. The location of trash and garbage storage facilities.

Holland Development's Request for Variances

36. On or about February 12, 2012, Holland Development submitted an application to the City of Boston's Inspectional Services Department for a change of occupancy of the Pergola Property from Furniture Manufacturing/Upholstering/Repair to 18 new residential units, including two new residential units in a new sixth story penthouse addition to the Pergola building, 2 new commercial units, and a 20 car underground parking garage.

37. On March 9, 2012, the Inspectional Services Commissioner denied the request for a change of occupancy on the ground that the change in occupancy would be a violation of the Boston Zoning Code in the following respects:

(A) the Floor Area Ratio is excessive;

(B) the usable open space is insufficient;

(C) the height is excessive;

(D) the rear yard is insufficient,

(E) a conditional use permit was required for the proposed roof top penthouses; and

(F) a conditional use permit was required as the property is in a groundwater conservation overlay district.

A copy of the March 9, 2012 letter from the Inspectional Services Commissioner is attached as **Exhibit J**.

38. On or about March 16, 2012, Holland Development and/or Pergola filed an appeal of the March 9, 2012 decision by the Inspectional Services Commissioner with the Board of Appeal. The appeal identified the applicant as Holland Development, LLC but was signed on behalf of the owner Pergola. A copy of the March 16, 2012 appeal is attached as **Exhibit K**.

39. On or about April 10, 2012, Holland Development made an Application for Small Project Review to the Boston Redevelopment Authority pursuant to Article 80 of the Boston Zoning Code for a project at Pergola's Property that continued to include windows on or near the property line between Pergola's Property and Plaintiff's property.

40. Plaintiff notified Holland Development, the Boston Redevelopment Authority and the Board of Appeal of Plaintiff's objections to Holland Development's proposal to develop Pergola's Property into residential condominiums, commercial space and underground parking.

The Applicable Zoning Provisions

41. The properties of both Plaintiff and Pergola are located in an area zoned as a Neighborhood Development Area of the South End Neighborhood District. A copy of City of Boston Zoning Map 1P, as amended effective February 9, 2012 is attached as **Exhibit L**. Section 64-19 of the Boston Zoning Code sets forth dimensional regulations applicable in Neighborhood Development Areas by reference to Section 64-9, which in turn references Table D. A copy of Boston Zoning Code, Article 64, Table D is attached as **Exhibit M**.

42. The South End Neighborhood District was only recently adopted after community discussions and input as to density, size and nature of development projects in the area.

43. Pergola's Property is subject to, among other provisions, Article 64 of the Boston Zoning Code.

44. The Zoning Code for the City of Boston controls the density, massing and dimensional envelope for buildings in the Neighborhood Development Area of the South End Neighborhood District in several respects, including, among others, the following:

A. the height of a building is limited to 70 feet;

B. the ratio of building gross floor area to land area (the "floor area ratio" or "FAR") is limited to 2.0;

C. there must be at least 200 square feet of open space for each residential unit in the building;

D. there must be a rear yard set back between the building's rear wall and the neighboring property of at least 20 feet;

E. a conditional use permit is required for roof structures that are to be used for human habitation; and

F. a conditional use permit is required for buildings located in a Groundwater Conservation Overlay District.

A copy of Boston Zoning Code, Article 64, Table D is attached as **Exhibit M**. *See* Boston Zoning Code, Article 32 as to the Groundwater Conservation Overlay District.

45. Holland Development's proposed development of the property fails to comply with the limitations of the Zoning Code for the City of Boston in the following respects:

A. the height of the project with the new residential penthouse addition is proposed to be 78 feet, 5 inches and, therefore, exceeds the zoning height limit of 70 feet;

B. the floor area ratio of the building and a new rear addition is 4.73 and therefore exceeds the allowable zoning floor area ratio of 2.0;

C. the project does not provide 200 square feet of open space for each of the 18 new residential units, a total open space requirement of 3,600 square feet as required by the zoning code;

D. the project, with the new rear addition fails to satisfy the Zoning Code minimum rear yard setback requirement of 20 feet;

E. the roof top structures require a conditional use permit; and

F. the property lacks sufficient land for a groundwater recharge system and therefore fails to meet the requirements for a conditional use permit.

46. The Board of Appeal granted the request for variances and conditional use permits and filed its decision with the Inspectional Services Department for the City of Boston on August 14, 2012. A copy of the Board of Appeal decision is attached hereto as **Exhibit N**.

Harm to the Plaintiff

47. The plaintiff is harmed by the excessive density of the project, by the lack of the required rear yard set back, by the excessive height of the project, and by the lack of required open space.

48. The excessive density of the project will increase the number of residential abutters to plaintiff's property and will lead to conflicts between the plaintiff and the new residential abutters. The development of residential condominiums that upon information and belief will range in price from several hundred thousand dollars to two million dollars or more will harm plaintiff's continued use of its property for manufacturing purposes as conflicts will inevitably arise between high end residential uses and manufacturing uses.

49. The current uses of Plaintiff's property include manufacturing industrial monorails, cranes, hoists and winches. The excessive density of the Pergola Property will result in increased risk of complaints against Plaintiff regarding the ongoing manufacturing activities conducted on Plaintiff's property, activities that have been conducted there for more than thirty-five years.

50. The excessive density of the Pergola Property project will harm Plaintiff in its ongoing efforts to develop its property. The windows for at least eight of the residential condominiums will be located only approximately six feet from the property line between Pergola's Property and Plaintiff's property. The windows of those units would provide access to light, air and sweeping views of Boston over Plaintiff's Property in its present form and use. However, the development of Plaintiff's Property would result in the new residential abutters facing a brick wall or otherwise having their access to light, air and views of Boston dramatically decreased. The new residential abutters without doubt will be hostile to Plaintiff's redevelopment of its property and will lead to unnecessary litigation over Plaintiff's proposed redevelopment of its property.

51. The excessive density of the proposed project on the Pergola Property will increase the risk of fire on plaintiff's property as a result of the proposal to puncture the brick wall along plaintiff's property line and insert windows and balconies.

52. The excessive density of the proposed project on the Pergola Property, including the creation of two penthouse rooftop structures and the placement of windows only six feet from Plaintiff's Property, harms Plaintiff by creating a risk that an effort will be made to re-zone Plaintiff's Property in an effort to protect the residential abutters' access to light, air and views. The creation, placement, and orientation of sight views over plaintiff's property constitute an effort by Holland Development and/or Pergola to force Plaintiff either (A) to create a street on Plaintiff's property along the property line of the property of the Plaintiff and the Pergola Property or (B) to create a set back on Plaintiff's Property to preserve access to light, air and views of the Pergola Property, both of which harm plaintiff by depriving plaintiff of a portion of its property.

53. Plaintiff is harmed by the grant of the variances for the Pergola Property as the variance from the open space and rear yard requirements result in an overcrowding of plaintiff's property. Plaintiff's ability to develop its property will be adversely affected by the overcrowding of the newly created condominiums on Pergola's Property. Plaintiff's ability to develop its property for residential uses is adversely affected by the lack of rear yard setback on the Pergola Property. Moreover, the lack of the required rear yard on the Pergola Property will result in an attempt to force Plaintiff to set back any residential development farther back from its property than would be required but for the overcrowding caused by the variances grant for the Pergola Property.

54. Plaintiff is harmed by the grant of the variances for the Pergola Property as the variances will result in the creation of an overcrowded underground parking garage that will produce noise, smoke and odors that will impact the Plaintiff's property.

55. Plaintiff is harmed by the excessive density of the project as the increased use of the Pergola's Property will generate significant amounts of trash and garbage and will produce odors and unsightly trash containers that will impact the Plaintiff's property. Neither the Pergola Defendants nor Holland Development has disclosed where the trash will be stored. The plans submitted by Holland Development to the Boston Redevelopment Authority do not disclose any details regarding the location of garbage and trash facilities.

56. Plaintiff is harmed by the excessive density of the project as the plaintiff will be subject to increased noise, increased venting of hot and/or cold air onto plaintiff's property and increased encroachment of the rear yard due to increased mechanical and utility requirements of the project.

57. Plaintiff is harmed by the grant of the variance because it is designed to force the plaintiff to give up rights it has to redevelop its property and has as its goal of forcing the Plaintiff to give up a portion of its property in order to create a street from Harrison Avenue to Washington Street between the Plaintiff's property and the Pergola Property.

58. Plaintiff is harmed by the grant of a variance from the height limits as the variance will allow excessive density and overcrowding of Pergola's Property; the resultant excessive density and overcrowding harms the plaintiff.

CLAIMS FOR RELIEF

COUNT I

(The Board of Appeal Failed to Make the Requisite Findings of Fact)

59. The plaintiff restates and re-alleges as fully set forth the allegations from the paragraphs set forth above.

60. The Board of Appeal's decision granting variances is in error of law, an abuse of discretion, and arbitrary and capricious.

61. Section 7-3 of the Boston Zoning Code provides that the Board of Appeal may grant a variance as follows:

> ". . . only if it finds that all of the following conditions are met:
>
> (a) That there are **special circumstances or conditions, fully described in the findings**, applying to the land or structure for which the variance is sought (such as, but not limited to, the exceptional narrowness, shallowness, or shape of the lot, or exceptional topographical conditions thereof) which circumstances or conditions are peculiar to such land or structure but not

the neighborhood, and that said circumstances or conditions are peculiar to such land or structure but the neighborhood, and that said circumstances or conditions are such that the application of the provisions of this code would deprive the appellant of the reasonable use of such land or structure;

(b) That, for **reasons of practical difficulty and demonstrable and substantial hardship fully described in the findings,** the granting of the variance is necessary for the reasonable use of the land or structure and that the variance as granted by the Board is the minimum variance that will accomplish this purpose;

(c) That the granting of the variance will be in harmony with the general purpose and intent of this code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare; and

(d) That, if the variance is for a Development Impact Project, as defined in Section 8-B-7, the applicant shall have complied with the Development Impact Project Exaction Requirements set forth in section 80B-7.3, except if such variance is for a deviation from said requirements.

In determining its findings, the Board of Appeal shall take into account (1) the number of persons residing or working upon such land or in such structure; (2) the character and use of adjoining lots and those in the neighborhood; and (3) traffic conditions in the neighborhood."
(Emphasis added)

62. The Board of Appeal failed to make, and its decision failed to contain, substantive findings of fact and, instead, its decision only repeated the criteria for a variance contained in the Boston Zoning Code in a conclusory manner and for this reason the decision granting the variance is invalid.

COUNT II

(Pergola and Holland Development Fail to Satisfy the Substantive Requirements for a Variance)

63. The plaintiff restates and re-alleges as fully set forth the allegations from the paragraphs set forth above.

64. The Board of Appeal's decision granting variances is in error of law, an abuse of discretion, and arbitrary and capricious.

65. St. 1956, § 665, § 9, as amended, provides, in part, as follows:

> "[The Board of Appeal] may authorize with respect to a particular parcel of land or to an existing building thereon a variance from the terms of such zoning regulation where, owing to conditions especially affecting such parcel or such building, but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of such zoning regulation would involve substantial hardship to appellant, and where desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent and purpose of such zoning regulation, but not otherwise."

66. Section 7-3 of the Boston Zoning Code provides that the Board of Appeal may grant a variance as follows:

> ". . . only if it finds that all of the following conditions are met:
>
> (a) That there are **special circumstances or conditions, fully described in the findings,** applying to the land or structure for which the variance is sought (such as, but not limited to, the exceptional narrowness, shallowness, or shape of the lot, or exceptional topographical conditions thereof) which circumstances or conditions are peculiar to such land or structure but not the

neighborhood, and that said circumstances or conditions are peculiar to such land or structure but the neighborhood, and that said circumstances or conditions are such that the application of the provisions of this code would deprive the appellant of the reasonable use of such land or structure;

(b) That, for **reasons of practical difficulty and demonstrable and substantial hardship fully described in the findings,** the granting of the variance is necessary for the reasonable use of the land or structure and that the variance as granted by the Board is the minimum variance that will accomplish this purpose;

(c) That the granting of the variance will be in harmony with the general purpose and intent of this code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare; and

(d) That, if the variance is for a Development Impact Project, as defined in Section 8-B-7, the applicant shall have complied with the Development Impact Project Exaction Requirements set forth in section 80B-7.3, except if such variance is for a deviation from said requirements.

In determining its findings, the Board of Appeal shall take into account (1) the number of persons residing or working upon such land or in such structure; (2) the character and use of adjoining lots and those in the neighborhood; and (3) traffic conditions in the neighborhood." (Emphasis added)

67. Neither Holland Development nor Pergola met the requirements for a variance and for this reason the decision of the Board of Appeal granting the variance is invalid and should be reversed.

