

## **City of Coral Gables City Commission Meeting**

**Agenda Item E-1**

**October 28, 2008**

**City Commission Chambers**

**405 Biltmore Way, Coral Gables, FL**

### **City Commission**

**Mayor Donald D. Slesnick, II**

**Vice Mayor William H. Kerdyk, Jr.**

**Commissioner Maria Anderson**

**Commissioner Rafael “Ralph” Cabrera, Jr.**

**Commissioner Wayne “Chip” Withers**

### **City Staff**

**City Manager, David Brown**

**City Attorney, Elizabeth Hernandez**

**City Clerk, Walter J. Foeman**

**City Clerk Staff, Billy Urquia**

**Zoning Administrator, Martha Salazar-Blanco**

### **Public Speaker(s)**

**Zeke Guilford, Esq., 2222 Ponce de Leon Blvd., representing Andy Murai**

**Robert Fine, Attorney**

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E-1 [Start: 10:10:06 a.m.]

Board of Adjustment Appeal – Application No. 8677-Z

F.W. Zeke Guilford, Esquire; Applicant, has filed an appeal to the Coral Gables City Commission from a decision of the Board of Adjustment at its regular meeting September 8, 2008, wherein it approved an application for a variance pursuant to Ordinance No. 1525, as amended and known as the “Zoning Code”. (Board of Adjustment approval vote: 4-1).

### **SUMMARY OF APPEAL**

The Applicant is appealing the Board of Adjustment approval in regard to the proposed standing seam metal roof for the proposed single-family residence.

Consider a variance request for a standing seam metal roof for the existing single-family residence located at 360 Solano Prado, Coral Gables, FL.

Mayor Slesnick: We have item E-1, Mr. Guilford, it’s a Board of Adjustment appeal. Let me explain something from the outset; this is a quasi-judicial hearing; this is not a DeNovo Hearing. We will be determining the appeal on the basis of the record below, and besides legal argument as to the specific standard of review, we will not be taking any new testimony. Mr. Guilford.

Mr. Guilford: Good morning Mr. Mayor, Commissioners; for the record my name is Zeke Guildford, with offices at 2222 Ponce de Leon Boulevard, representing Andy Murai, the owner of property at 200 Solano Prado.

Mr. Fine: Excuse me Mr. Mayor, there has been a motion filed that's jurisdictional that I believe should be heard before the appeal regarding the standing of the appellant. It was timely filed; it's in your packages.

Mr. Guilford: That's....I'm prepared to address is his issue of standing.

Mayor Slesnick: OK, and we'll need the City Attorney back from...oh there she is, I couldn't see you sitting there. Madam City Attorney.

City Attorney Hernandez: Mr. Mayor, Mr. Fine has raised the issue as to whether or not Mr. Murai has proper standing, as he did not appear at the hearing below. He takes issue with the fact as to whether Mr. Murai is an aggrieved party. It is the position of my office that Mr. Murai is indeed an aggrieved party; the objection is preserved for purposes of any appeal. However our Zoning Code specifically gives Mr. Murai standing, which provides aggrieved, means any applicant or any person who received courtesy notice of a public hearing from the City, and shall also mean the City Manager; and that is found in the definition. Section 3-606 indicates that any aggrieved party desiring to appeal a decision of the Board of Adjustment; thus, I believe that Mr. Murai meets the requirements of our Zoning Code and does have standing. Mr. Fine has submitted cases in support of his position. I've had an opportunity to review those cases, and those cases would be appropriate for purposes of a petition for a writ of certiorari, this is an appeal to the City Commission, and it is the position of my office that citizens that receive courtesy notice are within the area and do have standing to bring an appeal; but however, his objection is obviously preserved.

Mayor Slesnick: The Commission has heard the opinion of the City Attorney, is there any Commissioner that wishes to move to overturn or reject the advice of counsel and determine otherwise?

Commissioner Withers: Can you walk me through Liz, the different scenarios, whatever direction we go in.

City Attorney Hernandez: OK. Your question is?

Commissioner Withers: We have two...if we move forward we hear it today, correct?

City Attorney Hernandez: Yes, if you move forward...if you do not grant Mr. Fine's motion to dismiss you will hear the appeal today. Mr. Guilford is limited to the record below, and has to meet the standards of law which are whether or not procedural due process has been met?- whether there has been a deviation from the essential requirements of law? and/or whether the record below is supportive by substantial

competent evidence. That's what he is limited to, but he does have standing to come before the City Commission.

Commissioner Withers: So if we move forward, we still hear Mr. Fine's case?

City Attorney Hernandez: Oh yes, you absolutely hear his position, and again its legal argument on the record below.

Mayor Slesnick: Anybody that wishes to take issue with the City Attorney's ruling or her opinion?- which in fact is adopted as our ruling if we don't take....OK, then we are going to move forward, in fact I guess for the record what we should do is have a motion that we deny Mr. Fine's, what is it termed as....

Mr. Fine: I would like an opportunity to present my motion before you vote on that.

Mayor Slesnick: Sure, excuse me.

