

FOR THE  
CITY OF WALTHAM  
ZONING BOARD OF APPEALS

GENERAL HEARING

March 11, 2014

7:00 P.M.

at

Public Meeting Room, First Floor  
Arthur Clark Government Center  
119 School Street  
Waltham, Massachusetts 02451

Barbara Rando, Chair  
Mark Hickernell, Clerk  
Glenna Gelineau  
Gordon LaSane  
John Sergi

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Waltham Zoning Board of Appeals/3-11-2014/2

**I N D E X**

<u>CASE</u>	<u>PAGE</u>
2014-02	4
2013-28	17

**A T T A C H M E N T S**

Legal Notices: Case No. 2014-02  
Case No. 2013-08

Case No. 2014-02:  
Brief  
Proposed Findings of Fact  
Proposed Decision

Exhibits Case No. 2013-28:  
Binder presented by Attorney Dacey  
Handout presented by Richard Andersen

1 PROCEEDINGS

2 BARBARA RANDO, CHAIR: Good evening.  
3 The Zoning Board of Appeals for Tuesday, March 11,  
4 2014 is called to order at 7:00 p.m.

5 Tonight we have one continued case and  
6 one new case before us.

7 Case 2013-28, 232 Realty LLC, Ideal  
8 Concrete Block, 232 Lexington Street; and

9 Case 2014-02, George and Melissa Fox,  
10 32 Bancroft Street.

11 The members sitting this evening are:  
12 Mr. Sergi, Mr. Hickernell, Ms. Gelineau, Mr. LaSane,  
13 and I am Barbara Rando, Chair.

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1           ACCEPTANCE OF MINUTES OF FEBRUARY 11, 2014 MEETING

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                  BARBARA RANDO, CHAIR: The first  
action this evening is for a motion to accept the  
minutes of February 11<sup>th</sup>.

                  JOHN SERGI: So moved, Madam Chair.

                  BARBARA RANDO, CHAIR: Motion by Mr.  
Sergi.

                  Do I have a second?

                  GLENN GELINEAU: I'll second.

                  BARBARA RANDO, CHAIR: Second by Ms.  
Gelineau.

                  All in favor?

                  ALL BOARD MEMBERS: Aye.

                  BARBARA RANDO, CHAIR: Opposed?

                  (None opposed.)

                  BARBARA RANDO, CHAIR: The ayes have  
it.

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PUBLIC HEARING

Case Number 2014-02: George and Melissa Fox, 232  
Bancroft Street

BARBARA RANDO, CHAIR: Would the Clerk  
please read the petition in Case 2014-02, George and  
Melissa Fox?

MARK HICKERNELL: (The Clerk reads the  
notice for the above-mentioned Case into the record.  
See Attached.)

BARBARA RANDO, CHAIR: Thank you.

May we hear from the Petitioner or the  
Petitioner's representative please?

ATTORNEY JOSEPH CONNORS: Good  
evening, Madam Chair, members of the Zoning Board of  
Appeals. My name is Joseph M. Connors, Jr. My  
office is located at 404 Main Street here in Waltham.

I do have a brief that I prepared. I  
did email it to the Board, to the Zoning Board of  
Appeals Office, but I also have a paper copy for all  
members.

BARBARA RANDO, CHAIR: Thank you.

GLENN GELINEAU: Thank you, Joseph.

ATTORNEY JOSEPH CONNORS: And I know

1 the Chair referred to this as a new case, which it  
2 is, but this is also actually also a remake, a do-  
3 over. We were here before in July, on July 9<sup>th</sup> of  
4 2013, where the same petition essentially was  
5 presented to the Board where we had an existing  
6 single-family home, as was read in the legal notice.  
7 This is an existing family home, and that's the  
8 property that was situated there. And in the legal  
9 notice I do state that our intention is to demolish  
10 that and to construct a new single-family home on the  
11 same lot.

12 And so we appeared before this Board,  
13 and the Board granted two variances, and they pertain  
14 to the side yard setbacks. So, our lot has the  
15 adequate lot area, and we needed two side yard  
16 setbacks. We have a 10.4 and a 10.5, two side yard  
17 setbacks. So, we appeared before the Board. I noted  
18 a decision of the Board. It was Chairman Rando was  
19 here; Glenna Gelineau was here; Mr. Rudnick; Mr.  
20 Squillante; and Gordon LaSane were here. So, not all  
21 the members of this Board tonight were here for our  
22 presentation last summer, but several of you were so  
23 you may recall the case. And so what we asked for is  
24 two side yard variances, and we showed the footprint

1 of the design of the new structure that we intend to  
2 construct on the property.

3 So, in the course of them seeking the  
4 approvals from the Building Department, the Building  
5 Department -- and, actually, subsequent to the  
6 approval by the Zoning Board of Appeals, the  
7 architectural renderings were completed. We had one  
8 rendering that showed the front of the building for a  
9 presentation to the Board. But, essentially, the  
10 surveyor, and the architect, and the lawyer screwed  
11 up and didn't notice that the front steps have a  
12 covering over a portion of the front steps. And that  
13 wasn't shown in the footprint, because if you simply  
14 look at the footprint, the old footprint just shows  
15 the -- and I've attached that to my presentation  
16 documents, so I've created an Exhibit A, which shows  
17 the footprint of what was approved last year, and  
18 then I show Exhibit B, which is what the difference  
19 is.

20 And the only difference is -- the  
21 footprint remains the same, but the difference is  
22 that now we're calling out there's a proposed rooftop  
23 over a portion of the front steps.

24 So, what I also have for the Board,

1 and I wanted to pass out, is, you know, a couple of  
2 the pages of the plans, the architectural plans, so  
3 the Board can really identify what we're talking  
4 about.

5 So, this is a look at the proposed  
6 single-family residence from the side. And you'll  
7 see the front yard steps, which have a small roof  
8 covering over essentially the landing. And so that  
9 wasn't called out last year, and that was a mistake  
10 on our part. But the Building Inspector is of the  
11 opinion that once we put that roof on those steps,  
12 then we are required to have a variance for that  
13 particular roof.

14 So, what we show here is that we  
15 measure from the front lot line to the rooftop and  
16 it's 21 feet. So, we're requesting a variance,  
17 number one, for a front yard setback. Twenty-five  
18 feet is required. We're asking for a variance so we  
19 would have a 21-foot setback.