68. There are no special circumstances or conditions applying to the land or structure for which the variance is sought (such as, but not limited to, the exceptional

narrowness, shallowness, or shape of the lot, or exceptional topographical conditions thereof) which circumstances or conditions are peculiar to such land or structure but not the neighborhood.

69. The Pergola's lot is regularly shaped and improved by a five story brick structure that has been in use for many years.

70. Application of the provisions of Boston Zoning Code would not deprive the appellant of the reasonable use of such land or structure.

71. The Boston Zoning Code was only recently rewritten for this district, after a substantial public process. Granting variances for a project that adds height and density, reduces setbacks, and reduces open space requirements of the Boston Zoning Code in the face of recently enacted neighborhood zoning is arbitrary and capricious and an abuse of discretion.

72. Holland Development and Pergola have not shown that for reasons of practical difficulty and demonstrable and substantial hardship, the granting of the numerous variances is necessary for the reasonable use of the land or structure and that the variances as granted by the Board of Appeal are the minimum variances that will accomplish this purpose. The request for the variances arises from the new zoning violations created by the aggressive increases in height and density, reduction of setbacks, and open space requirements proposed by Holland Development.

73. The variances are designed to maximize the profits for Holland Development. The variances are not the minimum variances required to allow reasonable use of the property. *See* Boston Zoning Code, § 7-3 (requiring that variances be the "minimum variance" necessary for the "reasonable use of the land or structure").

74. The granting of the variances is not in harmony with the general purpose and intent of the Boston Zoning Code, and will be injurious to the neighborhood and/or otherwise detrimental to the public welfare

75. The sidewall of Pergola's Property that abuts Plaintiff's Property is built to the property line. This sidewall is completely bricked over and has no windows. *See* **Exhibits G, H,** and **I**.

76. Holland Development proposes to create new window penetrations in the sidewall of the Pergola building to enable Holland to shoehorn additional residential units into newly created windowless space. The windows would look over the roof of plaintiff's present property, which is a single story building.

77. The Plaintiff's ability to develop its Property in the future is adversely affected by the placement of windows at the property line that overlook Plaintiff's Property. When Plaintiff develops its Property, the placement of the windows would mean either that a wall erected along the property line but extending vertically above the current first floor would block the windows that Holland Development proposes to install or, alternatively, would require that Plaintiff set back its building from the side property line depriving Plaintiff of valuable development opportunities.

78. In the event Plaintiff sought to build vertically above the existing wall, Plaintiff will face the prospect of objections from, and litigation with, the occupants of the condominium units in Pergola's building that will have their windows blocked. Alternatively, if the Plaintiff erects a building set back from the Pergola's building, Plaintiff will be surrendering valuable land that could be built upon and, may in any

event, face objections and litigation from the abutters that the set back is insufficient to protect their interests.

79. The increase in density of the Holland project adversely affects the value of Plaintiff's Property and adversely affects Plaintiff's ability to develop its Property.

80. The failure of the Holland Development's project to meet the requirement of the Zoning Code results from the Holland Development's proposal to maximize new residential units and it will overload open space and existing buffers. Moreover, the resulting increased density and use of the Holland project will adversely affect Plaintiff's ability to develop its Property and will excessively increase the noise, congestion and traffic in the area.

81. The height of the Holland project materially exceeds the allowed limit under the Zoning Code as a result of the proposed new residential penthouses. The new roof top structures will further add to the excessive density and overly intensive use of the Holland project. The increased density will adversely affect Plaintiff's ability to develop its Property.

82. The rear yard of the Holland project also fails to meet the requirements of the Boston Zoning Code as a result of a new rear addition proposed by Holland. The failure to meet the rear yard requirements of the Zoning Code adversely affects Plaintiff.

83. The rear yard requirement is intended to provide a buffer between Plaintiff's Property and Pergola's Property. The variance would reduce the required buffer in order to allow Holland Development to expand the building on the Pergola Property and would adversely affect plaintiff.

84. The granting of the variances is not required to enable the reasonable use of the Pergola Property. Application of the Boston Zoning Code without providing the requested variances would not deprive Holland Development and 477 Harrison Ave., LLC of the reasonable use of the land and structure.

85. The granting of the variances is not in harmony with the general purpose and intent of the Boston Zoning Code and will be injurious to the neighborhood and detrimental to the public welfare.

86. The Board of Appeal's decision is in error of law, an abuse of discretion, and arbitrary and capricious as Pergola does not satisfy the substantive requirements for the numerous variances granted.

COUNT III

(Pergola and Holland Development Fail to Satisfy the Requirements for a Conditional Use Permit for the Roof Top Structures)

87. The plaintiff restates and re-alleges as fully set forth the allegations from the paragraphs set forth above.

88. The grant of a conditional use permit for the roof top condominium units depends on the grant of the variances at issue in this case. As the Board of Appeal's decision granting variances to Pergola and Holland Development is in error, both procedurally and substantively, as set forth in Counts I and II above, the grant of the conditional use permit for a roof top structure for human occupancy is in error of law, an abuse of discretion, and arbitrary and capricious and should be reversed.

Wherefore, the plaintiff JACE Boston, LLC requests that the Court grant it the following relief:

1. Reverse and annul the decision of the Board of Appeal granting variances and conditional use permit to the defendants Holland Development, LLC and Vincent M. Pergola and Joseph J. Pergola, as trustees of Pergola Nominee Trust;

2. award the Plaintiff its costs; and

3. grant Plaintiff such other and different relief to which it may be entitled.

Respectfully submitted,

JACE BOSTON, LLC
by its attorneys,

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John D. Stuebing (BBO# 483800)
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Dated: August 29, 2012

EXHIBIT
134

39

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPT.
CIVIL ACTION NO. 2012-03241-C

JACE BOSTON, LLC,
Plaintiff,

v.

BOARD OF APPEAL OF THE CITY OF BOSTON; VINCENT M. PERGOLA and JOSEPH J. PERGOLA, in their capacity as trustees of PERGOLA NOMINEE TRUST; HOLLAND DEVELOPMENT, LLC; and 477 HARRISON AVE., LLC,
Defendants.

2012 OCT -7 PM 2:02

AGREEMENT FOR JUDGMENT

The parties hereby agree to the entry of judgment as follows:

1. Subject to the reservation of rights contained in paragraphs 2, 3, 4 and 5 below, as a result of abandoning building permit application number ALT11831, Vincent M. Pergola and Joseph J. Pergola, in their capacity as trustees of Pergola Nominee Trust, Holland Development, LLC and 477 Harrison Ave., LLC, for themselves and their respective successors and assigns (individually and collectively "Holland"), hereby expressly and irrevocably waive, abandon, forfeit, forego and release, all variances, conditional use permissions and any and all other rights and relief granted by or under the Decision of the Board of Appeal of the City of Boston dated July 24, 2012, a copy of which is attached hereto as **Exhibit A**, in regard to 477-481 Harrison Avenue, Boston, Massachusetts, Ward 3, BZC-31857, Permit # ALT118831 (the "ZBA Decision"). As a result of such irrevocable waiver and abandonment, the ZBA Decision, including all rights and relief granted thereby, is hereby vacated and is and shall be of no force or effect.

Notice Sent 11-8-13
MSF
JDS
KQC
JGFR.
ML
AEG

2. Holland reserves the right to seek at any time from the City of Boston Inspectional Services Department and/or the Boston Redevelopment

JUDGMENT ENTERED ON DOCKET 11-8 2013
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. [illegible]
AND NOTICE SENT TO PARTIES PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

Authority, and any other City department or agency with jurisdiction over building proposals in the South End (a) the same relief previously requested and/or (b) any other relief. JACE Boston, LLC for itself and its successors and assigns (individually and collectively "JACE") reserves the right to object and challenge such permit and/or zoning relief (whether it is relief previously requested or any other relief), and reserves all rights of appeal except as stated in Paragraph 6.

3. JACE and Holland each reserve their rights to object to and/or appeal from any pending, issued, or future building permit applications and/or zoning relief except as stated in Paragraph 6.

4. JACE and Holland each also reserve all rights, claims, relief and defenses which have been or may in the future be asserted in the separate pending litigation entitled *JACE Boston, LLC v. Holland Development, LLC and 477 Harrison Ave., LLC*, Civil Action No. 13-2167-H (Suffolk Superior Court), which is not the subject of this Agreement for Judgment.

5. This Agreement for Judgment will have no preclusive effect as to any request by Holland for a building permit pending as of October 9, 2013, any future request by Holland for a building permit and/or zoning relief, and/or any future appeal of any of the foregoing by JACE except as stated in Paragraph 6.

6. JACE hereby expressly and irrevocably waives, abandons, forfeits, forgoes, and releases any right(s) to oppose, object to, or appeal the issuance of an Article 32 Conditional Use Permit for the building permit application currently pending, ALT282744, that is subject to ZBA approval. JACE hereby expressly reserves the right(s) to oppose, object to, and appeal all other portions of building permit application ALT282744.

7. This Judgment is not, and shall not be construed as, a judgment on the merits.

8. Each party to bear his or its own attorneys fees and costs.

9. Each party waives all rights to appeal this Agreement for Judgment.

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JACE BOSTON, LLC
by its attorneys,

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Dated: November 1, 2013

HOLLAND DEVELOPMENT, LLC and
477 HARRISON AVE., LLC,
By its attorneys,

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Dated: November 1, 2013

BOARD OF APPEAL OF THE CITY OF BOSTON,
By its attorney,
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Corporation Counsel,

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Dated: November 7, 2013

VINCENT M. PERGOLA and **JOSEPH J. PERGOLA**, in their capacity as trustees of **PERGOLA NOMINEE TRUST,**
by their attorneys,

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Dated: November 7, 2013

NOTICE

Commonwealth of Massachusetts
County of Suffolk
The Superior Court

34

CIVIL DOCKET# **SUCV2013-02167**

EXHIBIT 135

Jace Boston LLC,
Plaintiff(s)
vs.
Holland Development LLC, 477 Harrison Ave LLC,
Defendant(s)

JUDGMENT ON FINDING OF THE COURT

This action came on for Jury Waive Trial before the Court, Garry V. Inge,, Justice, presiding, and the issues having been duly tried, and finding having been rendered,

It is **ORDERED and ADJUDGED:**

For the foregoing reasons set out in the Findings of Fact, Ruling of Law and Order of Judgment entered by the Court on September 9, 2014. Judgment shall enter for the plaintiff, and a declaration is hereby issued in plaintiff's favor, setting forth that (a) the Indenture and Agreement creates an affirmative easement in favor of the JACE Boston Property; (b)the garage building described in the Indenture and Agreement remains standing on the JACE Boston Property today; (c)JACE Boston, and its successors and assigns, has the right to tie unto and use for support the northeasterly wall of the building located on 477 Harrison Avenue up to two stories or a maximum height of 34 feet measured from the line of the curbstone at the corner of Harrison Avenue and Perry Street as it existed in 1926 i.e.,49.38 feet above Boston City Base; (d)the right of JACE Boston, and that of its successors and assigns, to tie unto and use for support the northeasterly wall of the building located on 477 Harrison Avenue up to a height 0f 34 feet measured from the line of the curbstone at the corner of Harrison Avenue and Perry Street as it existed in 1926 remains in existence, irrespective of whether it is exercised, until such time the building on the JACE Boston Property no longer remains standing; (e) the easement created by the Indenture and Agreement has not been extinguished, whether by abandonment or operation of law; and (f) defendants shall not take any action to demolish the northeasterly wall of the building on 477 Harrison Avenue below 49.38 feet, measured from Boston, City Base.(see Findings of Fact, Ruling of Law and Order of Judgment entered by the Court (Inge,J.,) on September 8, 2014.).

Dated at Boston, Massachusetts this 10th day of September, 2014.

JUDGMENT ENTERED ON DOCKET Sept. 10 2014
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P.58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

By: Lora Goldrick
Assistant Clerk 9/10/14

A TRUE COPY OF JUDGMENT ENTERED ON DOCKET

cvdjudtrip.wpd 4334055 inidoc01 goldrick

NOTICE

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION NO.: 13-2167-H

JACE BOSTON, LLC

v.

477 HARRISON AVENUE, LLC & another[1]

FINDINGS OF FACT, RULINGS OF LAW AND ORDER OF JUDGMENT

INTRODUCTION

The plaintiff, JACE BOSTON LLC (JACE) has brought this action seeking a declaratory statement of its rights under an Indenture and Agreement recorded in the Suffolk Registry of Deeds, to tie unto and obtain support from the wall of a building located in the south end of Boston at 477 Harrison Avenue.