Mr. Fine: Thank you. This motion, which is a motion to dismiss, is a jurisdictional motion which goes to the very heart of whether or not you have the jurisdiction to hear this appeal. The authority of the Commission to hear appeals, which is called subject matter jurisdiction, comes from law, constitution, statutes or your ordinances. You have no authority to determine an appeal unless it's bestowed upon you by one of those laws, and within the limitations of those laws, and this case law we are talking about is the Zoning Code. The subject of the motion is the standing of the appellant or the lack thereof. If he doesn't have standing, then no appeal can be heard, you can't generate an appeal on your own. The law is clear that the appellant has the burden of demonstrating standing; it's not to be assumed, he has to show it, there is in fact a definition in the Zoning Code of what makes an aggrieved party. However, when you are evaluating that, you are limited to the record. The Zoning Code was changed so that when you evaluate an appeal, the appeal is on the record, there is no new additional testimony shall be taken, that testimony according to the courts includes whether or not he has standing. He can't come forth now and say here is why I'm an aggrieved party. Zeke's here saying my client is aggrieved because he got a courtesy notice, that's testimony, you can't consider that, that is out of bounds. So all you have is, when I filed my motion I included a complete copy of the record before the Board of Adjustment. If Murai appears there and anything at all there indicates that he, with his name, has gotten a courtesy notice as defined he's got standing, Zeke wins the motion. But within that package of documents, the transcript, the staff report that went to the Board of Adjustment, if he does not appear in there, then there is nothing in there that says you, because you can't rely on common knowledge, you can't rely on the fact that you were at his house two weeks ago for dinner, and you know where he lives; the only thing you are entitled to look at is the record; the definition of the record is very clear, I don't need to read it, its in your Zoning Code, I will if you like, but the bounds of which you can consider anything today is the record, including Zeke's argument whether Mr. Murai has standing. So the charge is on him to pull out that record and say, here is where Andy shows up, here's where it shows you that courtesy notice, here's where it shows him at his address, which indicates he had the courtesy

notice. I've been through the record a dozen times, I can't find it, and if he can't find it his client does not have standing. While we are on that same thing, to the extent that there has been any written correspondence, letters to the public, e-mails, to the extent there was a staff report filed, which would be inappropriate because it is on the record, that all is inappropriate and should be stricken from the record and not considered here today as well. And so, I leave it to you; you make your decision, but it's my position that Zeke's got the opportunity to point to the record, we've got copies of the record to show where his client has standing, but you can not take anything outside of that record to show he's got standing, because if he can't demonstrate it he doesn't have it. Thank you.

Mayor Slesnick: Actually and you raise a good point, so I want to put on the record, and I took the wrong method, I should have thought this out further, but I opened an e-mail from Mr. Murai about this case yesterday. I saw what it was about, I erased it immediately; I will say on the record, I did not read it, I did not take cognizant of it, I probably should have preserved it and sent it to the City Attorney or the City Clerk, but I didn't, nor did I read it, and I do not know what it contains except the opening sentence.

Commissioner Cabrera: Was that e-mail sent to all of us?

Mayor Slesnick: I do not know, it was sent to me.

Vice Mayor Kerdyk: I had one.

Commissioner Cabrera: You did. I didn't get the e-mail. OK, I think you made a compelling argument, and based upon your argument and your Boards...

Mayor Slesnick: We need to hear the other side.

Commissioner Cabrera: I know, but I don't care what the other side has to say, I mean, he's right on target, I mean, I mean it. I'm sorry Mr. Guilford, I think you are a fine, fine attorney, but I really try to abide by the Board of Adjustment's appeal process, and Mr. Fine has done an exceptional job of pointing out...

Mr. Guilford: While he has, except for one thing.

Commissioner Cabrera: OK, I'm sorry, and you know what, just like Mayor Slesnick pointed out that he reacted, I don't know exactly how he said it, but something like he went ahead of himself, maybe I did, but I'm biased towards his argument.

Mr. Guilford: That's fine. Actually what you should have in your record, because actually it was a part of the Board of Adjustment, is actually labels to deal with that, define exactly who notices go to. In that package of labels and notices is Mr. Murai's name and address. If it is not included in your package, then your package is deficient, and you do not have the full record before you, and you must defer this matter, because the City has not provided you with a complete package of what is the requirement of the Board below.

The application of the Board of Adjustment is clear; you must provide labels as part of that application package.

Commissioner Cabrera: But listen, but to me it's a mute, you know why it's a mute subject?

Mr. Guilford: Why is that Commissioner?

Commissioner Cabrera: Because I am up to hear with metal roofs, and so I'm ready to rule on this thing right now, and he's not going to get my favorable vote, because I'm not going to set precedence and open a can of worms on this whole metal roof issue. So we can go back and forth on this whole thing as much as everybody here wants; and maybe there are legalities that I'm unaware of and maybe that's what everybody is doing is building a case for themselves, but I want to move forward; I'm pretty sure how the vote's going to come down right now.

Mr. Guildford: Commissioner, there are several issues. You can argue that, you can agree with Mr. Fine that we don't have standing; you can make a motion that Mr. Murai does not have standing since he didn't appear at the meeting below, and that's one option; the other option is that I'm ready to argue frankly straight from the transcript. I don't believe that Mr. Fine meets the burden set forth for a hardship, and for what are the requirements of a variance, as set forth by page number in the transcript of the record of the Board of Adjustment, but that is a determination you have to make, if you find that he doesn't have standing, that is a decision that Mr. Murai is going to have to make on an appeal if he wants to appeal it.

Commissioner Cabrera: And I sincerely appreciate the education and the information because you are an attorney and you know this inside and out, I'm just telling you what my position is going to be, so I just found his argument...I continue to say his argument is compelling. So I want...

Mayor Slesnick:...[inaudible]...if you grant his motion the appeal fails and there will...[inaudible]...

Commissioner Withers: Don, I'm sorry, I can't hear.

Commissioner Cabrera: Say it out loud for everybody. We don't all recognize that, and I'm the first to say I don't understand.

Mayor Slesnick: If we approve the motion that Mr. Fine has made, the appeal then fails from its inception because we will dismiss it, then there will be an automatic approval of metal roofs. I'm not arguing the point, that's just the practical consequence of...

Commissioner Cabrera: See, I didn't understand it that way. I understood it that regardless of the position that Mr. Guilford may be taking, he's making an appeal to...

Mayor Slesnick: A citizen is appealing the granting of a metal roof.