20 We're also asking the Board to amend  
21 the prior case to reflect that this new plan shall be  
22 in control, and that what it does is simply calls out  
23 that we have a proposed rooftop over the front steps.

24 What I've also done is I do have a



1 full set of house plans for the Board. So, and I've  
2 also referenced them in the decision so that  
3 everything shown there shall be constructed, which  
4 is, you know, the one plan that I just called out to  
5 your attention, A-6, and that's included in that 11-  
6 page build-out. And that shows the -- what I've  
7 given the Chairman is the foundation, the rendering  
8 from the east side, west side, and the back and the  
9 front of the house. So there's no mystery as to what  
10 we're intending to build.

11 BARBARA RANDO, CHAIR: What's the date  
12 on this, on this plan? I can't see it. Can you see  
13 that?

14 ATTORNEY JOSEPH CONNORS: August 20 --

15 MARK HICKERNELL: August 26.

16 BARBARA RANDO, CHAIR: August 26.

17 ATTORNEY JOSEPH CONNORS: Right.  
18 Right.

19 BARBARA RANDO, CHAIR: The plans that  
20 you submitted the night of the case did not have this  
21 front covering on it, correct?

22 ATTORNEY JOSEPH CONNORS: We had --  
23 all we had was the front. And it wasn't even signed,  
24 stamped yet. But, to be honest with you, my mistake

1 for not seeing that there is a covering there. And I  
2 suppose if, you know, someone with a better eye than  
3 I would see that there is a covering on there, on the  
4 front steps. But I missed it.

5 And what I do call out in my brief is  
6 the particular points of the zoning ordinance that  
7 relate to setback because it does state in the zoning  
8 ordinance that Section 2.337 of the zoning ordinance  
9 states in pertinent part, "Front yard entrance steps  
10 shall not be subject to setback requirements." So,  
11 it's really when you go to other portions of the  
12 code, Section 2.343, which defines structures "to  
13 give shelter or support," and Section 4.219, yard  
14 exception and projections, "unenclosed steps" may  
15 project. So, it's not exactly clear from the code  
16 anyway. It says they're not included in the setback,  
17 but then other portions of it kind of redefine it and  
18 state that only unenclosed steps are excluded from  
19 the setback.

20 So, that's the interpretation of the  
21 Building Department. So, recognizing that kind of  
22 after the fact, we're returning here for a front yard  
23 setback.

24 What I can point out to the Board is

1 that the setback of the house that was there prior to  
2 our demolishing it was 20.5. So, even with the  
3 projecting steps, we're still not as close to the  
4 street line as the prior home that sat there on the  
5 locus for many years.

6 And I put together a full presentation  
7 as to the jurisdiction of the Board, the statutory  
8 conditions for a hardship involve shape, and that the  
9 literal enforcement of the provisions of the code  
10 would involve a substantial hardship to the  
11 Petitioners. And it had to do with the shape of the  
12 locus. It was a narrowly shaped locus as you ran  
13 from side to side, yet it's very deep. There was no  
14 right angles at the back of the lot or the front of  
15 the lot. And so it narrows as you travel from the  
16 front of the house to the back of the lot.

17 The existing home on the property was  
18 an 800-square-foot home. Only the first floor was  
19 finished. The second floor, although it looked like  
20 it had one, it was unfinished. So, this family had  
21 bought it, Melissa Fox and George Fox. They  
22 purchased the property. They've already demolished  
23 the existing single-family and they started to  
24 construct their new home for them and their family.

1 They live on Bancroft Street, right down the road.  
2 And they're simply moving down the street.

3 So, we believe that the Petitioner  
4 does not propose a substantial detriment to the  
5 neighborhood, and we would ask that the Board  
6 essentially endorse the same decision we had last  
7 year, but for the fact that I've added an added  
8 condition, which is the particulars of the 11-page  
9 architectural rendering that I presented here  
10 tonight.

11 BARBARA RANDO, CHAIR: Mr. Sergi, do  
12 you have any questions at this time?

13 JOHN SERGI: Just to verify that this  
14 is the same document you sent to us online that I  
15 read online prior?

16 ATTORNEY JOSEPH CONNORS: Yes.

17 JOHN SERGI: There's no other changes?

18 ATTORNEY JOSEPH CONNORS: Yes.

19 JOHN SERGI: Okay. That's all, Madam  
20 Chair.

21 BARBARA RANDO, CHAIR: Mr. Hickernell?

22 MARK HICKERNELL: Thank you. I'm not  
23 sure I consider that enclosed, but I assume you'd  
24 rather deal with it here than in Land Court.

1 ATTORNEY JOSEPH CONNORS: Right.

2 MARK HICKERNELL: So, all right.

3 Thank you.

4 BARBARA RANDO, CHAIR: Ms. Gelineau?

5 GLENNA GELINEAU: No.

6 BARBARA RANDO, CHAIR: Mr. LaSane?

7 GORDON LASANE: Who are these  
8 architects and surveyors we've got to keep an eye out  
9 for? No, no questions.

10 BARBARA RANDO, CHAIR: Is there anyone  
11 in the audience that is in opposition to this  
12 petition?

13 (No response.)

14 Is there anyone in favor? Seeing  
15 three.

16 Is there anyone seeking information?

17 (No response.)

18 Seeing none. All right. You may  
19 continue with your proposed finding of facts.

20 JOHN SERGI: Madam Chair, may I make a  
21 motion that we waive the reading of the finding of  
22 facts since it's been on file with the Legal  
23 Department?

24 BARBARA RANDO, CHAIR: I have a motion

1 by Mr. Sergi. Do I have a second?

2 GORDON LASANE: Second.

3 BARBARA RANDO, CHAIR: Second by Mr.  
4 LaSane.

5 All in favor?

6 ALL BOARD MEMBERS: Aye.

7 BARBARA RANDO, CHAIR: Opposed?

8 (None opposed.)

9 BARBARA RANDO, CHAIR: The ayes have  
10 it.

11 You may continue with your proposed  
12 decision.

13 JOHN SERGI: In a similar fashion,  
14 Madam Chair, may I make a proposal that we waive the  
15 reading of the proposed decision since it's been on  
16 file as well?

17 BARBARA RANDO, CHAIR: Motion to waive  
18 reading by Mr. Sergi. Do I have a second?

19 GORDON LASANE: Second.

20 BARBARA RANDO, CHAIR: Second by Mr.  
21 LaSane.

22 All in favor?

23 ALL BOARD MEMBERS: Aye.

24 BARBARA RANDO, CHAIR: Opposed?

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1 (None opposed.)