Based on the credible evidence admitted at this jury-waived trial the court makes the following findings of fact.

FINDINGS OF FACT

JACE Boston is a limited liability company managed by Arthur Leon. Since 1975, Arthur Leon and his father, Elias Leon, and then Arthur Leon, individually, and presently JACE Boston, LLC have owned real estate in Boston consisting of an approximately 61,000 square foot lot with frontage on Washington Street, Perry Street, Harrison Avenue and Savoy Street.

In 2012, 477 Harrison Avenue, LLC purchased 477- 481 Harrison Avenue, Boston, MA and the building located on it ("477 Harrison Avenue") and is the current record owner. JACE is

[1]Holland Development, LLC

the owner of an abutting parcel known as 1234 Washington Street. The manager of 477 Harrison Avenue is Holland Development, LLC.

The Indenture and Agreement is dated June 28, 1926 and was recorded on December 28, 1926, in Book 4863, Pages 165-167 of the Suffolk Registry of Deeds. The Indenture and Agreement is by and between Robert Jordan, William O. Taylor and Edward J. McClennen, as trustees under the will of Eben D. Jordan, (the "Jordan Trustees") and Joseph Pearlstein, Joseph A. Levin, David Pearlstein, Harry Zanditon, Isaac Glaser, Nathan Ullian, and Henry I. Morrison as trustees of the Savoy Realty Trust (the "Savoy Trustees").

Under the Indenture and Agreement, the Jordan Trustees granted the Savoy Trustees and their heirs, successors and assigns, "the right and easement, which shall endure so long as the garage building now in process of erection on said land of said 'Trustees of the Savoy Realty Trust' shall stand; to tie unto and to use for support of said garage building the northeasterly wall (including the foundation thereof) of the stable now standing on said land of said 'Jordan Trustees' to a height not exceeding two stories nor more than thirty-four feet above the line of the present curbstone at the westerly corner of Harrison Avenue and Perry Street."

In turn the Savoy Trustees granted, *inter alia*, permission to the Jordan Trustees to continue to use the wall and foundation that was encroaching on the Savoy Trustees' property. [2]

Defendant 477 Harrison Avenue is the successor in interest to the Jordan Trustees. JACE Boston is the successor in interest to the Savoy Trustees.

In 1926, an application for a building permit was submitted to the City of Boston by

---

[2] In splitting up parcels, Jordan's property somehow ended up under Savoy's property leaving Savoy's property, 1234 Washington Street, with only three walls.

Savoy Realty Trust to construct a reinforced concrete building at 1234-1276 Washington Street, including Perry Street, 471 Harrison Avenue and 14 Savoy Street. The building was to be used as a public garage and stores.

On April 12, 1926, zoning approval was issued for the construction of the garage and stores on the property of the Savoy Realty Trust, according to the records of the City of Boston's Inspectional Services Department.

As of April 19, 1926, the 1926 Plans provided for the construction of a five-story building. On May 4, 1926, the City of Boston approved an application to build the concrete caissons for the public garage and stores and on May 6, 1926 pouring concrete for the caissons commenced.

However, as of May 18, 1926, the 1926 Plans had been revised to provide for a single story building. On May 22, 1926, the 1926 Plans to construct the garage and stores were approved and on June 2, 1926 a building permit was issued for the construction of the garage and stores.

The Indenture and Agreement is in the chain of title of both the real estate of 477 Harrison Avenue, LLC located at 477-481 Harrison Avenue and the JACE Boston Property.

The building that is currently located at 477 Harrison Avenue and owned by 477 Harrison Ave., LLC is the "stable now standing on said land of the Jordan Trustees" referenced in the 1926 Indenture and Agreement.

The northeasterly wall of the building on 477 Harrison Avenue that abuts the JACE Boston Property, i.e., the wall that is the subject of the Indenture and Agreement, had been a five-story solid brick wall with no windows for almost 90 years up to 2014. Beams in the building on

JACE Boston's Property are tied into that wall.

477 Harrison Avenue, LLC and Holland Development, LLC are in the process of converting the building at 477 Harrison Avenue from a solely commercial use to mixed use consisting of 12 residential units, 1 commercial space and 20 underground parking spaces. The plans provide for residential units on floors 2-5 of the building at 477 Harrison Avenue to have windows that overlook the JACE Boston Property.

477 Harrison Avenue, LLC intends to demolish the majority of the length of the northeasterly wall on floors 2-5 of the building at 477 Harrison Avenue. The majority of the northeasterly wall on floors 3-5 of the building has already been demolished.

Defendants intend to construct a new wall that will be reconstructed at distances of 5 and 10 feet from the property line in the areas in which the wall is demolished. In locations where there are balconies, the new northeasterly wall will be 10 feet from the property line; where there are no balconies, the new northeasterly wall will be 5 feet from the property line. 477 Harrison Avenue, LLC intends to demolish the majority of the length of the northeasterly wall between approximately 3 feet above the roof of the JACE Boston Property and 49.38 feet above Boston City Base.

The Same Building

The court credits the testimony of Code Consultant and Structural Engineer Norton Remmer who performed an inspection of the building's interior and exterior and opined that based on the fact that the construction and details were identical, many of the dimensions are identical, as is the structure, that the JACE building today is the same building as the one constructed in 1926. Likewise the court credited the testimony of Construction Consultant Evan

Hankin who examined the plans and testified that the structural elements shown in the plans matched up with what exists at the site currently. The court also considered probative on the issue of whether this was the same building, the absence of any demolition permits among the records of the City of Boston's Inspectional Services department that authorized the demolition of the building located at 1234 Washington Street since June 28, 1926,

Furthermore on the issue of harm, the court accepts as credible Mr. Remmer's opinion that the removal of the wall down to the three-foot level would eliminate the ability to tie the beams into the wall, and the testimony of Structural Engineer Evan Hankin that the proposal to take down more of the wall would adversely affect the remaining portion of the wall through a process called elastic rebound.

RULINGS OF LAW

Abandonment

Abandonment is a question of intention. Sindler v. William M. Bailey Co. 348 Mass. 589, 592, citing Desotell v. Szczygiel, 338 Mass. 153, 158. It can be shown by acts indicating an intention never again to make use of the easement in question. Id. The abandonment of an easement could not be shown merely from nonuse by the dominant owners for many years "coupled with their failure to clear the right of way of its natural cover of trees and brush."Id. The existence of a dump located on the way was not shown to interfere with the use of the way or to have such an appearance of permanence as to create a doubt regarding the continued existence of the easement. Id. at 159-160.

An easement is abandoned when its beneficiaries have relinquished their right to use the

easement. Cater v. Bednarek, 462 Mass 523, 529 (2012) citing Restatement (Third) of Property (Servitudes). An easement may be proclaimed abandoned if evidence shows "intention [by the dominant] estate never again to make use of the easement in question." Sindler v. William H. Bailey, Co., 348 Mass. 589, 592 (1965).

The court agrees with the plaintiff that the defendants have failed to meet their burden of showing that JACE and/or its predecessors have pursued any course of action that "conclusively and unequivocally manifest [] either a present intent to relinquish the easement or a purpose inconsistent with its further existence." Lasell College v. Leonard 32 Mass. App. Ct. 383, 390 (1992) quoting Dubinsky v. Cama, 261 Mass. at 57.

Is the Indenture and Agreement Ambiguous?

The issue of whether a contract is ambiguous is a question of law for a court to determine. Berkowitz v. President & Fellows of Harvard College, 58 Mass. App. Ct. 262, 270 (2003). "Genuine ambiguity requires language 'susceptible of more than one meaning [so that] reasonably intelligent persons would differ as to which meaning is the proper one." Basic Tech. Co. v. Amazon.com, Inc., 71 Mass. App. Ct. 29, 36-37 (2008), quoting Quinn v. Mar-Lees Seafood, LLC, 69 Mass. App. Ct. 688, 695 (2007) (alternation in original). A contract is "not ambiguous simply because the parties have developed different interpretations of" its terms. Id. at 36.

Here, both parties contend that the language of the Indenture and Agreement is unambiguous. This appears to be correct. While the parties have different interpretations of the Indenture and Agreement, its plain language does not appear to be susceptible of more than one

meaning. See id. at 36-37.

Interpretation of Indenture and Agreement

"The basic principle governing the interpretation of [easements] is that their meaning, derived from the presumed intent of the grantor, is to be ascertained from the words used in the written instrument, construed when necessary in the light of the attendant circumstances." Sheftel v. Lebel, 44 Mass. App. Ct. 175, 179 (1998); see Patterson v. Paul, 448 Mass. 658, 665 (2007). All of the words and phrases of the easement "should, if possible, be given meaning, and that none should be treated as surplusage if any other construction is rationally possible." Computer Sys. of Am., Inc. v. Western Reserve Life Assurance Co., 19 Mass. App. Ct. 430, 437 (1985).

The plaintiff argues that the Indenture and Agreement allows it, as the successor of the Savoy Trustees, to "tie unto" the defendants' property at 477 Harrison Avenue, which the parties agree is the stable of the Jordan Trustees, up to a maximum height of two stories or thirty four feet from the curbstone so long as the garage building that was in the process of being erected in 1926 is still standing. The plaintiff interprets the easement to mean that as long as the garage in question is standing, the easement permits the garage to tie unto 477 Harrison Avenue up to the maximum allowed height in perpetuity. As such, the plaintiff argues that the easement allows for future expansion of the garage and for the new addition to tie unto the defendants' building up to thirty four feet from the curb. Thus, the plaintiff interprets the referenced thirty four feet to be the scope of the easement so long as the easement is valid.

In contrast, the defendants argue for a more narrow interpretation of the easement. The defendants contend that the easement allowed the garage being constructed in 1926 to tie unto

477 Harrison Avenue up to a maximum elevation of thirty four feet. Once construction was completed, the defendants contend, the right to tie unto 477 Harrison Avenue at a higher elevation ended.

The defendants also interpret the easement's height restriction to describe the maximum height that the garage could tie unto 477 Harrison Avenue at its construction in 1926, and not the scope of the easement. For support, the defendants rely on Johnson v. Kinnicutt, 56 Mass. 153 (1848). The Johnson case concerned the width of an easement over a private way. Id. at 156. The easement in question granted the plaintiff the "right of passing and repassing over the space of twenty feet between the west wall of the store and the eastern line of the . . . granted premises." Id. The Court found that the words "'the space of twenty feet between' . . . [did] not describe the limits of the way granted . . . [but rather, indicated] the grant of a convenient way, within those limits, adapted to the convenient use and enjoyment of the land granted . . . ." Id. at 157. Thus, the Court concluded that the easement granted the plaintiff a convenient way over the area and that the defendant could obstruct portions of the easement so long as the plaintiff retained a convenient passage. See id. Similarly, the defendants argue that the words "a height not exceeding two stories nor more than thirty four feet" merely indicates the grant of the right to tie unto the 477 Harrison Avenue within specified limits.

It is arguable that the defendants' interpretation of the easement is correct. The easement specifically refers to "the garage building now in process of erection." It is thus clear that the garage was in the process of being erected at the time the Indenture and Agreement was drafted. It is conceivable that the parties to the Indenture and Agreement intended to allow the garage to tie unto 477 Harrison Avenue up to a limited elevation, and that once the garage was erected, the

garage could then tie unto 477 Harrison Avenue at that height until it was demolished. Therefore, it could be inferred that the words "the garage building now in process of erection" signal an intent to limit the height of the easement to the elevation of the garage as it existed at its completion in 1926.

Furthermore, if this court were to follow the reasoning of the Court in Johnson, it appears that the language of the Indenture and Agreement that grants the right to tie unto 477 Harrison Avenue "to a height not exceeding two stories nor more than thirty four feet" does not describe the limits of the easement, but rather, describes a grant to tie unto the building within the articulated limits. See id. Contrast New York Cent. R.R. Co. v. Ayer, 239 Mass. 70, 74-76 (1921) (where the easement provided that "a strip of land twenty [20] feet wide on and along the southerly and westerly sides of the granted premises shall be forever kept open for a passageway and for light and air and drainage," the Court concluded that "the words of the grant and reservation import an intent of the parties that the entire passageway and not a convenient part of it shall be subject to an easement"). This supports the defendants' contention that the grantor of the easement in question intended to allow the Savoy Trustees to build a garage in 1926 and tie that garage unto its wall up to thirty four feet from the curb.