Mr. Fine: Mr. Mayor, just so you know, in your packages where you have an Exhibit B, that is a certified copy of the record of the Board of Adjustment; there are no mailing labels in here; there is no mailing list. Somewhere staff says we've mailed out mailing labels, but there are no names, and there is no mailing list, it is not included in here, that is not within the record.

Mayor Slesnick: It could be an error, but it is not a fatal error if it can be corrected.

Mr. Fine: Well the record is closed. I think it is a due process.

Mayor Slesnick: If the record is there and it just wasn't included, it is an error that can be corrected; I mean, once you have a record, you have a record. If they failed to send us the transcript, are you suggesting we couldn't go back and say, excuse us but there is a transcript that you failed to put in the record. We need to find out if there are mailing labels and if there is a mailing list and why it's not in here.

Commissioner Cabrera: Can we go back to the appeal process once again. Ok, so the only standing the Mr. Guilford would have as Mr. Murai's attorney is to be the aggrieved party...

Mr. Guilford: No, I'm sorry Commissioner, I don't mean to cut you off; once you say I do not have standing, you are saying that I do not meet the definition of an aggrieved party, and not being an aggrieved party, I had no right to file this appeal; the Mayor is correct, and I can't even file this appeal; this appeal is an error and Mr. Fine wins because I couldn't file the appeal in the first place.

Commissioner Cabrera: See Mr. Fine, anybody could file an appeal to the decision by the Board of Adjustment. I've seen it time and time and time again; I promise to be short. I remember not long ago, where Mr. Murai filed an appeal on a Board of Adjustment decision having to do with signage at the Village of Merrick Park, that subsequently turned into the review of our City sign ordinance, that was another seven, or eight, or nine month odyssey where we went through the entire exercise of reviewing the citywide sign ordinance, and at that time Mr. Murai had no standing, other than he was a Coral Gables citizen that found something to be wrong and wanted to try to correct the process that dates back to 2001, so Madam City Attorney, am I mistaken in this example that I am giving?

City Attorney Hernandez: No, and Mr. Murai had a business in the vicinity of the Village of Merrick Park.

Commissioner Cabrera: But ma'am I recall that the signage problem did not even face Mr. Murai's property, in fact Mr. Murai's property sits on Ponce de Leon, and therefore was on the west most side of the Village of Merrick Park's boundaries and the signage issue was on the west most side...

City Attorney Hernandez: Correct, but you look at the totality of the property and the Village of Merrick Park property is a large piece of property.

Commissioner Cabrera: OK. Then stay with me on this one. Mr. Murai lives in the same neighborhood as Mr. Fine?

Mr. Guilford: Correct.

Commissioner Cabrera: So why wouldn't that be then the same?

City Attorney Hernandez: Again, it goes back to our Zoning Code, and its any aggrieved party may appeal; he lives within the courtesy notice area, and therefore he is an aggrieved party, that's my position based just on a clear reading of the Zoning Code, that's all.

Mr. Fine: Commissioner.

Commissioner Cabrera: Yes sir.

Mr. Fine: I think the big answer to your question is when Mr. Murai files an appeal on Merrick Park, the Zoning Code then is not the Zoning Code now; back then the Zoning Code said, upon the taking of an appeal the City Commission shall conduct a DeNovo review of the decision of the Board of Adjustment. The property owners, objectors or interested parties may offer or submit additional evidence and testimony at the hearing of before the City Commission. When you re-wrote the Zoning Code, you adopted a brand new standard, actually the standard that most jurisdictions have, and that says the City Commission shall conduct a review of the Board of Adjustment, the statements shall be based on the record of the hearing for the Board shall not be a DeNovo hearing and no new additional testimony shall be taken. So what he was able to do then, the Code has changed, he cannot do now.

Mr. Guildford: But it still doesn't affect, Commissioner, whether a person is an aggrieved party or not, matter of fact it wasn't too long ago when prior to the new Zoning Code a case of Mandelstam vs. The City of Coral Gables, where he was held not to have standing, and the Court in that case was clear that you had to be an aggrieved party in order to have standing; and basically it says and cites a case that actually Mr. Fine cites as well, Bernard vs. Dade County that says, we have to have a damage that is different than the community as a whole. In this case Mr. Murai lives...there are three houses that separate, the only way to get to Mr. Muari's house back and forth, there is one road; and that is to go back and forth in front of Mr. Fine's house. He has a damage that is different than the community as a whole, and then falls under that case; and by your own Code now is an aggrieved party to file this appeal again, I'm ready to argue this appeal on the record, because I believe that the record is clear that a hardship wasn't shown. Now whether it's a DeNovo or on the record is immaterial to whether he has standing or not.

Mr. Fine: I disagree. If it's on the record you can only look on the record and you can only find standing in the record. If it's DeNovo you can read anything you want to support [inaudible] or otherwise.

Commissioner Withers: But your argument has to deal with the fact the Mr. Murai did not attend the meeting?

Mr. Fine: That does not appear in the record.

Commissioner Withers: And does not appear...Did Mr. Murai send you as his representative at any time?

Mr. Guilford: No he did not.

Commissioner Cabrera: This is one of the reasons I didn't go to Law School, because this is just becoming extremely difficult.

Mayor Slesnick: But this actually doesn't have to be that difficult. Do we have in the record, maybe not the record before us at the moment, but in the record, do we have evidence that Mr. Murai was in the notification area and was sent notice?

Ms. Salazar-Blanco: We do have the certified mailing list and labels, and yes Mr. Murai is on the list in our records.

Commissioner Cabrera: So is that enough to warrant...?

Mayor Slesnick: We can amend the record as presented to the Commission to include that, would you present that please to the City Attorney.

Commissioner Cabrera: OK, so help me out...

Mr. Fine: I have to object.