2 BARBARA RANDO, CHAIR: The ayes have  
3 it.

4 All right. If there are no other  
5 questions from Board members, I'm ready to entertain  
6 a motion on the proposed finding of facts.

7 JOHN SERGI: Madam Chair, I make a  
8 motion that the proposed finding of facts become the  
9 Board's finding of facts.

10 BARBARA RANDO, CHAIR: I have a motion  
11 by Mr. Sergi. Do I have a second?

12 GORDON LASANE: Second.

13 BARBARA RANDO, CHAIR: Second by Mr.  
14 LaSane.

15 How do you vote, Mr. Sergi?

16 JOHN SERGI: Yes.

17 BARBARA RANDO, CHAIR: Mr. Hickernell?

18 MARK HICKERNELL: Yes.

19 BARBARA RANDO, CHAIR: Ms. Gelineau?

20 GLENNA GELINEAU: Yes.

21 BARBARA RANDO, CHAIR: Mr. LaSane?

22 GORDON LASANE: Yes.

23 BARBARA RANDO, CHAIR: And the Chair  
24 votes yes.

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1 Do I have a motion on the decision?

2 JOHN SERGI: Motion that the proposed  
3 decision becomes the Board's decision as well, Madam  
4 Chair.

5 BARBARA RANDO, CHAIR: Motion by Mr.  
6 Sergi. Do I have a second?

7 GORDON LASANE: Second.

8 BARBARA RANDO, CHAIR: Second by Mr.  
9 LaSane.

10 How do you vote on the decision, Mr.  
11 Sergi?

12 JOHN SERGI: Yes.

13 BARBARA RANDO, CHAIR: Mr. Hickernell:

14 MARK HICKERNELL: Yes.

15 BARBARA RANDO, CHAIR: Ms. Gelineau?

16 GLENNA GELINEAU: Yes.

17 BARBARA RANDO, CHAIR: Mr. LaSane?

18 GORDON LASANE: Yes.

19 BARBARA RANDO, CHAIR: And the Chair  
20 votes yes. It is granted.

21 ATTORNEY JOSEPH CONNORS: Thank you,  
22 Madam Chairman.

23 BARBARA RANDO, CHAIR: Good luck.  
24 Don't find anymore mistakes.



1       **Case Number 2013-28: 232 Realty LLC, Ideal Concrete**  
2       **Block, 232 Lexington Street.**

3

4                   BARBARA RANDO, CHAIR: Would the Clerk  
5       please read the petition in 2013-28, 232 Realty LLC,  
6       Ideal Concrete Block, 232 Lexington Street, Waltham?

7                   MARK HICKERNELL: (The Clerk reads the  
8       notice for the above-mentioned Case into the record.  
9       See Attached.)

10                  BARBARA RANDO, CHAIR: Thank you.

11                  May we hear from the Petitioner or the  
12       Petitioner's representative please?

13                  ATTORNEY RICHARD DACEY: Yes, Madam  
14       Chairperson. My name is Richard Dacey. I am an  
15       attorney. My office is at 707 Main Street in  
16       Waltham. And I do represent the Petitioner 232  
17       Realty LLC in the matter of the case before you  
18       tonight, which has a Docket Number of 2013-28.

19                  With me this evening is John Burgoyne.  
20       He is the manager of 232 Realty LLC. His son is also  
21       here and is active in the business.

22                  I see we now have a quorum.

23                  BARBARA RANDO, CHAIR: We do.

24                  ATTORNEY RICHARD DACEY: That's good.

1 We used the interim to accomplish a site view, which  
2 was Saturday. I recognize many of the neighbors who  
3 attended the site view, and hopefully it was  
4 informative for those who came.

5 I do have one addition to your  
6 packages that were submitted earlier, and they are  
7 additional pictures. And with your permission I  
8 would give them to you.

9 BARBARA RANDO, CHAIR: Please do.

10 ATTORNEY RICHARD DACEY: These are  
11 from the Waltham Library archives. And they are  
12 three pictures showing the site at various points in  
13 time. Two of them, I should say, are from the  
14 archives. One of them is from the City Atlas that  
15 was provided to me courtesy of James Regan, who had  
16 an old atlas in his office and he allowed me to copy  
17 of it. So, a color picture is from the 2001 atlas.  
18 But from the archives in the library, I asked them  
19 specifically what they had for aerial photos of this  
20 particular site, and we were able to unearth two.  
21 One is 1974. The other one is 1977. So, with your  
22 permission, I would hand them to you. They have been  
23 punched and they would fit conveniently at Tab 15 in  
24 the book that I have previously given to you if you

1 would like to keep track of them that way. I have  
2 one for the Clerk.

3 MARK HICKERNELL: Thank you.

4 BARBARA RANDO, CHAIR: Thank you.

5 ATTORNEY RICHARD DACEY: You're  
6 welcome.

7 I can't resist looking at pictures.  
8 So, if I direct your attention, it would be to the  
9 upper left quadrant of the picture. And you can see  
10 the football field in the lower left side.

11 If there's anyone else here -- I have  
12 one extra set if this wants to be circulated.

13 AUDIENCE: Thank you.

14 ATTORNEY RICHARD DACEY: You can see  
15 the football field in the lower left side. And, the  
16 V is Dale Street and Lexington Street. And the site  
17 is the light area, which is right under the W-A-L if  
18 you will. The black and whites aren't as  
19 illustrative as the color, but that's -- I guess that  
20 was the technology in 1974.

21 In your book previously, which was  
22 submitted, is a 1969 aerial photograph. This is at  
23 Tab 15. So, if you wanted these in sequence, the  
24 1969 aerial photograph would be first, then the '74,

1 then the '77, then the 2001, and, finally, the Google  
2 picture, which is a color picture courtesy of Google  
3 Earth, and it was taken on December 18<sup>th</sup>, 2013. So  
4 that shows you the current condition of the property.

5 Do you have any questions for me  
6 before we start, Madam Chair?

7 BARBARA RANDO, CHAIR: Does anyone  
8 have any questions for Attorney Dacey at this time?

9 (No response.)

10 Seeing none, you may proceed.

11 ATTORNEY RICHARD DACEY: Okay. I know  
12 there are several neighbors here, all of whom I'm  
13 sure would like to have an opportunity to speak.