However, while the defendants' interpretation is not without merit, the plaintiff likely offers the more sound interpretation of the plain language of the easement. As a preliminary matter, the defendants' predecessor granted the easement, and therefore, its language must be construed against the defendants. See Estes v. DeMello, 61 Mass. App. Ct. 638, 624 (2004) ("[i]t is a rule in the construction of deeds, that the language, being the language of the grantor, is to be construed most strongly against him." [alteration in original]). Here, the plain language of the

Indenture and Agreement expressly granted the Savoy Trustees the right to tie unto 477 Harrison Avenue to a height not exceeding thirty-four feet from the curbstone so long as the garage in question is standing. The easement contains no express time limit as to when the Savoy Trustees, or their successors, had to utilize the easement and there is no express language prohibiting a future addition to the garage. The plaintiff correctly points out that if the parties to the Indenture and Agreement intended to limit the scope of the easement to the height of the garage as constructed in 1926, they could have expressly included such a restriction in the easement. Further, the language "the garage building now in process of erection" can easily be read as identifying the specific garage referenced in the easement. In short, the defendants' interpretation requires the court to read restrictive language into the easement that could have been expressly included but was not.

Moreover, the Johnson case concerned an easement for a convenient right of way, which is distinguishable from the right to tie unto a wall for support. The right to tie unto a wall for support up to a specific height is not as open ended or flexible as the concept of a convenient right of way.

ORDER OF JUDGMENT

For the foregoing reasons, judgment shall enter for the plaintiff, and a declaration is hereby issued in plaintiff's favor, setting forth that (a) the Indenture and Agreement creates an affirmative easement in favor of the JACE Boston Property; (b) the garage building described in the Indenture and Agreement remains standing on the JACE Boston Property today; (c) JACE Boston, and its successors and assigns, has the right to tie unto and use for support the northeasterly wall of the building located on 477 Harrison Avenue up to two stories or a maximum height of 34 feet measured from the line of the curbstone at the corner of Harrison Avenue and Perry Street as it existed in 1926 *i.e.*, 49.38 feet above Boston City Base; (d) the right of JACE Boston, and that of its successors and assigns, to tie unto and use for support the northeasterly wall of the building located on 477 Harrison Avenue up to a height of 34 feet measured from the line of the curbstone at the corner of Harrison Avenue and Perry Street as it existed in 1926 remains in existence, irrespective of whether it is exercised, until such time the building on the JACE Boston Property no longer remains standing; (e) the easement created by the Indenture and Agreement has not been extinguished, whether by abandonment or operation of law; and (f) defendants shall not take any action to demolish the northeasterly wall of the building on 477 Harrison Avenue below 49.38 feet, measured from Boston City Base.

Garry V. Inge, Superior Court Justice

September 8, 2014

EXHIBIT
136

City of Boston
Board of Appeal

Inspectional Services Department
1010 Massachusetts Avenue 4th Floor
Boston, MA 02118
617-635-4775

Members
Christine Araujo – Secretary
Bruce Bickerstaff
Mark Fortune
Peter Chin
Michael Monahan
Anthony Pisani, AIA
Robert Shortsleeve - Chairman

NOTICE OF DECISION
CASE NO. BOA 435779
PERMIT # ALT429735
APPEAL SUSTAINED
WITH PROVISOS

In reference to appeal of

477 Harrison Avenue LLC (by John Holland)

concerning premises

477-481 Harrison Avenue, Ward 3

to vary the application of the Zoning Act, Ch. 665, Acts of 1956, as amended, in this specific case, I beg to advise that the petition has been granted.

Decision has been filed in the office of the Commissioner of the Inspectional Services Department , 1010 Massachusetts Avenue, fifth floor, Boston, MA 02118, and is open for public inspection. Date of entry of this decision in the Inspectional Services Department was 5/12/2015.

FOR THE BOARD OF APPEAL

Derric Small
Principal Administrative Assistant

477H00156

CITY OF BOSTON

BOARD OF APPEAL

OFFICE OF THE BOARD OF APPEAL

March 24, 2015
DATE

Decision of the Board of Appeal on the Appeal of

477 Harrison Avenue, LLC (by John Holland)

to vary the terms of the Boston Zoning Code, under Statute 1956, Chapter 665, as amended, Section 8, at premises:

477-481 Harrison Avenue, Ward 3

For the terms of the Boston Zoning Code (see Acts of 1956, c. 665) in the following respect: Variance

Article(s): 64(64-9) 64(64-19: Floor Area Ratio & Height Excessive) 64(64-34)

Change occupancy to include 3 unit penthouse addition at 477 Harrison Avenue.

In his formal appeal, the Appellant states briefly in writing the grounds of and the reasons for his appeal from the refusal of the Building Commissioner, as set forth in papers on file numbered BOA 435779 and made a part of this record.

In conformity with the law, the Board mailed reasonable notice of the public hearing to the petitioner and to the owners of all property deemed by the Board to be affected thereby, as they appeared on the then most recent local tax lists, which notice of public hearing was duly advertised in a daily newspaper published in the City of Boston, namely:

THE BOSTON HERALD on Tuesday, March 3, 2015

The Board took a view of the petitioner's land, examined its location, layout and other characteristics.

The Boston Redevelopment Authority was sent notice of the appeal by the Building Department and the legal required period of time was allotted to enable the BRA to render a recommendation to the Board, as prescribed in the Code.

After hearing all the facts and evidence presented at the public hearing held on March 25 2015 in accordance with notice and advertisement aforementioned, the Board finds as follows:

The Appellant appeals to be relieved of complying with the aforementioned section of the Boston Zoning Code, all as per Application for Permit# ALT429735and November 24, 2014 plans submitted to the Board at its hearing and now on file in the Building Department.

CITY OF BOSTON

BOARD OF APPEAL

OFFICE OF THE BOARD OF APPEAL

Decision of the Board of Appeal on the Appeal of

477-481 Harrison Ave., Ward 03
BOA 435779
Date of Hearing: March 24, 2015
Permit: # ALT429735
Page: # 2

This appeal seeks permission to construct a three unit residential penthouse addition on the roof of the existing five story building which is currently comprised of commercial space on the first two levels and residential space on the remaining three levels. There is also an existing underground parking garage.

The appeal is necessary as the requested relief requires relief from the terms of the Boston Zoning Code (Code). The specific relief required in furtherance of the proposed project is as follows: a variance for (1) excessive floor area ratio pursuant to Art. 64-19(1); (2) excessive height pursuant to Art. 64-19(1); and (3) insufficient usable open space for each newly created residential dwelling unit pursuant to Art. 64-19, Table F, footnote 3. The relief requested also includes a conditional use permit for a restricted roof structure pursuant to Art. 64-34. The proposed residential use is allowed as of right in the Neighborhood Development Area [NDA] sub-district of the South End Neighborhood District as governed by Art. 64-18, Table B. Accordingly, the relief requested relates solely to the dimensional aspects of the proposed project.

The requested relief will permit construction of three new residential units of much needed residential housing in the City of Boston. The structure which is the subject of this appeal was built for the Jordan Marsh Company. Carriages that delivered the department store's wares were housed on the first two floors. Horses were stabled above on the third and fourth floors. Over time, that use was discontinued and the structure was later used for various light industrial uses such as furniture upholstering. After purchase of the structure by the project proponent in July 2012, the building was the subject of an extensive renovation conducted pursuant to a building permit issued as of right. The renovation included construction of an underground parking garage and conversion of the ground floor and second floor to commercial space. Floors three, four and five were converted to residential dwelling space.

The existing structure sits on a lot of land which is long and narrow, unlike other lots in the block between Savoy and Perry Streets, Harrison Avenue and Washington Streets. The lot is 170.99 feet in length on the northerly side, adjacent to property owned by Jace Boston, LLC; and 147 feet in length on the southerly side, adjacent to property known as the 485 Harrison Avenue Condominium. The lot is approximately 65 feet wide at the front on Harrison Avenue and 61 feet wide at the rear lot line. The total lot area is 9,895 square feet according to the City of Boston Assessing Department.

CITY OF BOSTON
BOARD OF APPEAL
OFFICE OF THE BOARD OF APPEAL

Decision of the Board of Appeal on the Appeal of

477-481 Harrison Ave., Ward 03
BOA 435779
Date of Hearing: March 24, 2015
Permit: # ALT429735
Page: # 3

Due to the landlocked position of this long, narrow structure on Harrison Ave., as shown in the records and maps of the Assessing Department, and the long, narrow floor plates of the existing building, a section of the northeasterly brick wall has been removed, pursuant to a validly issued building permit, and the floor plates on floors three through five set back 5-10' in order to create windows and balconies set back from the zero lot line. Without this newly created 'window well', the long, narrow floor plates of the existing structure would have been ill-suited to residential use. As a result of the cut out and set back of the northeasterly brick wall and floor plates on floors three through five, a significant amount of gross floor area of the structure was lost.

In order to replace the gross floor area which was lost on floors three through five as a result of the cut out to create the window well, the proponent seeks to replace the lost floor area by constructing a modest sized penthouse addition on the roof of the existing structure. The proposed penthouse addition will replace the square footage lost and permit the creation of additional much needed housing in this neighborhood. Parking for the new residents of the new residential units will be provided in the underground parking garage.

The proposed penthouse addition is lower in height than a similar penthouse addition at the immediately adjacent property at 485 Harrison Ave. The proposed penthouse is set back from the front and rear edge of the building, and with respect to the front of the building, is situated behind an existing parapet such that it is virtually not visible from the public way along Harrison Ave. The proposed penthouse requires the minimum variances necessary to accomplish this purpose.

The creation of additional housing by reusing existing loft buildings, such as this property, is consistent with the long range planning for this neighborhood which was conducted by the Boston Redevelopment Authority. The recently adopted Harrison Albany Corridor Strategic Plan, approved the BRA Board, refers to this part of the NDA zoning sub-district as the SOWA sub-area [for South of Washington]. According to the Strategic Plan, "the area is a lively and eclectic mix of former industrial loft buildings, many now converted into artists' work space and housing; as well as galleries, shops and restaurants primarily oriented to Harrison Avenue and East Berkeley Street." The Strategic Plan sets forth the Vision Statement for the SOWA area as follows: "The SOWA sub-area should maintain the feel of a vibrant mixed-use neighborhood. Existing historic resources and industrial character should be preserved while fostering a diverse

CITY OF BOSTON
BOARD OF APPEAL
OFFICE OF THE BOARD OF APPEAL

Decision of the Board of Appeal on the Appeal of

477-481 Harrison Ave., Ward 03
BOA 435779
Date of Hearing: March 24, 2015
Permit: # ALT429735
Page: # 4

range of uses including housing, commercial, artist space and strategically located retail." The proposed penthouse addition to create additional housing in the neighborhood is entirely consistent with the goals of the Strategic Plan.

With respect to the conditional use permit required by Art. 64-34 for the new roof structure, i.e., the penthouse addition, all of the conditions necessary for a conditional use permit required by Article 6 of the Boston Zoning Code have been met. The location of the penthouse addition on Harrison Ave. for residential use is entirely consistent with similar structures nearby, including the immediately adjacent structure at 485 Harrison Ave. The residential use will not adversely affect the neighborhood: to the contrary, the existing neighborhood consists of an eclectic mix of commercial and residential space in loft style buildings which have long since ceased being used for the industrial purposes for which they were built. The immediate neighborhood consists of residential units, art galleries, restaurants, a fitness center, hair salons, and various retail stores – precisely the mix envisioned for the NDA zoning sub-district. The proposed penthouse addition to create three new residential units is entirely consistent with the surrounding neighborhood context and therefore satisfies each of the criteria of Article 6-3(a)-(e), criteria (f) and (g) of Article 6-3 being inapplicable.

Additionally, the upper roof surface of the new penthouse will be 'green-scaped' in order to enhance its appearance as seen from the penthouse units of the abutting property at 485 Harrison Ave. The condensers for the air conditioning units have been aggregated on the roof away from the adjacent property.

For these reasons, the requested relief may be granted in harmony with the general purpose and intent of the Code, specifically, the provisions of Article 64 applicable to the NDA sub-district which is designed to encourage a mix of uses such as proposed for this building, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

At the hearing, a representative of the Mayor's Office of Neighborhood Services, Jordan Deasy the South End liaison; City Council President Bill Linehan; City Councilors At Large Ayanna Pressley, Michelle Wu, Stephen Murphy, and Michael Flaherty, all stood in support of the project. This showing of approval from the community further supports the Board's finding that the requested relief will have no negative impact on the surrounding area, and is in harmony with the general purpose and intent of the Code.