City Attorney Hernandez: OK, Mr. Mayor...

Mr. Guilford: [Inaudible].

City Attorney Hernandez: OK folks let me please interject here. Our Zoning Code is clear that part of the record includes the history of Mr. Fines file, includes the City's Zoning Code, that doesn't mean that we are going to copy, nor do we copy the entire Zoning Code and give you a copy to review for the file, and copy his entire planning file; we see the basic document...

Mayor Slesnick: I just said that.

City Attorney Hernandez: Thank you.



Mayor Slesnick: Would you please present to the City Attorney that piece of the record for her to review,

City Attorney Hernandez: Over Mr. Fine's objection.

Mr. Fine: Strenuous objection.

Mayor Slesnick: ...for her to review; could you please do that, walk up and hand that to her, please.

City Attorney Hernandez: She is going to have the City Clerk mark it first, Mr. Mayor.

Mayor Slesnick: Mr. Fine, your objections are noted.

Mr. Fine: And again, please note that there is a certified copy of the record to the B.O.A. and it does not include that.

Commissioner Withers: Liz, let me try to frame this as what I understand is going on here, so I make sure I'm correct. Mr. Fine missed an opportunity, stop me anytime if I'm saying something I shouldn't say; missed an opportunity to pull a permit to put a roof on his home that we had approved that he could do so, that's what started this.

Mr. Fine: If I may. I applied for a permit, the permit was missing two signatures and a water pipe broke in the house, and after it became...not cost but to rebuild it because of the different code things and all that, we tried to revise the permit to do the changes, and staff said it was too much of a change, you've lost the roof, you have to go back and get a variance.

Commissioner Withers: There is no...so he could uphold the permit based on his current plans and extended the permit....he could have pulled the permit on his current plans that was approved before the water damage, before the construction issue, you were approved to do a certain kind of roof, and you just didn't get around to doing it, and you were stopped because...

Mayor Slesnick: You were two signatures short.

Commissioner Withers:...two signatures short.

Mayor Slesnick: Two signatures short of being approved, he was not fully approved.

Commissioner Withers: Right. Right.

Mayor Slesnick: But we have no reason to know whether if he would have gotten it or not.

Commissioner Withers: Right, but I just want to put this into play here. So you went to the Board of Adjustment...

Mr. Fine: Right.

Commissioner Withers:...the City recommended denial...

Mr. Fine: Correct.

Commissioner Withers:...the Board of Adjustment said we agree with you...

Mr. Fine: Right.

Commissioner Withers: You're OK.

Mr. Fine: Yes.

Commissioner Withers:...the City did not appeal that decision...

Mr. Fine: Correct.

Commissioner Withers:...which is another issue; however, Andy Murai appealed the decision, and within the timeframe.

Mr. Guilford: That's correct.

Commissioner Withers:...and we are here today determining whether Andy Murai has the right as a resident, or as a citizen, or whatever, to file an appeal...

City Attorney Hernandez: That's a preliminary issue.

Mr. Guilford: That's the issue that is before you right now.

Commissioner Withers: And that's where we are right now, OK. And what you're saying is that because this is a rehearing on an issue, that if any evidence that wasn't presented at the original Board of Appeal...

Mr. Fine: Right.

Commissioner Withers:...since Mr. Murai, Board of Adjustment, since Mr. Murai wasn't there and didn't publicly stand up, or didn't publicly say anything, or whatever, then he add testimony in the record, we can't take into consideration, so therefore he does not have the standing to do that.

Mr. Fine: That is correct.

Commissioner Withers: And what you are saying is that, I just want to make sure because its complicated to me; and what you are saying is that the fact that he was noticed even though he didn't show up, even though he didn't speak, but the fact that he was part of the community that received the notice and whatever, that establishes standing.

Mr. Guilford: Correct, and...[inaudible]...I believe 3-606 it says, any aggrieved party.

Commissioner Withers: OK. And what you are saying is how do we know he was even notified as an aggrieved party, because there is no postage record or anything like that.

Mr. Fine: That's correct. There's no mailing list, no name, there's no...

Commissioner Withers: And I'm almost there; and what Don is saying is that, look this thing has been going on for awhile, Andy has been involved in the metal roof issue, obviously he has been opposed to the issue, he's been here before, whatever, that should carry some weight and some bearing into the...

Mayor Slesnick: But we do have a record that he was on the record.

City Attorney Hernandez: I received from staff's file on this particular application from Florida Real Estate Decisions, a certified copy of the ownership list of all the individuals who received a courtesy notice. We've marked where Mr. Murai's residence is marked, and he falls within the courtesy notice area.

Mr. Fine: I think it would be appropriate to ask staff if they put that in the package to the Board of Adjustment as part of their record, because I can tell you they did not.

Mayor Slesnick: You are asking what?- that we put it in the package?

Vice Mayor Kerdyk: They should have put it

Mr. Fine: I'm saying that they should have put it.

Mayor Slesnick: Oh, they should have put it; you are absolutely right it should have been in the package, but I think, my humble opinion Robert, it's a correctable error.

Mr. Fine: But there are other...this is not the one time they haven't done it, there have been other variances, staff as a matter of course have not been putting it in, it's not in the record. The Board, remember the reason you have an appeal...[inaudible]...the lower Board to consider everything...

Mayor Slesnick: I certainly think that if it affects the standing of the parties it should have been part of the record; you are absolutely right, but I don't think that the clerical exclusion of it is a fatal flaw.

Mr. Fine: But the courts have said otherwise.

City Attorney Hernandez: I think that the courts have taken a position...

Mayor Slesnick: That's my own opinion; I will look to the City Attorney again.