14 BARBARA RANDO, CHAIR: And they will.

15 ATTORNEY RICHARD DACEY: So, I am  
16 suggesting that if I could voluntarily limit myself  
17 to a half an hour, that would give the neighbors an  
18 adequate amount of time to speak. I truthfully don't  
19 expect this hearing will be concluded in one night,  
20 but that's just my experience. But I will make an  
21 attempt to keep my initial remarks to a half an hour  
22 and give the neighbors an opportunity to speak before  
23 it gets too late.

24 The matter before you this evening has

1 -- I attempted to organize my materials into a  
2 binder, which has been submitted to you and  
3 distributed. And hopefully you've had an opportunity  
4 to at least glance through it. I'd like to begin by  
5 telling you what's in the binder and the relative  
6 order that it's in.

7           There is a document index. So, my  
8 first document is the memorandum, which is  
9 traditional in the way we present cases to this  
10 particular Board of Appeals.

11           Tab 2 is the Proposed Findings of  
12 Fact.

13           Tab 3 is the Proposed Decision.

14           Tab 4 is the actual petition and legal  
15 notice.

16           Tab 5, which is an important one, is  
17 the letter, the cease and desist letter from the  
18 Building Inspector.

19           Tab 6 is the map and abutters' list.  
20 So, if the neighbors are speaking, it's a convenient  
21 way for you to see where they live in relation to the  
22 property. If they just give you their residential  
23 address, you should be able to pick it out on that  
24 color sheet that's at Tab 6.

1                   Tab 7 is some deed information, which  
2 is also interesting. Tab 7 is a copy of the Registry  
3 records of the deed from the City of Waltham to Ideal  
4 Concrete Block for the parcel that we're talking  
5 about, which is 17 AFT. Varnum Park. It is the 1953  
6 deed.

7                   Accompanying the deed is a reference  
8 to a plan, which is also in Tab 7. The plan is  
9 actually an 1897 plan, and it is recorded with the  
10 deed from the New Jerusalem Church to the City of  
11 Waltham in 1897. The photocopying wasn't the best.  
12 The lot is outlined in yellow. But, in faint letters  
13 -- it did not come through the copy machine very well  
14 -- the three words that are inside the lot area  
15 itself is "city gravel lot." So, that is how the  
16 property was described in the deed from the New  
17 Jerusalem Church to the City of Waltham in 1897.

18                   If you follow the descriptions, you'll  
19 see that the descriptions of the lot have remained  
20 true all the way through. And this lot, it has  
21 essentially the same description that it did in 1897  
22 by metes and bounds, by lot area, and its frontage on  
23 Varnum Park.

24                   Tab 8 was my attempt -- is the

1 documentation of my attempt to unearth what  
2 information was available from City departments. The  
3 departments that I thought might have information on  
4 the City property when they owned it were the Public  
5 Works, City Clerk, Assessors, and Library. So, you  
6 can see my requests for information. And you will  
7 see that we did get a reply from Janice Deveney from  
8 the Public Works Department to the effect that they  
9 have no information at all on 17 Varnum Park.

10 We were a little more successful with  
11 the City Clerk. And he was able to bring out all of  
12 the Council meeting minutes beginning on September  
13 10, 1951, which was the initial point at which the  
14 City decided to offer the gravel lot for sale to  
15 abutters. And it turned out to be a two-year process  
16 with many iterations back and forth by the City  
17 Council, a series of competitive bids from neighbors.  
18 Ultimately, the successful bidder was Ideal Concrete  
19 Block and they purchased the lot in 1953 by vote of  
20 City Council and signature by the then Mayor Turner  
21 for \$2,300.

22 The Assessors Office had a few cards  
23 and also had some old maps indicating the City owned  
24 the property and identified it as a City of Waltham

1 parcel. These are the 1923 Assessors Maps. So,  
2 they're in your package at Tab 8, so you can -- you  
3 can see that it was not for lack of diligence on the  
4 part of the Petitioner and myself to unearth what  
5 information might have been available in the City.  
6 But to the extent that we were able to, you have it.  
7 There doesn't seem to be a whole lot of information  
8 in the various departments that goes back to the  
9 early days.

10 Tab 9 is very important and central to  
11 the case. And it's actually Tab 9 through 14. And  
12 they are a series of affidavits. And, as you know,  
13 affidavits, properly signed under the penalties of  
14 perjury, are admissible for certain purposes in court  
15 cases. They would be admissible in a summary  
16 judgment petition in Land Court. And I would expect  
17 that under your rules you would find them to be  
18 acceptable from an evidentiary standpoint.

19 The first is from Thomas Burgin. He's  
20 66 years old, a general contractor, and lived in the  
21 area for many years and has a personal recollection  
22 of the property and how it was used. You can read  
23 the affidavit.

24 Rosario Mueller, a City employee for



1 many years, started with the Rec Department. And his  
2 office was at the field house. The Park and  
3 Recreation Department was actually housed in the  
4 field house on Athletic Field Road and he started  
5 with them in 1946. His affidavit is very interesting  
6 for a couple of reasons. Number one, it gets us back  
7 to a time that we really need to determine what was  
8 going on over here. And he has some very specific  
9 recollections of the use of the property to the point  
10 where he was in charge of building the ball fields,  
11 what's now the ball fields that you access from  
12 Athletic Field Road but front on Dale Street. Those  
13 ball fields were a low area and the City filled them  
14 to make the fields. And it was Rosario's job to  
15 monitor that. So he was in the area frequently and  
16 had a clear sight line up to the area that we are  
17 talking about, which is just on the other side of  
18 Dale Street.

19 He has a specific memory of Monk  
20 Mahoney, who apparently is a local figure of some  
21 renown. Monk Mahoney ran Donlan Construction  
22 Company, did a lot of work with the City, and was the  
23 go to contractor for doing roads, sewer lines, drain  
24 man holes, and that kind of work that the City didn't

1 do it self but contracted out.

2 You might find it interesting to know  
3 that the City Yard at the time was on Pond Street.  
4 So, the City kept its trucks on Pond Street at the  
5 time in the area of what is now the elderly housing.  
6 This particular property was owned by the City and  
7 apparently initially used as a gravel pit or as a  
8 source of raw material, and then eventually used as a  
9 storage area by the City before it was sold.