CITY OF BOSTON
BOARD OF APPEAL
OFFICE OF THE BOARD OF APPEAL

Decision of the Board of Appeal on the Appeal of

477-481 Harrison Ave., Ward 03
BOA 435779
Date of Hearing: March 24, 2015
Permit: # ALT429735
Page: # 5

Additionally, the Old Dover Neighborhood Association submitted a letter of support for the project from neighbors and abutters which is on file with the Board. The Old Dover letter of support indicates that the proponent presented the plans for the project to a meeting of the Old Dover Association on March 3, 2015 and that those in attendance unanimously supported the project proposal.

The Board of Appeal finds that all of the following conditions are met:

(a) That there are special circumstances or conditions, fully described in the findings, applying to the land or structure for which the variance is sought (such as, but not limited to, the exceptional narrowness, shallowness or shape of the lot, or exceptional topographical conditions thereof), which circumstances or conditions are peculiar to such land or structure but not the neighborhood, and that said circumstances or conditions are such that the application of the provisions of this Code would deprive the appellant of the reasonable use of such land or structure; and

(b) That for reasons of practical difficulty and demonstrable and substantial hardship fully described in the findings, the granting of the variance is necessary for the reasonable use of the land or structure and that the variance as granted by the Board is the minimum variance that will accomplish this purpose; and

(c) That the granting of the variance will be in harmony with the general purpose and intent of this Code and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

In determining its findings, the Board of Appeal has taken into account: (1) the number of persons residing or working upon such land or in such structure; (2) the character and use of adjoining lots and those in the neighborhood; and (3) traffic conditions in the neighborhood.

The Board is of the opinion that all conditions required for the granting of a variance under Article 7, Section 7-3 of the Zoning Code have been met, and that the varying of the terms of the Zoning Code as outlined above will not conflict with the intent and spirit of the Zoning Code.

CITY OF BOSTON

BOARD OF APPEAL

OFFICE OF THE BOARD OF APPEAL

Decision of the Board of Appeal on the Appeal of

477-481 Harrison Ave., Ward 03
BOA 435779
Date of Hearing: March 24, 2015
Permit: # ALT429735
Page: # 6

Therefore, acting under its discretionary power, the Board (the members and substitute member(s) sitting on this appeal) unanimously voted to grant the requested variance as described above, annuls the refusal of the Building Commissioner and orders him to grant a permit in accordance with this decision, with the following proviso which, if not complied with, shall render this decision null and void.

APPROVED AS TO FORM:

Assistant Corporation Counsel

PROVISOS:
1. Subject to design review by BRA.

MAY 05 2015

SIGNED

CHRISTINE ARAUJO-SECRETARY

MARK FORTUNE

PETER CHIN

BRUCE BICKFORD-STAFF

MARK ERLICH

ANTHONY PISANI-AIA

ROBERT SHORTSLEEVE-CHAIRMAN



COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPT.
CIVIL ACTION NO.

JACE BOSTON, LLC, Plaintiff,	*
v.	*
BOARD OF APPEAL OF THE CITY OF BOSTON; and 477 HARRISON AVE., LLC, Defendants.	*

COMPLAINT

Introduction

1. Plaintiff JACE Boston, LLC ("JACE") appeals from a decision of the Board of Appeal of the City of Boston (the "Board of Appeal") granting variances from floor area ratio and height requirements of the Boston Zoning Code and granting a conditional use permit for 3 rooftop penthouse residential units in a building located at 477 Harrison Avenue, Boston, MA owned by the defendant 477 Harrison Ave., LLC (for ease of reference, 477 Harrison Ave., LLC, whose manager is Holland Development, LLC, is referred to herein as "Holland" and its property as the "Holland Property"). JACE is an abutter to the Holland Property.

2. The Board of Appeal filed its decision with the Commissioner of the Inspectional Services Department for the City of Boston on May 12, 2015. A copy of the Board of Appeal decision is attached hereto as **Exhibit A**.

3. The decision of the Board of Appeal is in error procedurally, as the decision of the Board of Appeal fails to contain the findings required by St. 1956, c. 665, § 8 and Boston Zoning Code §7-3 showing that Holland meets the requirements for issuance of the variances as set forth in St. 1956, c. 665, § 9 and Boston Zoning Code §7-3. Copies of St. 1956, c. 665, §§ 8 and 9 and Boston Zoning Code § 7-3 as appearing on the Boston Redevelopment Authority's website are attached as **Exhibits B, C** and **D,** respectively.

4. The decision of the Board of Appeal is in error substantively, as Holland fails to satisfy the requirements for the variances as set forth in St. 1956, c. 665, § 9 and Boston Zoning Code § 7-3. *See* **Exhibits C** and **D.**

5. The decision of the Board of Appeal granting a conditional use permit to allow use of a rooftop structure for residential condominiums is in error, as the conditional use permit is based on the granting of variances which do not satisfy the requirements of St. 1956, c. 665 and the Boston Zoning Code.

6. The Board of Appeal's decision granting the variances and conditional use permit constitutes an error of law, an abuse of discretion, is arbitrary and capricious, and should be set aside and annulled.

PARTIES

7. Plaintiff JACE is a limited liability company with a usual place of business at 1234 Washington Street, Boston, Suffolk County, Massachusetts.

8. Defendant Board of Appeal is established by St. 1956, c. 665, § 8 with usual place of business at 1010 Massachusetts Avenue, Boston, Suffolk County, Massachusetts, and at Boston City Hall, Boston, Suffolk County, Massachusetts.

9. Defendant Holland is a limited liability company with a usual place of business at 519 Albany Street, Boston, Suffolk County, Massachusetts.

STATEMENT OF FACTS

JACE's Property

10. JACE's property (the "JACE Property") abuts the Holland Property on two sides: the entire 170.99 foot length of the one side of the Holland Property and the entire 61.18 foot rear property line of the Holland Property. *See* **Exhibit E,** City of Boston Assessor's Maps for the JACE Property and for 477 Harrison Avenue. As discussed below, JACE's building shares the northeasterly wall of the building on the Holland Property and JACE has an easement to tie unto and use for support the northeasterly wall of the building on the Holland Property.

11. The JACE Property has frontage on Harrison Avenue from the northeasterly corner of the Holland Property to the corner of Perry Street and Harrison Avenue, frontage on Perry Street for the entire length of Perry Street between Harrison Avenue and Washington Street, frontage on Washington Street between Savoy and Perry Street and frontage on Savoy Street between Washington Street and Harrison Avenue. *See* **Exhibit E.**

12. The JACE Property consists of approximately 61,000 square feet of land improved by a reinforced concrete building. The building occupies substantially all of the land except for a yard area fronting on Savoy Street.

13. The portion of the JACE Property fronting on Washington Street is leased for commercial purposes, including a doctor's office, temporary employment agency, a nail salon, a sandwich shop, a sign company, a restaurant supply store and two

barbershops. The remainder of the property is used for manufacturing activities by E.G. Leon & Co., Inc. and American Crane and Hoist Corp. The JACE Property has been used in the same or a similar manner since about 1975 and, upon information and belief, has been similarly used before that.

The Holland Property

14. The Holland Property is located on Harrison Avenue between Perry Street and Savoy Street in Boston's South End neighborhood. Copies of the City of Boston's Assessor's maps showing the location of the JACE Property and the Holland Property are attached as **Exhibit E.**

15. The Holland Property is a rectangular shaped lot with approximately 62.73 feet of frontage on Harrison Avenue, side lot lines approximately 147 feet long and 170.99 feet long, and a rear lot line approximately 61.18 feet long.

16. The Holland Property abuts the JACE Property along the entire length of the 170.99 foot side lot line and on the entire length of the 61.18 foot rear lot line. *See* **Exhibit E.**

17. The Holland Property consists of approximately 9,735 square feet of land improved by a five-story brick building with a footprint of approximately 9,108 square feet.

18. Facing the Holland Property from Harrison Avenue, the right side of the Holland building is built to the property line and is shared with JACE's building. Two photographs showing Holland's building abutting JACE's building are attached as **Exhibits F** and **G.**

19. A portion of the foundation for the shared wall is on the JACE Property.

The Common Wall and the 1926 Indenture and Agreement

20. Pursuant to a 1926 Indenture and Agreement, recorded at the Registry of Deeds, JACE has an affirmative easement to tie unto and use the northeasterly wall of the Holland Property for support to a height of two stories or 34 feet above the line of the curbstone at the corner of Perry Street and Harrison Avenue, which is 49.38 feet above Boston City Base. A copy of the 1926 Indenture and Agreement is attached as **Exhibit H.**

21. In 2013, JACE filed an action against Holland to declare its rights under the 1926 Indenture and Agreement in a case styled *JACE Boston, LLC v. Holland Development*, Civil Action No. 2013-02167-H (Suffolk Superior Court).

22. On or about September 10, 2014, the Suffolk Superior Court entered a judgment declaring and affirming that JACE has an affirmative easement, which remains in existence, in the northeasterly wall of the building on the Holland Property up to two stories or 34 feet above the line of the curbstone at the corner of Perry Street and Harrison Avenue, or 49.38 feet above Boston City Base, and that no action was to be taken to demolish the northeasterly wall of the building on 477 Harrison Avenue below 49.38 feet measured from Boston City Base. A copy of the Judgment is attached as **Exhibit I.** Holland's appeal from the Judgment of the Superior Court is pending in the Appeals Court.

The Prior Use and the Prior Zoning Appeal

23. For approximately 30 years, from 1982 to 2012, the Holland Property had been used for "furniture manufacturing, upholstering and repair."

24. In 2012, Holland acquired the Holland Property from the former owner with the intent to redevelop the building to residential, commercial and underground parking uses.

25. In 2012, Holland obtained variances from the requirements of the Boston Zoning Code that would allow it to change the use of its building to multi-unit residential housing, including two rooftop penthouses, two commercial spaces, and 20 underground parking spaces (the "2012 Variances").

26. The proposed redevelopment of the Holland Property included the removal of a substantial portion of the wall in which JACE has an affirmative easement under the 1926 Indenture and Agreement.

27. In 2012, JACE appealed the grant of 2012 Variances to Holland in a case styled *JACE Boston, LLC v. Board of Appeal of the City of Boston*, Civil Action No. 2012-032410-C (Suffolk Superior Court) (the "2012 Zoning Action").

28. On or about November 7, 2013, an Agreement for Judgment entered in the 2012 Zoning Action by which Holland waived, abandoned, forfeited, and released the 2012 Variances, while reserving the right to seek the same or other relief in the future. A copy of the Agreement for Judgment is attached as **Exhibit J**.

The Holland Property is being Redeveloped

29. In 2013, Holland was issued a building permit (the "2013 Building Permit") to convert the building on the Holland Property to 12 residential units, 1 commercial space, and underground parking for 16 vehicles. Other building permits were subsequently issued. (The 2013 Building Permit and the subsequently issued building permits are collectively referred to as the "Existing Building Permits").

30. The Existing Building Permits allow Holland to redevelop its building. Construction pursuant to the Existing Building Permits is ongoing. **Exhibit K** is a photograph which depicts the current condition of the Holland Property from Harrison Avenue. **Exhibit L** is two photographs which depict the northeasterly wall of the Holland Property before the redevelopment of the Holland Property. **Exhibit M** is a photograph which depicts a current view of the northeasterly wall of the Holland Property with undisputed portions of the wall removed.

Holland Seeks Variances for 3 Rooftop Penthouses

31. In 2014, Holland proposed a revised redevelopment plan that would, among other things, increase the number of residential units to 15, including 3 penthouse residential units.

32. The Inspectional Services Commissioner denied Holland's request to construct three rooftop residential penthouses on the ground that construction of the penthouses would violate the Boston Zoning Code in the following respects: (a) the Floor Area Ratio is excessive; (b) the Height of the building is excessive and (c) there is insufficient Usable Open Space. A copy of the letter from the Inspectional Services Commissioner is attached as **Exhibit N**.

The Applicable Zoning Requirements

33. The JACE Property and the Holland Property are located in an area zoned as a Neighborhood Development Area of the South End Neighborhood District. A copy of City of Boston Zoning Map 1P, as amended effective February 9, 2012, is attached as **Exhibit O**. Section 64-19 of the Boston Zoning Code sets forth dimensional regulations applicable in Neighborhood Development Areas by reference to Section 64-9, which in

turn references Table D. A copy of Boston Zoning Code, Article 64, Table D is attached as **Exhibit P**.

34. The South End Neighborhood District was adopted after community discussions and input as to density, size and nature of development projects in the area.