City Attorney Hernandez: You know we are getting back into...I don't understand why Mr. Fine is creating a record for Mr. Murai, and providing procedural due process claim for Mr. Murai. The file is clear; courtesy noticed individuals have standing; he is part of the courtesy notice. The Zoning Code provides that all of the records of the City with regard to a particular piece of property are part of the record, and will be considered. So it's going to be considered.

Commissioner Withers: OK, Liz you answered my question.

Commissioner Anderson: Let me just add that part of your history that you gave, was also he was under the pilot program that we had for the south, is that correct?- when you pulled your initial permit?

Mr. Fine: That's correct, yes.

Commissioner Anderson: And as a result of the damage done to your house and the substantial changes that had to be made that's what caused the hang up.

Mr. Fine: That's what caused it, yes.

Commissioner Anderson: OK.

Mayor Slesnick: We are not yet at that point.

Commissioner Anderson: I just wanted to clarify.

Mayor Slesnick: And what we have before us now is Mr. Fine's motion to dismiss the appeal based on the lack of standing. I would accept a motion to move the, either the approval of his motion or the denial of his motion. We do need to rule on it. This is to say that Mr. Murai does not have standing therefore there is no appeal.

Mayor Slesnick: Do you move to deny Mr. Fine's...

Commissioner Withers: No, I won't do that; I'm in favor of the appeal.

Mayor Slesnick: That's what I'm saying, you deny the motion you continue the appeal.

Commissioner Withers: Well, that was my whole question I was asking Liz to give me the two roads we were travelling down.

**City Attorney Hernandez:** If you deny Mr. Fine's motion to dismiss then Mr. Guilford will proceed with his appeal. If you grant Mr. Fine's motion to dismiss then its over, everybody goes home and one of them will sue.

**Commissioner Anderson:** I'll make that motion.

**City Attorney Hernandez:** Which one?

**Commissioner Anderson:** The second one.

**City Attorney Hernandez:** The motion to dismiss – the motion to dismiss the appeal.

**Mayor Slesnick:** OK. Mrs. Anderson moves to grant Mr. Fine's motion to dismiss the appeal; is there a second?

**Commissioner Withers:** I'll second it.

**Mayor Slesnick:** We have a motion and a second. This is to grant Mr. Fine's motion to dismiss the appeal, which will in fact dismiss the appeal and end this case and the Board of Adjustment's decision to grant Mr. Fine's variance will in fact proceed forward, it will be the law.

**City Attorney Hernandez:** Correct.

**Mayor Slesnick:** OK. Mr. Clerk if you'll call the roll please.

**Commissioner Withers:** Yes

**Commissioner Anderson:** Yes

**Commissioner Cabrera:** Yes

**Vice Mayor Kerdyk:** No

**Mayor Slesnick:** No

**(Vote 3-2)**

**City Attorney Hernandez:** OK

**Mayor Slesnick:** Thank you very much.

**Mayor Slesnick:** Just a second.

**Commissioner Cabrera:** It's not over.

**Mayor Slesnick:** Someone get Mr. Guilford outside.

**Commissioner Cabrera:** I'm changing my vote Mr. Clerk. Mr. Clerk I'm changing my vote to no. I didn't understand the question. Mr. Fine, I'm sorry, I truly am.

**I'm not doing this to be difficult to you; this was confusing for me, and I responded with my vote incorrectly, and I apologize for that. I'm sorry. My vote is a no.**

**Mayor Slesnick: The motion fails; I would now accept a motion to deny Mr. Fine's motion.**

**Vice Mayor Kerdyk: I'll make that motion.**

**Mayor Slesnick: Mr. Kerdyk makes the motion, do you second this motion?**

**Commissioner Cabrera: Yes.**

**Mayor Slesnick: Mr. Cabrera seconds the motion. This is to deny the motion to dismiss.**

**Mr. Clerk**

**Commissioner Anderson: No**

**Commissioner Cabrera: Yes**

**Vice Mayor Kerdyk: Yes**

**Commissioner Withers: No**

**Mayor Slesnick: Yes**

**(Vote: 3-2)**

**Mayor Slesnick: OK. The motion to dismiss is denied. Mr. Guilford please.**

Mr. Guilford: Mr. Mayor, Commissioners, I just want to say and I think we are all very familiar with this case, the whole metal roof issue; no one is going to argue the hard work and effort that Robert has put into this; no one is going to argue his tenacity that he took on this issue; no one is going to disagree with the predicament he ended up with, but the fact of the matter is none of those things are issues for the granting of a variance. There are eight criteria now for granting of a variance. He must meet each and every single one of those criteria in order or they do not apply, in order for them to obtain a variance. Now let's talk about the record because we keep talking about what's on the record. Let's talk about the basis of the Board's decision, and Mr. Fine's arguments in order to grant a variance. On pages 54 and 55, Ms. Langer states, that it would be unfair not to grant a variance; he got what she described, as the "golden ticket", but for the breaking pipes, the City inspected a metal roof on Mr. Fine's house and gave him the green light. Mr. Fine argues on page 43 and on, of the transcript that he's entitled to a variance because number one, the broken pipe. He argues that the Code, on page 44, he argues that the Code is arbitrary and that it allows copper roofs, but doesn't allow metal roofs and therefore our ordinance is unconstitutional. On page 45 he argues that metal roofs are just better; this is the same argument he used two and-a-half years ago in which this Commission rejected that argument, and the Third District Court of Appeals rejected it as finding no hardship. None of the arguments that I just stated on the record is the basis for a variance. Now, let me tell you what a variance is. We all know what it is, we know the