10 So, Rosario Mueller has a clear  
11 recollection of Monk Mahoney driving the Donlan  
12 Construction trucks up there, dropping materials,  
13 picking up materials. He was mistaken. He thought  
14 that Donlan Construction actually owned the property  
15 and was surprised to hear that it was actually owned  
16 by the City. But, nevertheless, I think his  
17 affidavit is a first party knowledge of what was  
18 going on at the time, certainly by a person who is  
19 unbiased in the sense that he has no particular  
20 interest in the outcome of this case, but he has a  
21 very clear recollection of matters that I think are  
22 relevant and helpful.

23 Mary Burgoyne, God love her, she is 84  
24 years of age. And she is the sister of some of the

1 earlier -- okay, so Mary is John's aunt.  
2 Interesting. 1946, went to business school in  
3 Boston, graduated from business school, and then went  
4 to work for the company business around 1950. Has a  
5 clear recollection of the company, what it was doing  
6 on the 232 Lexington Street site. Remembers the City  
7 storage yard, remembers the fence, and remembers when  
8 her brother, or her father, bought it in 1953. So,  
9 her recollection is pretty accurate. She's  
10 physically a little under the weather. Otherwise, I  
11 think she'd probably be here tonight. But, mentally,  
12 she's very acute and had no difficulty recounting  
13 this in the form of an affidavit. So, I would urge  
14 you to read her affidavit and count it as credible.

15 Robert Cincotta, a longtime employee  
16 of Ideal Block, has an interesting recollection. His  
17 memories are from the '60s. He began to work there -  
18 - he's only 69 years old, a mere youth, but he worked  
19 there in the '60s, in the 1960s, and remembers the  
20 City coming even long after they sold the property to  
21 Ideal, he remembers the City coming over and picking  
22 up materials that they had still continued to store  
23 on the site. So, this was by agreement with Ideal.  
24 It wasn't confrontational in the least. Ideal

1 permitted them to leave materials that they used.  
2 And it would be the barrel block. It would be piles  
3 of sand. It would be pipe, the vitreous pipe that  
4 they use to build sewer lines. And these materials,  
5 according to Cincotta, were stored on the property  
6 long after the City sold it to Ideal.

7 Ideal, you might well suspect, is also  
8 a supplier to the City so that if the City needed  
9 extra materials they would come over, pick up what  
10 they had in their own inventory, and then go down to  
11 the store and buy what they were missing in the form  
12 of cement or stone or whatever else they needed. So  
13 the relationship was reciprocal for many years.

14 According to Cincotta, the material  
15 that was obsolete, at some point in the '60s, that  
16 was of no further value to the City, was placed in  
17 one of the holes in the property and then covered  
18 over. So, if we went on an archaeological expedition  
19 and dug in the area that he designated, we would  
20 probably find still some of the old concrete block  
21 pipe, or concrete block, barrel block, and vitreous  
22 clay pipe used for sewers. So, an interesting  
23 affidavit.

24 Larry Nicolai, also an employee of

1 Ideal for many years, and I suppose having said that  
2 you need to -- you need to credit him accordingly --  
3 but his affidavit is interesting because he grew up  
4 in the area and he remembers the area as part of his  
5 play area. He grew up on Dale Street and he played  
6 in the area. And he remembers the sand piles, long  
7 before he was an employee of Ideal Block.

8 So, I think that Larry Nicolai's  
9 affidavit is not being offered as an employee, but as  
10 a resident of Waltham with a very long memory and  
11 something that goes back to his childhood. But it's  
12 clear in his memory that he recognizes the  
13 relationship between Ideal and the City, the fact  
14 that the City did use this lot well after they sold  
15 it to Ideal, and used it to store materials that are  
16 very similar in construction content to the materials  
17 that Ideal stores on the property today. These are  
18 construction materials. These are pea stone. These  
19 are sand. These are gravel. These are concrete  
20 block.

21 I mean what's happened in the industry  
22 right now is what used to be built out of barrel  
23 block is now a precast product. So, we don't have --  
24 we don't have sewer manholes made of red brick and

1 built up one at a time anymore. They are typically  
2 precast. But, allowing for some modernization, the  
3 basic construction of the product is still a concrete  
4 and a construction based product. And I think that's  
5 an important point.

6 It probably goes without saying to  
7 anybody who has lived in Waltham for any length of  
8 time, but the *Waltham Rediscovered* book, which is  
9 probably the definitive history of Waltham -- you'll  
10 remember this book was put together by Ira Gordon.  
11 And there's a section in here on the Burgoyne family,  
12 so that's at Tab 14. And it recites the fact that,  
13 you know, "One of the most successful businesses by  
14 far has been the Ideal Concrete Block Company founded  
15 in 1923 by Joseph Leo Burgoyne." So, interesting.

16 The next tab is the pictures that we  
17 have discussed. And the tabs then begun with a color  
18 tab are the cases that I have provided for you.

19 So, with that, and having said that, I  
20 would like to spend a few minutes on the substance of  
21 the matter before you this evening.

22 This is, as your Clerk has read, a  
23 two-part petition. One is an application for a  
24 special permit and the other is an application for an

1 appeal from the decision of the Building Inspector  
2 who determined that the property was not sufficiently  
3 proved to him to be a nonconforming use such that he  
4 would allow it to continue without submission to this  
5 Board, you being the higher authority of the Building  
6 Inspector.

7 So, if you read his letter on Tab 5,  
8 you will see that he didn't have much difficulty  
9 seeing that the property had evidence of a prior  
10 nonconforming use, but he was concerned about the  
11 level of activity that has existed and remained  
12 constant and without interruption. So that was his -  
13 - that was his primary level of concern, not that the  
14 property wasn't nonconforming, but he was concerned  
15 about, as he describes it, the level of activity.

16 So, what we have here is an appeal  
17 from the decision of the Building Inspector. And  
18 this is a classic nonconforming use case for a  
19 commercial property so that it falls squarely under  
20 the *Powers v. Barnstable* jurisdiction if you will.  
21 I'm sure this Board is familiar with *Powers* and  
22 *Barnstable*. I see a smile on the face of Madam  
23 Chairperson.

24 BARBARA RANDO, CHAIR: We've done

1 research on the *Powers*. We have.

2 ATTORNEY RICHARD DACEY: I see. Well,  
3 it is a seminal case. It is a case that if you are  
4 dealing with nonconforming uses for commercial  
5 property, it's where it all starts. And there isn't  
6 any -- there isn't any better case.