35. The Holland Property is subject to, among other provisions, Article 64 of the Boston Zoning Code.

36. The Zoning Code for the City of Boston controls the density, massing and dimensional envelope for buildings in the Neighborhood Development Area of the South End Neighborhood District in several respects, including, among others, the following:

A. the height of a building is limited to 70 feet;

B. the ratio of building gross floor area to land area (the "floor area ratio" or "FAR") is limited to 2.0;

C. there must be at least 200 square feet of open space for each residential unit in the building;

D. there must be a rear yard setback between the building's rear wall and the neighboring property of at least 20 feet; and

E. a conditional use permit is required for roof structures that are to be used for human habitation.

See **Exhibit P**.

37. Holland's proposal to add three rooftop residential penthouses to its property fails to comply with the limitations of the Zoning Code for the City of Boston in the following respects:

the height of the project with the new residential penthouse additions exceeds the zoning height limit of 70 feet;

A. the floor area ratio of the building exceeds the allowable zoning floor area ratio of 2.0;

B. the project does not provide 200 square feet of open space for each of the residential units; and

C. the rooftop structures require a conditional use permit.

38. Holland appealed the denial of a building permit by the Inspectional Services Commissioner to the Board of Appeal.

39. On March 24, 2015, the Board of Appeal held a hearing on Holland's request for variances and conditional use permit. JACE appeared at the hearing through counsel and opposed the request for variances and conditional use permit. The Board of Appeal approved Holland's request for variances and conditional use permit.

40. On May 12, 2015, the decision of the Board of Appeal granting Holland's request for variances and a conditional use permit was entered in the office of the Commissioner of Inspectional Services.

Harm to JACE

41. JACE is harmed by the decision allowing an additional floor on the Holland Property with three penthouses.

42. JACE has an affirmative easement in the northeasterly wall of the Holland Property as a result of the 1926 Indenture and Agreement, which was confirmed by this Court.[1]

43. JACE does not have its own wall where its building is adjacent to the northeasterly wall to the Holland Property. Instead, JACE ties unto and uses the northeasterly wall for support for the building on the JACE Property.

[1] Holland's appeal from the Judgment of this Court regarding the JACE's easement is pending.

44. A portion of the foundation for the northeasterly wall of the Holland Property is located on the JACE Property.

45. Adding an additional floor to the Holland Property increases the load on the northeasterly wall of the Holland Property.

46. As a result, the increased load caused by adding a floor of penthouses to the Holland Property will reduce the load capacity otherwise available to JACE to tie unto such wall for support up to the height of its easement (two stories or 34 feet above the line of the curbstone at the corner of Perry Street and Harrison Avenue, or 49.38 feet above Boston City Base). Therefore, the amount of support available for the JACE Property will be reduced.

47. The additional penthouse level will also increase the exposure of the Holland Property to wind and increase its sail area and the impact of any seismic events by increasing the mass or weight of the building. As a result, adding a floor of penthouses to the Holland Property will increase loads on the northeast wall of the Holland Property from those forces and thus also reduce the capacity otherwise available to JACE to tie unto such wall for support.

48. JACE is harmed by the excessive density of the project, by the excessive height of the project, and by the lack of required open space.

49. The excessive density of the project will increase the number of residential abutters to the JACE Property and will lead to conflicts between JACE, JACE's industrial tenants' operations, and the new residential abutters. The development of residential penthouse condominiums that upon information and belief will each sell for substantially more than one million dollars will harm JACE's continued use of its property for tenant

manufacturing purposes, as conflicts will inevitably arise between high-end residential uses and manufacturing uses.

50. The current uses of the JACE Property include manufacturing industrial monorails, cranes, hoists and winches. The excessive density of the Holland Property will result in increased risk of complaints against JACE regarding the ongoing manufacturing activities conducted on the JACE Property, activities that have been conducted there for more than 35 years.

51. The excessive density and height of the Holland Property will harm any efforts to develop the JACE Property. The windows for one of the rooftop residential condominiums will be located close to the property line between the Holland Property and the JACE Property and would provide access to light, air and sweeping views of Boston over the JACE Property in its present form and use. However, the potential development of the JACE Property would result in one or more of the owners of the penthouses having their access to light, air and views of Boston decreased. The new residential abutters will likely be hostile to JACE's redevelopment of its property and lead to litigation over JACE's proposed redevelopment of its property. JACE will be significantly negatively impacted both in its current uses of its property and its future redevelopment.

52. JACE is harmed by the grant of the variances for the Holland Property as the variance from the open space requirements result in an overcrowding of the JACE Property. JACE's ability to develop its property will be adversely affected by the overcrowding caused by the rooftop penthouses on the Holland Property.

53. JACE is harmed by the excessive density of the project, as the increased use of the Holland Property will generate significant additional amounts of trash and garbage and will produce odors that will impact the JACE Property.

54. JACE is harmed by the excessive density of the project, as JACE will be subject to increased noise and increased venting of hot and/or cold air onto the JACE Property due to increased mechanical and utility requirements of the project. It appears that the location of the HVAC equipment will be on the roof of the proposed penthouses and along the property line of JACE. This will harm JACE.

55. JACE is harmed by the grant of a variance from the height limits, as the variance will allow excessive density and overcrowding of the Holland Property and the immediate area, and will increase the loads on the wall the JACE Property building uses for support. The excessive density, overcrowding and reduction in wall support capacity resulting from the height variance harm JACE.

CLAIMS FOR RELIEF

COUNT I

(The Board of Appeal Failed to Make the Requisite Findings of Fact)

56. JACE restates and re-alleges as fully set forth the allegations from the paragraphs set forth above.

57. The Board of Appeal's decision granting variances constitutes an error of law, an abuse of discretion, and is arbitrary and capricious.

58. Section 7-3 of the Boston Zoning Code provides that the Board of Appeal may grant a variance as follows:

> ". . . only if it finds that all of the following conditions are met:
>
> (a) That there are **special circumstances or conditions, fully described in the findings,** applying to the land or structure for which the variance is sought (such as, but not limited to, the exceptional narrowness, shallowness, or shape of the lot, or exceptional topographical conditions thereof) which circumstances or conditions are peculiar to such land or structure but not the neighborhood, **and that said circumstances or conditions are such that the application of the provisions of this code would deprive the appellant of the reasonable use of such land or structure;**
>
> (b) That, for **reasons of practical difficulty and demonstrable and substantial hardship fully described in the findings,** the granting of the variance is necessary for the reasonable use of the land or structure and that the variance as granted by the Board is the minimum variance that will accomplish this purpose;
>
> (c) That the granting of the variance will be in harmony with the general purpose and intent of this code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare; and
>
> (d) That, if the variance is for a Development Impact Project, as defined in Section 8-B-7, the applicant shall have complied with the Development Impact Project Exaction Requirements set forth in section 80B-7.3, except if such variance is for a deviation from said requirements.
>
> In determining its findings, the Board of Appeal shall take into account (1) the number of persons

> residing or working upon such land or in such structure; (2) the character and use of adjoining lots and those in the neighborhood; and (3) traffic conditions in the neighborhood."
> (Emphasis added)

59. The Board of Appeal failed to make, and its decision failed to contain the required findings of fact and, instead, its decision only repeated the criteria for a variance contained in the Boston Zoning Code in a conclusory manner and for this reason the decision granting the variance is invalid.

COUNT II

(Holland Fails to Satisfy the Substantive Requirements for Variances)

60. JACE restates and re-alleges as fully set forth the allegations from the paragraphs set forth above.

61. The Board of Appeal's decision granting variances constitutes an error of law, an abuse of discretion, and arbitrary and capricious.

62. St. 1956, §665, §9, as amended, provides, in part, that the Board of Appeal may authorize a variance

> "...where, owing to conditions especially affecting such parcel or such building, but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of such zoning regulation would involve substantial hardship to appellant."

63. In addition to finding substantial hardship, the Board of Appeal must find that zoning relief "may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent and purpose of such zoning regulation, but not otherwise."

64. Section 7-3 of the Boston Zoning Code provides that the Board of Appeal may grant a variance as follows:

> ". . . only if it finds that all of the following conditions are met:
>
> (a) That there are **special circumstances or conditions, fully described in the findings,** applying to the land or structure for which the variance is sought (such as, but not limited to, the exceptional narrowness, shallowness, or shape of the lot, or exceptional topographical conditions thereof) which circumstances or conditions are peculiar to such land or structure but not the neighborhood, **and that said circumstances or conditions are such that the application of the provisions of this code would deprive the appellant of the reasonable use of such land or structure**;
>
> (b) That, for **reasons of practical difficulty and demonstrable and substantial hardship fully described in the findings, the granting of the variance is necessary for the reasonable use of the land or structure** and that the variance as granted by the Board is the minimum variance that will accomplish this purpose;
>
> (c) That the granting of the variance will be in harmony with the general purpose and intent of this code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare; and
>
> (d) That, if the variance is for a Development Impact Project, as defined in Section 8-B-7, the applicant shall have complied with the Development Impact Project Exaction Requirements set forth in section 80B-7.3, except if such variance is for a deviation from said requirements.
>
> In determining its findings, the Board of Appeal shall take into account (1) the number of persons

> residing or working upon such land or in such structure; (2) the character and use of adjoining lots and those in the neighborhood; and (3) traffic conditions in the neighborhood." (Emphasis added)

65. Holland does not meet the requirements for a variance, and for this reason the decision of the Board of Appeal granting the variance is invalid and should be reversed.

66. There are no special circumstances or conditions applying to the land or structure for which the variance is sought (such as, but not limited to, the exceptional narrowness, shallowness, or shape of the lot, or exceptional topographical conditions thereof) which circumstances or conditions are peculiar to such land or structure but not the neighborhood.

67. The Holland lot is regularly shaped and improved by a five story brick structure that has been in use for many years. The Holland lot has a similar shape to many lots in the South End neighborhood.

68. The Holland lot is wider than many lots in the South End neighborhood.

69. The South End has scores, if not hundreds, of townhouses which are narrower than the Holland lot.

70. Moreover, there is no substantial hardship to Holland. Pursuant to its Existing Building Permits Holland is redeveloping its property without variances into 12 residential units, 1or more commercial units, and underground parking spaces.

71. Application of the provisions of Boston Zoning Code would not deprive Holland of the reasonable use of such land or structure, as demonstrated by how the

Holland Property is currently being developed under the Existing Building Permits without the need for variances or a conditional use permit.

72. The Boston Zoning Code was rewritten for this district, after a substantial public process. Granting variances for a project that adds height and density, reduces setbacks, and reduces open space requirements of the Boston Zoning Code in the face of enacted neighborhood zoning is arbitrary and capricious and an abuse of discretion.

73. Holland has not shown that for reasons of practical difficulty and demonstrable and substantial hardship, the granting of the variances is necessary for the reasonable use of the land or structure and that the variances as granted by the Board of Appeal are the minimum variances that will accomplish this purpose. Given Holland's redevelopment of the Holland Property via the Existing Building Permits, and the fact that Holland has presumably been able to obtain financing for that redevelopment, Holland has already been able to make reasonable use of the Holland Property. The request for the variances simply arises from a desire to generate additional profits by violating the requirements of the Zoning Code and imposing the costs on its neighboring property owner, JACE.

74. The variances are designed to maximize the profits for Holland. The variances were not required under the Existing Building Permits and are not the minimum variances required to allow reasonable use of the property. *See* Boston Zoning Code, § 7-3 (requiring that variances be the "minimum variance" necessary for the "reasonable use of the land or structure").

75. The granting of the variances is not in harmony with the general purpose and intent of the Boston Zoning Code, and will be injurious to the neighborhood and/or otherwise detrimental to the public welfare.

76. The three new proposed penthouses will increase density and height beyond that allowed by the Zoning Code.

77. The height of the proposed penthouses exceeds the allowed limit under the Zoning Code. The new rooftop structures will further add to the density and intensive use of the Holland Property.

78. The Board of Appeal's decision constitutes an error of law, an abuse of discretion, and is arbitrary and capricious, as Holland does not satisfy the substantive requirements for the numerous variances granted.

COUNT III

(Holland Fails to Satisfy the Requirements for a Conditional Use Permit for the Rooftop Structures)

79. JACE restates and re-alleges as fully set forth the allegations from the paragraphs set forth above.

80. The grant of a conditional use permit for the rooftop condominium units depends on the grant of the variances at issue in this case. As the Board of Appeal's decision granting variances to Holland is in error, both procedurally and substantively, as set forth in Counts I and II above, the grant of the conditional use permit for a rooftop structure for human occupancy is an error of law, an abuse of discretion, is arbitrary and capricious, and should be reversed.

Wherefore, the Plaintiff, JACE Boston, LLC, requests that the Court grant it the following relief:

1. Reverse and annul the decision of the Board of Appeal granting variances and conditional use permit to the defendant 477 Harrison Ave., LLC;

2. award JACE its costs; and

3. grant JACE such other and different relief to which it may be entitled.