criteria. In fact in the transcript it really doesn't discuss all eight criteria. He doesn't follow through as to how he meets them, it really just talks about one, and everybody who really talks always when you talk about variances, we like to talk about the main criteria, which is called hardship. Hardship under the case *Maturo vs. City of Coral Gables*, says hardship requires a variance will be found only where the property, and this is important, property is virtually unusable or incapable of yielding reasonable returns when used pursuant to the Zoning regulations. We all agree the window was open for ninety (90) days; he was unable due to unfortunate circumstances to obtain his permit. He must now follow the rules and regulations in order to grant that variance. He must show that the land by case law is virtually unusable, incapable of yielding reasonable return. Well, let's find out what staff and others said at the meeting. On page 3 and 4 Ms. Gonzalez representing staff said, the lot is not unusual in shape; on page 12, Mr. Lucas asked, are the borders of the property the same as before? Mr. Fine answered that the borders are the same. Page 21, Mr. Lucas asked regarding two other variances that Mr. Fine requested, will the lack of variance impede your ability to use this house as a single family residence? Mr. Fine's answer, no. Page 31, Mr. Lucas asked, are we dealing with a clean slate and that we are dealing with a design of a new house and new construction? Mr. Fine's answer, correct. And then he goes on and says, except for the broken pipe I wouldn't be building a new house, but the fact of the matter is we do have a clean slate before us. You also have on the record plans for this new house. The plans show a house for six thousand seven hundred and sixty square feet (6,760 sq.ft.); it's approximately three hundred feet short of maxing out the total FAR for this piece of property. Clearly, this piece of property is not virtually unusable by the definition handed down by *Maturo vs. City of Coral Gables*; also we have staff's report. In the staff report regarding this issue, staff said in review of the plans presented in considering the specific materials allowed for pitch roofs as prescribed in the Zoning Code, and there are ten different roofs that are prescribed in the Zoning Code. The applicant failed to demonstrate a hardship, therefore staff recommends denial, it says item number 4, but that's the metal roof. Nowhere does it argue in the transcript that Mr. Fine cannot use one of the ten prescribed items listed in the staff report that's part of your record. He's failed to meet the burden of showing a hardship; he can use the property pursuant to the Code for the single family resident for which it was intended. We understand what happened. Two years ago he applied for the same variance to allow a metal roof; it was denied. We understand what happened, there was a ninety day window and all the hard work that went into, that Mr. Fine put into this issue. Unfortunately, things happen. He now must comply with the Code as it currently stands. Unfair is not one of the criteria; breaking pipes is not one of the criteria. It is a new house based on plans in your record, and therefore it needs to comply with the Code. There is no hardship shown in this record. Mr. Mayor, Commissioners, if you have any questions, I'll be more than happy to answer them at this time.

Mayor Slesnick: Thank you. Mr. Fine.

Mr. Fine: Good morning again Commissioners. My name is Robert Fine representing my wife Isabella and myself in this appeal brought by Mr. Murai. Again, before you go farther I need to restate my objections, not only to...[inaudible]...but to any materials

including the staff report, which is put in, its not the original staff report that should not have been done, and those should not be considered by you in this matter. In 2006, I appealed the denial of a variance that would allow for pitch roof covering material that was not expressly allowed in the Zoning Code. Although I did not succeed in the appellate process, the outcome was an ordinance that would allow me to have the roof material I desired, non copper metal. If I applied to the Board of Architects within ninety days, and obtained approval within a hundred and twenty. I submitted plans for a plan renovation, an addition to my home, including the metal roof to the Board of Architects and received approval and was vested under that ordinance. I then proceeded to process my plans for a building permit. As I was, I believe, was within two signatures of a building permit, a forty-plus year old one inch galvanized water pipe burst in my house leaving me with about twenty inches deep with water under four thousand square feet of house. This is documented in the record of the B.O.A., and you have some photographs in your package showing the damage; I don't know if you have color photographs or not, but if you haven't, you'd like to see them, I can provide them. You can image select maple floors cupping and turning black, mold on walls, swimming pool settling, a real enormous damage. The relevance of all this the cost of my renovation addition increased to where the project would trigger the City's Flood Plain Management Ordinance, sometimes referred to as the F.E.M.A. ordinance, and that would require finish floor elevation from my house to go from the existing 9 ft. 6 in. to 11 feet. Now that is almost impossible when a house not on pilings, but is impossible for a house on pilings to do that, so as a practical matter I really, had no choice but to build a new house as opposed to repairing it. Now, in planning to do that and because I was trying to stay in the context I had before, we kept as close as possible to the original program, and while there is certain things with a new house, it no longer has eight foot ceilings, the air condition square footage of this house is virtually identical to what was the house that had been submitted for those plans. So what Mr. Guilford said, we were really sticking very close to the original program. I met with the Zoning staff to see if I could do this as a plan revision and keep my vested rights, including the metal roof, and they said no. So I had no choice but to apply for the variance needed for the new structure, among them the pitch roof covering material variance, and a variance to allow hardy plank siding; the reason I mention that would become relevant in a little bit. Now, the appellant has asserted that a hardship was not presented to justify the granting of a metal roof hearing. I respectfully disagree. As a record of the Board of Adjustment demonstrates, there were several different independent grounds that would have justified the granting of this variance, including a hardship well elaborated on by the B.O.A. itself at the close of the public hearing. Other grounds included that my application for a pitch roof covering material variance was similarly situated to other variances, and approvals granted by the City, including at least one in my immediate neighborhood, and one a short distance away at 219 Ridgewood, and finally because not granting approval for the roof, the metal roof being sought would be arbitrary when considering light of certain aspects of the Zoning Code involving copper roofs, such a denial would be arbitrary. At the Board of Adjustment hearing for my roof variance, I stated several grounds in support of the application. The first ground was in fact, I do meet the grounds for a hardship and variance set forth in 3-806 of the Zoning Code. Going through that list, once special conditions and circumstances exist which are peculiar to the land, structure or building