7 So, I think that if you look at  
8 *Powers*, which is an interesting case, and it's pretty  
9 well -- it's pretty well documented, the first thing  
10 you notice is that it's a Supreme Court case. And  
11 Supreme Courts, at least in Massachusetts, have a  
12 tendency to look for cases at a lower level and then  
13 bring them up and decide them in their court if they  
14 feel that the case has some precedent value and it  
15 has some educational value to the bar, to judges  
16 sitting and listening to these kinds of cases, and to  
17 boards of appeal who have to -- and building  
18 inspectors who have to make these decisions. So,  
19 *Powers* was selected by the Massachusetts Supreme  
20 Judicial Court for a very particular reason. The  
21 case had a lot of substance to it.

22 And if you'll remember *Powers* --  
23 you'll have to excuse me. I have to continue to sit  
24 here. The medicine that I'm on for my cold just



1 completely dries me up.

2 Powers was a candle manufacturer down  
3 the Cape. They had a little building out on Route 6  
4 I guess it was, someplace down in Hyannis. And it  
5 did okay. But then it expanded. It was successful  
6 and it started to expand. And the business changed  
7 hands two or three times. And by the time the final  
8 owner, Powers, got involved in this case, the  
9 business had expanded from a single little retail  
10 operation to a major wholesale operation  
11 manufacturing of candles. The second building, which  
12 was some sort of a residence, was converted to an  
13 office. The building that was used to store  
14 refrigerators was converted to the manufacturing  
15 process of candles. And, of course, this case came  
16 up through the courts on a complaint by the neighbors  
17 that the use was substantially more than the original  
18 nonconforming use, which no one argued with. This  
19 was a business in a residential zone. And the  
20 question was at what point did the expansion of the  
21 business into the two adjoining buildings exceed the  
22 ability to stay within the penumbra of what is  
23 permissible as a nonconforming use. So, the case is  
24 interesting because it really broke down within the

1 site itself what was permissible and what wasn't.

2 Now, the neighbors were unhappy that  
3 the initial retail business out front was serviced --  
4 was designed to service shoppers, tourists, people  
5 who would come and stop in a car, and mom and dad  
6 would go in and buy a candle and leave. By the time  
7 Powers got involved in this thing, it was busloads of  
8 people. And there wasn't enough parking for the  
9 buses, and the buses continued to run, and the  
10 neighbors objected to the smell and the diesel noise  
11 and everything else. So that was one problem.

12 The other problem was that the initial  
13 building, the second building behind the retail, was  
14 used as a residence. Powers converted it to an  
15 office. So, suddenly the residence became a business  
16 use associated with the retail out front.

17 The initial people also had a barn,  
18 and they used to store fishing gear in there, and  
19 they used to store old refrigerators in there.  
20 Powers converted it to part of his manufacturing  
21 process.

22 Net effect in the *Powers* case, the  
23 retail use was sustained as a valid nonconforming  
24 use. The mere fact that the use was intensified is

1 not an issue under Powers. The mere fact that this  
2 went from automobiles with mom and dad going in and  
3 buying a single candle to busloads of tourists  
4 parking out front and buying them buy the hundreds is  
5 an increase of the same kind of business and it is  
6 not impermissible to increase the business. As long  
7 as the business stays the same, within the same  
8 penumbra, it's okay.

9 They looked at the out building out  
10 back and they said "uh uh." That was a residence and  
11 now it's an office. You can't convert a residence to  
12 an office. That's a no no. The first floor, you  
13 always used it as part of the business. It was where  
14 you kept your extra supplies. It was where your  
15 accounting was done. That's fine. So they even went  
16 to the point of dividing the building out back  
17 between the second floor use and the first floor use.  
18 And that's how fussy they were when they analyzed  
19 this case.

20 The barn they said you can't use. The  
21 only evidence you have here is that it was used to  
22 store fishing gear and refrigerators. You can't  
23 convert that to candle manufacturing. So the barn  
24 was out.

1                   The first floor of the building  
2 behind, and the retail store out front was permitted,  
3 a split decision, something for everybody. But the  
4 case is very helpful because the analysis is very  
5 detailed, and it's very thorough as to what they want  
6 you to look at.

7                   So, the *Powers* case is a little easier  
8 than your task tonight. And I will tell you this  
9 because it is true. In *Powers*, there was a very  
10 clear and a very easy way to define what the  
11 nonconforming use was. It was the sale of candles in  
12 the retail store out front. No one had any trouble  
13 with that. Your problem here, and the reason I've  
14 asked you to start with the nonconforming use aspect  
15 of the case, is that it is a little murky what the  
16 nonconforming use of 17 AFT. Varnum Park was in 1951  
17 before the zoning ordinance changed and before 1953  
18 when it was sold to Burgoyne.

19                   We have a pretty good idea of what  
20 Burgoyne did with the property since 1953. He's used  
21 it to store construction materials associated with  
22 his business. You can see from the pictures that  
23 there's been a consistent use of the property over  
24 the years. It's always been a storage use. The

1 question is what's the starting point because that's  
2 what Powers requires you to do. It's always a now  
3 compared to then analysis. So, in order to make the  
4 analysis effective, you need to see what was on the  
5 property here in 1946, 1948, 1950, 1951. The zoning  
6 changed in 1953, which is when we got the Residence  
7 A3 zone. It's when we have the Table of Uses cited  
8 in Section -- in the Building Inspector.

9 But the question is what was the City  
10 doing with this property just before they sold it,  
11 hence, the affidavits. There is nothing in the City  
12 records that help a lot. We think the City was using  
13 this property for storage of construction-related  
14 materials. That's what we believe. If that's the  
15 case, the comparison to what Burgoyne is currently  
16 doing with the property is pretty straightforward.  
17 And you'll have to decide whether storage of vitreous  
18 clay pipe and barrel block is the functional and  
19 modern equivalent of storing pavers and materials  
20 that he uses or that he now manufactures in his  
21 process.

22 The industry has changed, as I  
23 indicated. There is -- in 1923 when Leo Burgoyne  
24 started this business, there were no pavers. His

1 business was sold -- his business was the 16-inch  
2 concrete blocks sold to contractors for the purpose  
3 of building houses, building buildings. Twenty  
4 percent of the cement products sold before 1950 were  
5 landscape-related. That ratio has reversed itself.  
6 Eighty percent currently of what is sold at Ideal is  
7 now landscape-related. These pavers are used for  
8 driveways. They're used for walkways. They're used  
9 for walls. They're used for decorative purposes.  
10 Twenty, maybe 25 percent of his business, is still  
11 the old construction stuff, the block. But the bulk  
12 of it has changed. Times change, materials change.  
13 That's not a problem under *Powers*. That's not a  
14 problem under the successor cases. The fact that a  
15 product has been modernized, the fact that a product  
16 has been changed or altered slightly, isn't a big  
17 issue. What is a big issue is the finding, the  
18 starting point for all of this.