Respectfully submitted,

JACE BOSTON, LLC,
By its attorneys,

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John D. Stuebing (BBO# 483800)
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Dated: May 28, 2015

EXHIBIT
138

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 15-1585-H

Notice sent
2/03/17
J. D. S.
T.,B.,H. & F
S. S. N.
R. W. D.,JR
D. LAW.,PC.
A. E. G.

JACE BOSTON, LLC,
Plaintiff,
vs.

BOARD OF APPEAL OF THE CITY OF BOSTON
and 477 HARRISON AVE., LLC,
Defendants.

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(sc)

The defendants, Board of Appeal of the City of Boston (the "Board") and 477 Harrison Ave., LLC ("477 Harrison"), moved for summary judgment on the Complaint filed by the plaintiff, JACE Boston, LLC ("JACE"), appealing the Board's grant of certain zoning variances to 477 Harrison. The Board and 477 Harrison (collectively, the "Defendants") argue that JACE lacks standing to bring this action. The Court heard oral argument on January 3, 2017. For the below reasons, Defendants' motion for summary judgment is ALLOWED.

UNDISPUTED FACTS

The following undisputed facts are drawn from the summary judgment record. 477 Harrison owns the property located at 477-481 Harrison Avenue in the South End section of Boston. (SOF 1; J. App'x Ex. 1, at 15).[1] 477 Harrison purchased the property in 2012 and renovated the five-story structure located on the property shortly thereafter. (SOF 5-6; J. App'x Ex. 17, at 5). As part of the renovations, 477 Harrison converted the first and second floors to commercial space, converted the remaining floors to residential space, and constructed an underground parking garage. (SOF 6; J. App'x Ex. 17, at 5).

[1] "SOF" refers to the Consolidated Statement of Facts. "J. App'x" refers to the Joint Appendix.

JACE owns an abutting property located at 1234 Washington Street. (SOF 7, 9; J. App'x Ex. 5). A large structure totaling around 60,000 square feet is located on JACE's property. (SOF 17; J. App'x Ex. 42, at 3). Within that structure, JACE operates E.G. Leon & Co., Inc. and American Crane and Hoist Corporation. (SOF 20; J. App'x Ex. 42, at 2). E.G. Leon & Co., Inc. is an electrical contractor that conducts machine shop services, while American Crane and Hoist manufactures industrial lifting equipment. (SOF 21-22; J. App'x Ex. 3, at 15-16). JACE also leases a portion of the structure to a number of local businesses. (SOF 27; J. App'x Ex. 3, at 3). Pursuant to an easement granted by 477 Harrison's predecessor in interest, JACE has the right to use a portion of 477 Harrison's northeasterly wall for support. (SOF 68; J. App'x Ex. 38; Ex. 42, at 2; Ex. 60 at 1). JACE's building currently attaches to the northeasterly wall at 20 points, where beams attach to the wall. (Id.)

The parties' properties are located in the Washington Street Neighborhood Development Area ("Washington Street NDA"), which was established by section 64-17 of the Boston Zoning Code.[2] (SOF 38-39; J. App'x Ex. 12, at 6). The Washington Street NDA was "established to serve as a buffer area separating residential areas from industrial areas." (J. App'x Ex. 12, at 6). According to section 64-17, the purpose of the Washington Street NDA is to "promote the siting and design of any new development in a manner that is sensitive to the adjacent residential areas in the South End Neighborhood District and to enhance the Washington Street corridor." (J. App'x Ex. 12, at 6).

---

[2] Article 64 of the Boston Zoning Code governs the South End Section of Boston. According to section 64-1, the purpose of the South End's zoning regulation is "to preserve and enhance the South End neighborhood; to provide housing for individuals and families of all economic levels, age groups and household types; to promote and expand neighborhood educational and cultural facilities; to promote a viable neighborhood economy, and provide for new economies and expansion of job opportunities; to preserve, enhance and create open space; to enhance the appearance of residential, commercial, and industrial areas; to protect the environment and improve the quality of life; to promote the most desirable use of land; and to promote the public safety, health, and welfare of the people of the South End." (J. App'x Ex. 12, at 1).

Due to the nature of the Washington Street NDA, a number of different uses are allowed within the neighborhood. (J. App'x Ex. 12, at 6; Ex. 14, at 48-63). For example, multifamily residential use is allowed as long as a number of dimensional, structural, and open space requirements are met. (J. App'x Ex. 12, at 3-4, 6). In addition, certain banking, community, office, and retail uses are also permitted. (J. App'x Ex. 12, at 6; Ex. 14, at 48-58). However, general and light manufacturing, certain industrial activities, and the outdoor storage of junk and scrap material are forbidden. (SOF 44-45; J. App'x Ex. 12, at 3; Ex. 14, at 53-45, 60). As such, JACE's use of its property is non-conforming. (SOF 48; J. App'x Ex. 13, at 3-4). JACE, however, qualifies as a pre-existing non-conforming user and is allowed to continue such use of its property. (Id.).

On November 24, 2014, 477 Harrison applied for a building permit to construct an additional three residential units on the roof of its building. (J. App'x Ex. 15). The permit was denied and 477 Harrison was informed that construction of the units required the Board's approval. (Id.). 477 Harrison subsequently filed an appeal and the Board conducted a hearing on March 24, 2015. (J. App'x Ex. 17, at 2). The Board ruled in 477 Harrison's favor, approving a three-unit residential penthouse addition on the roof of the existing five-story building, and granting the following zoning variances: relief from the prohibition of excessive floor area ratio; relief from the prohibition of excessive height; and relief from the usable open space requirement. (SOF 61; J. App'x Ex. 17, at 2, 3, 7).

JACE filed this action in the Superior Court on May 28, 2015 seeking review of the Board's decision.

DISCUSSION

A. Legal Standards

1. Legal Standard on Summary Judgment

Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c). In determining whether the moving party is entitled to judgment as a matter of law, the evidence is viewed in the light most favorable to the nonmoving party. See Harrison v. NetCentric Corp., 433 Mass. 465, 468 (2001). "The moving party bears the burden of affirmatively demonstrating the absence of a triable issue." Lev v. Beverly Enters.-Mass., Inc., 457 Mass. 234, 237 (2010). "Where the party opposing the motion bears the burden of proof at trial, the moving party will prevail only if it demonstrates that the nonmoving party has no reasonable expectation of proving an essential element of the case." Cabot Corp. v. AVX Corp., 448 Mass. 629, 637 (2007), citing Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Finally, "[i]n deciding a motion for summary judgment, a court does not resolve issues of material fact, assess credibility, or weigh evidence." Kernan v. Morse, 69 Mass. App. Ct. 378, 382 (2007).

2. Standing in Zoning Appeal Cases

Under the Boston Zoning Enabling Act, a "person aggrieved" by a decision of the Board may appeal the decision to the Superior Court. St. 1956, c. 665, § 11, as amended by St. 1974, c. 669, § 1 and St. 1994, c. 461, § 2. "Because the language in the Boston Zoning Enabling Act is, in this respect, identical to that in [the Zoning Act,] G. L. c. 40A, § 17, . . . [courts] may look beyond Boston cases to determine the meaning of aggrieved status for these purposes." Sherrill House, Inc. v. Board of Appeal of Boston, 19 Mass. App. Ct. 274, 275 (1985).

Under G. L. c. 40A, § 17, "[a] plaintiff is a 'person aggrieved' if he suffers some infringement of his legal rights." Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721 (1996). "Abutters are entitled to a rebuttable presumption that they are 'aggrieved persons' under the Zoning Act and, therefore, have standing to challenge a decision of a zoning board of appeals." 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 700 (2012) (footnote omitted). A defendant may rebut the presumption by "offer[ing] evidence 'warranting a finding contrary to the presumed fact.'" Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 34 (2006), quoting Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255, 258 (2003).

In the context of summary judgment, a defendant may defeat the presumption by: (1) "showing that, as a matter of law, the claims of aggrievement raised by an abutter...are not interests that the Zoning Act (or other zoning law) is intended to protect;" (2) "coming forward with credible affirmative evidence that refutes the presumption," or (3) "showing that the plaintiff has no reasonable expectation of proving a cognizable harm." Picard v. Zoning Bd. of Appeal of Westminster, 474 Mass. 570, 573 (2016) (internal quotations omitted).

Once the plaintiff's presumption of standing is rebutted, the burden shifts back to the plaintiff to establish standing by producing credible evidence. 81 Spooner Rd., LLC, 461 Mass. at 701. "At that juncture, the jurisdictional issue of standing will be decided on the basis of all the evidence, with no benefit to the plaintiff from the presumption of aggrievement." Id. The plaintiff must "establish—by direct facts and not speculative personal opinion—that his injury is special and different from the concerns of the rest of the community." Standerwick, 447 Mass. at 33 (internal quotations and citation omitted). Moreover, in a summary judgment motion challenging standing, "a defendant is not required to present affirmative evidence that refutes a

plaintiff's basis for standing....It is enough that the moving party 'demonstrate[ ], by reference to material described in Mass. R. Civ. P. 56 (c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving' a legally cognizable injury." Id. at 35, quoting Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

B. Application of the Legal Standards

As an abutter of 477 Harrison's property, JACE enjoys a presumption of being an aggrieved party. See 81 Spooner Rd., LLC, 461 Mass. at 700. This presumption of standing is not rebutted by the mere fact of its non-conforming use. See Vainas v. Board of Appeals of Lynn, 337 Mass. 591, 594 (1958) (non-conforming use did not defeat plaintiff's status as a person aggrieved). However, 477 Harrison has successfully rebutted JACE's presumption of standing on the summary judgment record. Possible harm to the structural integrity of JACE's building is not within the purview of the zoning laws. And 477 Harrison has rebutted JACE's allegations related to increased density and overcrowding, demonstrating that they are speculative and unsupported by credible admissible evidence. Therefore, summary judgment must be granted in favor of 477 Harrison on the grounds that JACE lacks standing.

1. JACE's Support Easement Is Not Protected By the Zoning Laws

Although JACE states in its opposition brief that its "central objection to the ZBA Decision is the increased density caused by the addition of the three penthouses," JACE Opp. Br. at 11, its argument focuses almost entirely on the potential harm that could result from the increased load on the northeasterly wall of 477 Harrison's building, as to which JACE has an easement of support. See JACE Opp. Br. at 13-17, 20-25. Although there is no case directly on point, this Court holds that concerns over the structural integrity of JACE's building are a

building code matter to be addressed by the City of Boston's Inspectional Services Department, not a zoning matter.

"[T]he purposes and operation of zoning laws and building codes are somewhat divergent .... Whereas the main purpose of zoning is to stabilize the use of property and to protect an area from deleterious uses, a building code relates to the safety and structure of buildings." Enos v. Brockton, 354 Mass. 278, 280-281 (1968) (city zoning ordinance cannot regulate thickness of masonry walls) (quotations and additional citations omitted). Consistent with this ruling, the Commonwealth's zoning enabling act provides that "[n]o zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code." G. L. c. 40A, § 3.

In Rinaldi v. Board of Appeal of Boston, 50 Mass. App. Ct. 657, 660 (2001), the Appeals Court held that plaintiff, an abutting land owner, lacked standing to pursue a zoning appeal based upon building code violations on the land as to which the variance had been granted. Although JACE presents evidence of potential structural harm to its own property, which was not alleged in Rinaldi, the nature of the violation, i.e., conditions that may affect the safety of a structure, is the same in both cases.

The fact that JACE has an easement protecting its structural rights does not change the Court's analysis. In Picard, *supra,* the Supreme Judicial Court held that the impairment of plaintiff's easement giving him access to a pond did not give plaintiff standing to oppose a zoning variance because plaintiff "did not claim that constructing a residence on the locus would be deleterious in any respect related to typical zoning concerns, for example, density, traffic, parking availability, or noise." 474 Mass. at 574. JACE's efforts to distinguish Picard are not

persuasive. More significantly, JACE cites no case supporting the proposition that the zoning laws are intended to protect the structural integrity of buildings.

Because the zoning laws do not protect JACE's interest in its support easement, JACE's presumption of standing as to its easement-related allegation of harm has been rebutted.

2. JACE's Allegations Related to Density Are Rebutted and/or Speculative

The only impact of density that JACE addresses in its summary judgment opposition is parking. 477 Harrison has refuted this claim with expert evidence, and JACE has offered no admissible evidence on the issue that creates a disputed issue of material fact. JACE's purported evidence of the other impacts of density alleged in the Complaint, i.e., traffic, waste, noise, and shadows, consists entirely of speculation and inadmissible opinions. 477 Harrison has successfully rebutted JACE's presumption of standing as to this alleged harm through a combination of credible affirmative evidence that refutes the presumption and a showing that JACE's purported evidence cannot establish a "cognizable harm." Picard, 474 Mass. at 573.