involved, and which are not applicable to other lands, structures or buildings in the same zoning district. A broken pipe resulting in twenty inches of water under four thousand square feet is effectively a giant sink hole with a house on top. I don't think there are any other properties in my zoning district that have this condition. Two; as the special condition and circumstances do not result from the actions of the applicant. I think the broken pipe speaks for itself. Three; by granting the variance requested will not confer on the applicant any special privilege that is denied by these regulations to other lands, buildings or structures in the same zoning district. Well, there are three homes in Old Cutler Bay that have metal roofs from under the same ordinance that I was vested under, so there would be no special privilege. Four; that the literal interpretation of these provisions, of these regulations would deprive the applicant's rights commonly enjoyed by other properties in the same zoning district under the terms of these regulations, and would not work unnecessary undue hardship. This property was vested with the right to have a metal roof, a catastrophe beyond my control required the rebuilding of the house, and because of your regulations it did not give me the option of restoring the house, that being the flood plain ordinance that required the raising of the floor elevation. The Zoning Code provides, this new current Zoning Code, different from the old, provides that all residential structures located in a residential district may be reconstructed, if destroyed to any extent provided that the reconstruction does not increase the extent of the non conformities that existed prior to the damage. Now, the fact that it talks about different non conformities suggests it wouldn't have to be the exact house and you couldn't become more non conforming; that's Section 6-302 of the Zoning Code. So the policy of the City is to allow homes to be built to their vested rights. My property was vested with the right to have a metal roof. I cannot build the exact home; I had to do this with the split plain regulations. My new proposed home is approximately the same size; I kept it one story just like the one I cannot restore. So based on this, I submit that it is the policy of the Zoning Code to allow me to keep my non conformity in effect the metal roof, and in doing so I am not increasing the amount of the non conformity. Five; that the variance granted is a minimum variance that will make possible the reasonable use of the land. Well, if reasonable use is looked at, the usage falls within the policy goals of the Zoning Code, then it would include being able to maintain non conforming vested rights after a catastrophe, and this is the minimum variance that would allow for that. Six; that granting the variance will change the use to one that is not permitted in the zoning district or different from other land in the same district; its still a single family home, it does not change the use. Seven; that the granting of the variance will not be in harmony with the general intent and purpose of these regulations, and that such variance will be injurious to the area involved or otherwise detrimental to the public policy. Well, there are now three homes in Old Cutler Bay that have metal roofs within a fairly short distance of my house, so it would certainly be in the harmony of the neighborhood. Number eight is actually a historic preservation item and is not applicable. In addition, you've got the record Sharon Langer from the Board of Adjustment, made a statement in the transcript at page 54 confirming that she felt there was appropriate hardship. You've got in your record, if you like, I can read that to you. The next ground for variance is that my application is similarly situated to other applications and situations approved by the City. When I originally saw the metal roof several years ago, there were no non copper metal roofs approved anywhere near my house, with the exception of 13014 San Jose; there are now

three metal roofs within a very short distance of my house. There is a picture of a board in your package that shows the location of those homes. I have handouts if you'd like to see them. However, when you keep in mind that the variance I'm seeking, is really, metal roof variance, its not a metal roof variance, it's a variance from the provision of the Zoning Code that governs pitch roof covering materials, and when you look at that provision and what it is, it actually expands farther, and this is something that was not in the record before the third DCA, so they didn't consider it even if its true. At 165 Solano Prado just a few doors down from my house, there was a variance of pitch covered materials that allowed for the cedar shaped roof. 219 Ridgewood has a standing seam non copper metal roof that was done in the last year-year and-a-half; and as I mentioned before 13014 San Jose has standing seam metal. These are all variances; these were not approved under the metal roof ordinance. The backup for these variances, the City's files, they are in your materials and they are in the record of the Board of Adjustment. Since my application is similarly situated to these applications, it would be a denial of equal protection under the law to deny the variance I am seeking; and case law suggests that, that is sufficient grounds appropriate for a variance. The final ground is that to deny the roof I'm asking for would be arbitrary. Local government has great authority to determine how it wishes to govern and impose the number of standards under its Police powers intended to help protect health, safety and welfare of the general public. Included in the welfare part is aesthetics, the Courts have said that time and again. You can govern aesthetics, but you can not do so in a manner that is arbitrary. There is no question that today, whether you like it or not, it is legal in Coral Gables to have a copper roof painted an opaque color, so long as it is approved by the Board of Architects, that may change soon, you directed staff to work on that, but it is the law in effect governing my application. That it was an issue that was appealed at a lower level by City staff, they lost; they chose not to appeal to the Commission so that issue is waived; and as a matter of law right now Board of Architects approved a painted copper roof because it is not in violation of the Zoning Code. So once that happens, and again that may change with the Zoning Code change, but that's where we are at now. Now, in addition to aesthetics Florida...[inaudible]...certainly goes to health and safety; the structural integrity of homes falls right in that category. The metal I'm seeking is stronger than copper. There is documentation from Miami-Dade County in the record on product approval; if I can have a look of painted metal, painted copper as of right, and I want to put in something that looks absolutely identical, and is stronger...I'm just about wrapping up...and I'm being denied that, then that would be arbitrary. In addition, the City has a history of approving ordinances on that basis. At 219 Ridgewood that's a house where someone, I think was...[inaudible]...permitted started a metal roof was caught, and came for a variance, and you know, the initial testimony was you can't have, you can't put on tile, the house won't handle it. But the original house had wood shades, or wood shingles, and there are product approved wood shingles that meet approval, it would have been legal, but because metal was a better material it was granted. And finally, there was Hardy Plank siding; it was approved, staff recommended it, in my case they granted the variance, and the basis for staff continuing recommending variance size, it looks exactly the same, but it's a better, stronger more durable material. So when you take that all into account, denying me a non copper metal roof that looks exactly like an as-of-right, painted copper roof would be arbitrary. So for any and all these reasons, hardship, similarly situated, or

arbitrary, you should deny the appeal of Mr. Murai and affirm the decision of the Board of Architects. Thank you.