19 So, our representation to you is in  
20 1950, say 1946, 1948, 1950, 1951, the City was using  
21 this for storage of concrete and building-related  
22 materials. They had piles of sand. They had barrel  
23 block. They had gravel. They had all of the  
24 accoutrements for building manholes, sewers, and that

1 kind of thing.

2 We represent to you that the storage  
3 of those materials is close enough to what is  
4 currently being manufactured by Ideal because they  
5 share the commonality of a concrete product.

6 So, the value of a hearing and  
7 testimony is that everybody has a memory. Everybody  
8 has a history here. And people will remember it  
9 differently. Understandable. It happens. We did  
10 the best we could and sorted out the most  
11 authoritative sources we could find, asked all the  
12 various City departments that we could locate, and we  
13 leave it to your good offices.

14 Now, it's probably worth running  
15 through the other two aspects of *Powers* because these  
16 run through all of the cases. So, the so-called  
17 *Powers* test reduces itself to three sentences.

18 The first *Powers* test: Does the  
19 current or resulting use reflect the nature and  
20 purpose of the nonconforming use prevailing when the  
21 zoning ordinance or bylaw took effect? Is the use  
22 the same, in other words. Okay? Storage of concrete  
23 materials, storage of a different kind of concrete  
24 materials, storage of sand, storage of gravel,

1 storage of pea stone, storage of whatever. All  
2 right? We think the answer is yes, but that's for  
3 you to decide.

4 The second test: Is there a  
5 difference in quality or character as well as the  
6 degree of the resulting current use? And I think  
7 this is where the Building Inspector got hung up.  
8 And I don't think he was particularly concerned that  
9 there was a storage use there then and a storage use  
10 there now. He was concerned about what is the  
11 degree, what is the resulting degree. And I think  
12 that's probably where his focus landed. It's a fair  
13 question under *Powers* because that's the second  
14 question that *Powers* asks you to determine: Is there  
15 a difference in quality or character as well as the  
16 degree of the resulting use? Is it a different  
17 quality? All right.

18 The third test is: Is the resulting  
19 or current use different in its kind -- in its effect  
20 on the neighborhood? So, those are the puzzlements,  
21 if you will.

22 Now, every one of these *Powers* test  
23 situations has been litigated. There's literally  
24 dozens of cases on nonconforming uses. And they go



1 in two distinct paths: one they're sustainable and  
2 one they're not. So, the cases that I have cited in  
3 here are cases where the nonconforming use has been  
4 sustained. It would not be difficult for you or  
5 someone with a little research ability to come up  
6 with another line of cases that go in the exact  
7 opposite direction. That's the nature of the beast.  
8 These are fact-driven cases. So you really have to  
9 look very carefully at the facts and then apply the  
10 three tests to decide what you're doing.

11 So, I've offered you a second case  
12 here, which is a Land Court case, and it's at Tab 2.  
13 It's *Skydell*. And I did this on purpose because lots  
14 of times what's reported in the appellate level  
15 courts or the supreme court is a very truncated  
16 version of the facts. So, at a land court level, the  
17 judges spend much more time developing the facts.  
18 So, the *Skydell* case is a land court judge's  
19 decision. It is pretty close to what we're talking  
20 about here.

21 *Skydell* was running a landscaping  
22 business. We're running a concrete storage business.  
23 But as soon as you can make that analogy, the rest of  
24 it works pretty well.

1                   *Skydell* is helpful I think to you  
2 because it's a land court judge's perspective of how  
3 to interpret *Powers*. And that's what he does in  
4 considerable detail. And he spends more time on the  
5 facts of the case than an appellate court would.  
6 Appellate courts tend to focus on the law. Land  
7 court judges tend to focus on facts. Facts drive  
8 these cases. So, *Skydell* is interesting and worth  
9 reading to see the process that a land court judge  
10 goes through in analyzing facts.

11                   You'll be pleased to know that at the  
12 end of the day the land court judge decided that the  
13 landscaping business, even though it had expanded  
14 from five employees to 30 employees, and from two  
15 trucks to 13 trucks, was still the landscaping  
16 business and that it belonged there.

17                   So, naturally, this is one of these no  
18 good deed goes unpunished situations. The owner of  
19 the landscaping business sold off half of his land.  
20 This is down the Vineyard, these feisty little towns  
21 in Tisbury or someplace down there. So, he sold off  
22 half of his land, kept the other half for landscaping  
23 business, which he had been running for 30 years.  
24 Sold the landscaping business to this guy who bought

1 it, *Skydell*. Sold the other half of the property for  
2 residential house lots. Well, guess who took the  
3 landscaper to court? His new next door neighbors.  
4 So, if he was smart he would have sold the whole  
5 thing to the landscaper and been done with it. But,  
6 instead, he sold half of the property to the  
7 landscaper and half to residential neighbors and  
8 created the conflict. And that's why you've got  
9 *Skydell* as part of the Massachusetts jurisprudence.  
10 Great stuff. You can't make it up.

11 Questions come all the time. What can  
12 you do that's slightly different? *Derby Refining*  
13 *Company* is a very good case on that point. How far  
14 can you stray from the original? How far can you  
15 stray from the original product and still stay within  
16 the penumbra that we've talked about?

17 So, *Derby* is interesting for two  
18 reasons, *Derby v. the City of Chelsea*. One is that  
19 the tanks that we're talking about here that were  
20 nonconforming were filled with heating oil. There  
21 were seven heating oil tanks and they were unloaded -  
22 - they were filled by ships unloading in the Chelsea  
23 Creek. The property went dormant for several years.  
24 They kept up their licenses. They kept up all of

1 their permits. But there was no fuel oil being  
2 distributed.

3 The person who was interested in  
4 reactivating the business wanted to use it for liquid  
5 asphalt. And the question was is liquid asphalt  
6 close enough to the fuel oil, the number two heating  
7 fuel, to stay within the penumbra of the  
8 nonconforming use. And the answer was yes. It's an  
9 oil-based product. So, number two heating fuel and  
10 liquid asphalt are basically petroleum products and  
11 the answer was yes, that's close enough. It doesn't  
12 violate the *Powers* test.