On the issue of parking, 477 Harrison submitted a traffic impact analysis and an accompanying affidavit of the traffic engineer who conducted the report. (J. App'x Ex. 29). In the report and affidavit, the traffic engineer opines that 477 Harrison's proposed construction will have a de minimus impact on traffic. (J. App'x Ex. 29, at 1, 5). 477 Harrison also offered an affidavit in which its manager averred that "each purchaser of a proposed penthouse will be provided a parking space inside of [477 Harrison's existing parking] garage." (J. App'x Ex. 2, at 2). Such evidence is sufficient to rebut JACE's presumption of standing as to its allegation of traffic-related harm. See Standerwick, 447 Mass. at 35 (unchallenged affidavit of traffic expert rebutted presumption of standing); Rinaldi, 50 Mass. App. Ct. at 660 (plaintiff did not have

standing where "it [wa]s difficult to envision significant increases in traffic and loss of parking spaces" from variance that allowed defendant's use to increase from five to six dwelling units).

In response, JACE offers the deposition testimony of its manager as to parking shortages in the neighborhood. (J. App'x Ex. 42, ¶¶ 28-33). However, on the dispositive issue of harm resulting from the three proposed penthouse units, JACE's manager offers only speculative and inadmissible opinions that "it is reasonable to expect that the addition of the three penthouse units...will only exacerbate the parking challenges in the area... [and] lead to additional unauthorized parking in the no parking zone in front of the JACE Property." (J. App'x Ex. 42, ¶ 34.)[3] This is clearly insufficient. Standerwick, 447 Mass. at 33. See also Barvenik v. Board of Alderman, 33 Mass. App. Ct. 129, 138 (1992) (no standing "where none of the plaintiffs presented evidence that demonstrated a reasonable likelihood of any tangible, as opposed to speculative, harm to their property.").[4]

On the issues of waste and noise, JACE offers only the speculative opinions of its manager that additional waste from 477 Harrison's new residents "will probably" be placed on the public sidewalk in front of JACE's building (J. App'x Ex. 3, at 57-58), and that, *if* JACE expands its building upward, future occupants may hear the rooftop HVAC units on 477 Harrison's building (id. at 80-81). On the issue of shadows, the same manager states that a Google application estimates that the penthouse units would increase shadows on JACE's property by "approximately 18%." (J. App'x Ex. 42, ¶ 23). This estimate, made by a layperson and unsupported by any documentation, is clearly inadmissible.

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[3] The same manager also opined at his deposition that the occupants of the penthouse units would not use their assigned parking spaces in the building garage. (J. App'x Ex. 3, at 59-60).

[4] In its opposition brief, JACE does not address the issue of traffic as distinct from its concerns about parking.

Notice sent
2/03/17

(sc)

In sum, 477 Harrison has successfully rebutted JACE's presumption of standing as to any density-related harm, through a combination of "credible affirmative evidence that refutes the presumption" and a showing that JACE "has no reasonable expectation of proving a cognizable harm." Picard, 474 Mass. at 573. JACE has failed to present any admissible evidence that "demonstrate[s] a reasonable likelihood of any tangible, as opposed to speculative, harm to [its] property." Barvenik, 33 Mass. App. Ct. at 138. *A fortiori*, JACE has failed to demonstrate that its "injury is special and different from the concerns of the rest of the community." Standerwick, 447 Mass. at 33. Accordingly, JACE does not have standing to pursue a review of the Board's decision.

CONCLUSION AND ORDER

For the above reasons, Defendants' motion for summary judgment (Docket # 18) is ALLOWED. Judgment shall enter in favor of the defendants, Board of Appeal of the City of Boston and 477 Harrison Ave., LLC, and the case file shall be closed.

Dated: February 2, 2017

Robert L. Ullmann
Justice of the Superior Court

EXHIBIT 140

This form must be completed and signed by the owner-of-record, their attorney and/or authorized agent. If form is not signed by property owner, please attach a signed letter of authorization designating the authorized agent.

APPEAL

under Boston Zoning Code

2497

Boston, Massachusetts March 16, 2012, 20

To the Board of Appeal in the Inspection Services Department of the City of Boston:

The undersigned, being the attorney for applicant, Holland Development, LLC
(The Owner(s) or authorized agent)

of the lot at 477-481 Harrison Ave. Ward 3 South End
(number, street, ward, district)

hereby appeal(s) under St. 1956, c. 665, s. 8, to the Board of Appeal in the Inspectional Services Department of the City of Boston the action taken by Inspectional Services Commissioner as outlined in the attached refusal letter.

DESCRIBE IN DETAIL THE REASON(S) FOR THIS APPEAL

This appeal seeks relief from various provisions of Art. 64-19 in order to convert an industrial warehouse into 18 residential condominium units and 2 commercial (office and retail spaces) together with parking on the basement level. The property is located in a Neighborhood Development Area (NDA) and therefore, for residential uses the provisions of Article 64-9 are applicable. This appeal also seeks conditional use permits for a restricted roof structure under Art. 64-34 and a groundwater permit under Art. 32-9.

STATE REASONS FOR THIS PROPOSAL

Consistent with the Harrison Albany Corridor Strategic Plan, which has been incorporated into Art. 64, this proposal seeks to convert an underutilized warehouse building and convert it to residential use with street level retail activity. The building will be adaptively reused and a new penthouse addition on the roof will create two additional residential units.

PROVIDE REASONS WHY BOARD SHOULD GRANT RELIEF

The relief sought will not be detrimental to the neighborhood and will not substantially derogate from the intent and purpose of Article 64 of the Code. The granting of the variance and conditional use permits is necessary for the reasonable use of the structure and is the minimum relief that will accomplish this purpose. The proposed groundwater recharge system will promote infiltration of rainwater into the ground and will have no negative impact on groundwater levels within the area.

COMMENTS

OWNER Pergola Nominee Trust

AUTHORIZED AGENT Marc LaCasse, Esq.

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1 of 1 DOCUMENT

JACE BOSTON, LLC vs. HOLLAND DEVELOPMENT, LLC, & another.[1]

1 477 Harrison Avenue, LLC.

15-P-388

APPEALS COURT OF MASSACHUSETTS

2016 Mass. App. Unpub. LEXIS 183

February 24, 2016, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009)*, ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, *MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE CHACE V. CURRAN, 71 MASS. APP. CT. 258*, 260 N.4 (2008).

JUDGES: Green, Wolohojian & Henry, JJ.[2]

7 The panelists are listed in order of seniority.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This appeal arises from a dispute between abutting property owners over the interpretation of an easement granted in a 1926 indenture and agreement (indenture), entered into by their predecessors in interest.[2] At trial, the plaintiff, JACE Boston, LLC (JACE), sought a declaratory judgment and an injunction to establish its rights under the indenture and to prevent the defendants, 477 Harrison Avenue, LLC, and Holland Development, LLC (collectively, 477 Harrison), from demolishing a large portion of the wall subject to the easement. 477 Harrison appeals from a judgment in favor of JACE entered by the Superior Court after a jury-waived trial. We affirm.

2 477 Harrison Avenue, LLC, purchased the 477 Harrison Avenue property in 2012, and is the successor in interest to the Jordan trustees, who originally owned the property. JACE Boston, LLC, is the successor in interest of the Savoy Realty Trust for 1234 Washington Street in Boston.

The scope of an easement, "derived from the presumed intent of the grantor, is to be ascertained from the words used in the written instrument, construed when necessary in the light of the attendant circumstances." *Patterson v. Paul, 448 Mass. 658, 665 (2007)*, quoting from *Sheftel v. Lebel, 44 Mass. App. Ct. 175, 179 (1998)*. Whether the easement is in a deed or a contract in the chain of title of both properties is of no moment because the essential question is the intent of the parties as indicated by the words used in the instrument. Moreover, the scope of an easement does not change just because the grantor transfers title. Accord *Anderson v. De Vries, 326 Mass. 127, 132 (1950)* (noting that with regard to the easement "[t]he respondents acquired no greater rights than their grantors had"). Here, the plain language of the indenture is not ambiguous and controls our analysis. The indenture grants JACE an easement:

> "which shall endure so long as the garage building now in process of erection on said land of said Trustees of the Savoy Realty Trust shall stand to tie unto and use for the support of said garage



> building [the wall subject to the easement] . . . to a height not exceeding two stories nor more than thirty four feet above the line of the present curbstone at the westerly corner of said Harrison Avenue and Perry Street."

In short, as the trial court judge found, the easement grants JACE, and its successors and assigns, the right to tie unto and use for support the northeasterly wall of the building located on 477 Harrison Avenue up to two stories or a maximum height of 34 feet measured from the line of the curbstone at the corner of Harrison Avenue and Perry Street as it existed in 1926, i.e., 49.38 feet above "Boston City Base,"[3] and this right remains in existence, irrespective of whether it is exercised, until such time as the building on the JACE property no longer remains standing.

> 3 Boston City Base is a fixed point below ground developed by the city of Boston in the 1850's that allows architects and engineers to use the same vertical reference frame for all new construction in the city.

The case of *Johnson* v. *Kinnicutt*, 2 Cush. 153, 156 (1848), does not suggest a different analysis. That case concerned the width of an easement for "passing and repassing over the space of twenty feet." The court found that the easement was a "grant of a convenient way" within the limit of twenty feet and left for a jury whether the whole of the space must be left open. *Id.* at 157-158. The easement here is of a different kind, granting the right to tie into a wall for support up to a specific height. 477 Harrison acknowledges, as it must, that for at least some period, the Savoy trustees had the right to use the full area described in the easement to the maximum height.

477 Harrison contends that the reference to "the garage building now in process of erection" limits the scope of the easement. 477 Harrison contends the quoted phrase means that once that garage was completed in 1926, the right of JACE or its predecessors to tie in at a height more than one story ended. For support, it contends that a later clause of the indenture evidences the original parties' intent to restrict the easement to the original building, rather than allow for future expansion.[4] These arguments are unavailing.

> 4 The later clause provided that the Savoy trustees' obligation to indemnify the Jordan trustees was limited to the time period when the garage building was being constructed.

The indenture expressly limits the duration of the easement -- until the garage building no longer stands on the property. The parties used limiting language in other clauses of the easement and it is dispositive that here they chose not to. At the time the parties entered into the easement, both knew that the Savoy trustees had an approved building plan for a one-story garage and yet wrote an easement that contemplated a taller building and did not expressly limit the Savoy trustees' (or their successors and assigns) ability to expand. That is dispositive. As the trial judge properly noted, "[T]he easement contains no express time limit as to when the Savoy Trustees, or their successors, had to utilize the easement and there is no express language prohibiting a future addition to the garage."[5] This interpretation applies the plain and ordinary meaning of the terms and ensures that no terms are rendered superfluous. *Estes v. DeMello, 61 Mass. App. Ct. 638, 642 (2004).*

> 5 The trial judge's finding of fact that further removal of the wall would adversely affect the remaining portion of the wall provides an independent basis for the injunction. The trial judge credited JACE's experts on this point. 477 Harrison does not demonstrate that this finding of fact is clearly erroneous. See *U.S. Bank Natl. Assn. v. Schumacher, 467 Mass. 421, 427 (2014)* ("On review of a jury-waived proceeding, we accept the judge's findings of fact unless they are clearly erroneous"). Instead, it argues that if reducing the wall height harms JACE's building, the exclusive remedy would be damages. This is not correct -- JACE is entitled to an injunction to prevent the harm.

477 Harrison asks us to rewrite the easement to substitute the Boston City Base for the line of the curbstone. It is not for this court to rewrite the express language of the easement.[6]

> 6 Additionally, the easement refers to a "garage building now in process of erection" and the building plan for that garage, which was signed earlier in the same month the indenture was signed, refers to the Boston City Base. This allows the inference that the parties were aware of the Boston City Base, but specifically chose to measure the vertical elevation stated in the easement in another manner -- the line of the curbstone.

Because the terms of the easement are not ambiguous, we do not reach 477 Harrison's alternative arguments.

Judgment affirmed.

By the Court (Green, Wolohojian & Henry, JJ.[7]),

Entered: February 24, 2016.

7 The panelists are listed in order of seniority.

CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13, I certify that I caused this Application for Direct Appellate Review to be served by email to the following counsel of record:

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Dated: October 14, 2026

/s/ Kevin P. Martin
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