Mayor Slesnick: There is one part of your presentation, I would take issue with and that is the painted copper roof; we have had one case, it came before this Commission; we took exception to painted copper and in so doing denied the metal roof, and we denied that the painted copper was not under appeal at the time.

Mr. Fine: No, no, no that's not correct. You denied the variance, but prior to that an issue came up as an appeal but never came to the Commission.

Mayor Slesnick: It never came to the Commission?

Mr. Fine: No, no, but it was appealed to the Board of Adjustment, the City lost, and they did not appeal it to you. Once they didn't appeal it that was waived and that's the Code right now...

Mayor Slesnick: I'm not sure I agree with that, but OK. You made your point. Mr. Guilford short closing.

Mr. Guilford: Thank you. Mr. Mayor, Commissioner, I didn't go through the seven conditions before, but I just wanted to pick out one more because he has to meet all these conditions, Mr. Fine brought it up; and I assume that he brought it up because it is in the record below, is that the granting of this variance will not confer on the applicant any special privilege that is denied by these regulations; the regulations in effect do not allow metal roofs. Denied by these regulations to other lands, buildings or structures; I guarantee you if anybody came before you tomorrow to allow a metal roof you would deny it because it is not provided by these regulations. The reason Mr. Fine filed a variance is because he knows he must come under the guidelines that are set forth for a variance, and not because he can go under the ninety day window; the window closed, he must meet the requirements of the variance. I pointed out two of the eight, obviously the eighth one doesn't apply, that reasons that this variance should not be granted, and I kindly ask that you uphold this appeal.

Mayor Slesnick: Thank you. Thank you both for your presentations, appreciate it. We have one person who is in the affected area that has filed to speak, Mr. Richard Namon. Madam City Attorney, I'd like to go on record as...and Mr. Namon, do not take this personally, as I spoke to you, I have no issue with your desire to speak; I take complete issue with his ability to speak, and I disagree whole-heartedly in your ruling that he can speak; I don't understand who that can happen, he is not part of the original record, he is not a lawyer representing one of the parties, and anything he says is not part of the original record. I just don't understand how you can rule.

City Attorney Hernandez: I'm sorry Mr. Mayor, as an aggrieved party because he did receive courtesy notice he can speak to the record below, and he can only make legal

argument. He cannot testify, all he can do is make legal argument; you do not have to be an attorney to make legal argument, but he has the right to speak as to the legal issues.

Mayor Slesnick: Mr. Namon, thank you for forbearing the discussion between the City Attorney and myself. This is Mr. Richard Namon of 5555 Oakwood Lane.

Mr. Namon: Thank you for just letting me speak. I've read the transcript. I think the Board of Adjustment is correct in its decision that I think it would be upheld in a further court, and I think it would be appropriate to agree with the Board of Adjustment; I think that Mr. Fine clearly proved a hardship in this case. Thank you.

Mayor Slesnick: Madam City Attorney, I would like a memo before the next case confirming your decision on that.

City Attorney Hernandez: OK.

Mayor Slesnick: I find that very troubling that we would have an appeal where we would open up...there maybe other people in the audience who have read the transcript who have an opinion too. I mean that's silly, but thank you Mr. Namon.

Commissioner Anderson: Just want to throw in a few thoughts on...

Mayor Slesnick: Let me make one point.

Commissioner Anderson: OK, sure go ahead.

Mayor Slesnick: The point is it was referred to, I would refer the Commission to page 56 of the transcript for Ms. Langer – 55 to 56 – of Ms. Langer's comments supporting the variance and then, I would refer them to page 57 for Chairman Lucas' comments in opposition to the variance. So there, I think they encapsulate the two positions.

Commissioner Anderson: First of all Ms. Langer is my appointment and I did not speak to her about the case, so I just wanted to make that perfectly clear. I don't make a point of interfering with my Board appointments decisions on that, I look for their thought processes. Mr. Fine applied during the time that he as allowed to apply for a permit and was approved during that pilot period. I don't know what...a burst pipe where he has to rebuild his home and the City imposes certain conditions on top of that, I don't know if that's a hardship, I mean, I can't tell you, I mean it's just amazing that that's not a hardship based on all that the arguments also that Mr. Fine made. I just can't see...I mean I can see not liking a metal roof or liking a metal roof which I do, but this was a vested right when he came before, and he was granted that when we authorized the ninety day pilot program. I would think that he did not want that pipe to burst and for him to have to go through all the expense he and his family. So for me it's clear, it's a hardship on that case alone.

Mayor Slesnick: Any other comments?

Commissioner Withers: Well, I mean I think it was the intent of this Commission pretty strongly, because we all voted for it, that these folks be given an opportunity to apply and put a metal roof on their home. I think, we agreed that they were allowed to do so; and Mr. Fine was part of the test area; you know for him to miss a window because of extraordinary circumstances of a flood or whatever, I don't think he should be penalized for that; and I congratulate our City's Board of Appeal on this, Board of Adjustment, because I think they saw the human side of it; and I think the City can be a compassionate City, and I think the Board members were compassionate, and I think that played into their decision. So I would encourage the Commission to support the Board of Adjustment findings.

**Mayor Slesnick: Why don't we do this; Ms. Anderson moves to deny the appeal, Mr. Withers seconds it. Any further comment?- any further discussion?**

**Mr. Clerk**

**Commissioner Cabrera: No**

**Vice Mayor Kerdyk: No**

**Commissioner Withers: Yes**

**Commissioner Anderson: Yes**

**Mayor Slesnick: Yes**

**(Vote 3-2)**

[End: 11:05:05]