13 The other issue that was raised by the  
14 neighbors was have they abandoned this use? Is there  
15 enough of a consistent use here to justify sustaining  
16 this property or have they walked away from it? So,  
17 there's a very good discussion in here on  
18 abandonment, and what constitutes abandonment, and  
19 what doesn't constitute abandonment. And the mere  
20 fact that they did not use all of the tanks -- and  
21 there were seven tanks. The asphalt people used  
22 three of the seven. The mere fact that there was a  
23 seven-year hiatus between the time there was heating  
24 oil in the tanks and the time that the liquid asphalt

1 was put in the tanks was not fatal. They kept up all  
2 their permits. They kept the property inspected.  
3 They kept up all their fire codes. And that was  
4 enough to sustain the use.

5 So, it's an interesting case from the  
6 standpoint of abandonment. It's an interesting case  
7 from the standpoint of a slight change in use and  
8 where the tipping point is between a product that was  
9 used prior as a nonconforming product and then the  
10 new owner comes in and wants to alter it.

11 McAleer, seasonal use, another  
12 interesting case. A lot of this stuff comes out of  
13 the Cape. I don't know why. The Cape, Martha's  
14 Vineyard, they're litigious down there for some  
15 strange reason.

16 This was a motel that McAleer wanted  
17 to convert to year-round use. It was a seasonal  
18 hotel -- a seasonal motel. And, of course, the  
19 neighbor said, "No, you can't do it. It's a seasonal  
20 use. You can't convert it to year-round use." And,  
21 McAleer basically stands for the premise that, look,  
22 it's not critical that you use the property 12 months  
23 a year. The use is what's important. So, if you're  
24 going to convert this property from a seasonal motel

1 to a year-round motel, it's okay to do. If, on the  
2 other hand, you are going to convert a seasonal motel  
3 to condominiums and sell them as personal residences,  
4 that's a no no.

5 So, it depended heavily on what  
6 McAleer was going to do with the property.  
7 Converting a motel from a seasonal use to a year-  
8 round use was perfectly acceptable.

9 There's an analogy here. A lot of  
10 times during the year, this property on Varnum Park  
11 is dormant. It's definitely a seasonal use business.  
12 There's a lot of activity in the summer and when the  
13 contractors need product. There's much less activity  
14 in the winter when the contractors can't work. So, I  
15 mean if it's the seasonal use that was troubling  
16 Patrick Powell, McAleer should be of help to you  
17 because the fact that the property is being used on a  
18 year-round basis or it's being used more extensively  
19 for more months of the year isn't fatal under the  
20 **Powers** test.

21 Seekonk, I believe this is the junk  
22 yard. Yes, this is the car junk yard. Very  
23 understandable, the neighbors are not happy. This  
24 guy had a junk yard in Seekonk and he had six or

1 eight cars there. The junk yard grew and he had 50  
2 cars there. And the question was did the increase in  
3 the number of cars change the character under the  
4 Powers test? And, again, the answer was no. This is  
5 the same use; it's merely more intense. A more  
6 intense use is fine. A different use is not fine.

7 So, Seekonk basically says six cars is  
8 the nonconforming use and establishes the use. Fifty  
9 cars is what happens. Life goes on.

10 The Town of Weston.

11 BARBARA RANDO, CHAIR: Half hour.

12 ATTORNEY RICHARD DACEY: Okay. Here I  
13 go. Town of Weston, interesting, close to home.  
14 Mass. Broken Stone over here. Interesting because --  
15 and, again, there's a good analogy here to our little  
16 situation. The nonconforming use on the Mass. Broken  
17 Stone property turned out to be a manufacturer of  
18 bituminous concrete, asphalt, road pavement by any  
19 other means. They ran their asphalt plant for years,  
20 the Mass. Broken Stone. They brought in the liquid  
21 petroleum product and used their stone from the  
22 quarry. When they ran out of stone in the quarry,  
23 they imported the stone, trucked it in. The  
24 neighbors said, "It's a different use because you're

1 now trucking in product. You're not building it on  
2 site." Wrong. Wrong.

3 The use was the manufacture of the  
4 bituminous concrete product. The fact that when they  
5 ran out of product on their own site and trucked in  
6 product to manufacture the bituminous concrete did  
7 not change the use.

8 So, our situation here, for years Leo  
9 Burgoyne manufactured these concrete blocks on site.  
10 Starting in 1978, he bought a piece of property up in  
11 Westford. The manufacturing gradually shifted to  
12 Westford and there has been no manufacturing on the  
13 Waltham property since 1996.

14 So, does that alter the equation, the  
15 fact that we are now trucking in bricks that are made  
16 in Westford. And the answer is, according to the  
17 Town of Weston and Massachusetts Broken Stone, no.  
18 The use here is a storage use. It doesn't matter  
19 where they manufactured it. The question is what are  
20 you doing on the site. And the answer is we're  
21 storing concrete product. So, if we manufacture it  
22 on site and store it, or we bring it into the site  
23 and store it, it's the same use. It's the same --  
24 it's the same process that is entitled to protection



1 under 40A Section 6.

2           *Blackstone* is more of the same. This  
3 is one of these expansion cases and it's the school  
4 bus case. So, this guy started with five school  
5 buses, and the next thing you know he's got 30 school  
6 buses. It's the same problem. Does it have a higher  
7 degree of impact on the neighbors? Probably. The  
8 same way that the buses had a higher degree of impact  
9 on the neighbors in Barnstable in the *Powers* case.  
10 But the focus has to be on the use. So, if the use  
11 is the same but merely increased, the effect on the  
12 neighbors is the same. It may be amplified, but it's  
13 no different.

14           And, this is why the law is so  
15 interesting. This is why it's so much -- you have to  
16 read these things. You have to study them. You have  
17 to become a student of this because that's how these  
18 cases are nuanced. There are subtle distinctions.  
19 And that's what we're doing here tonight. We're  
20 making very subtle distinctions between bricks that  
21 were manufactured and bricks that are brought in,  
22 pavers as opposed to barrel block. That's where  
23 we're going with this.

24           So, I will end with this and then the

1 neighbors can have their fun with me. They've been  
2 very patient and very polite. And I promise I'll be  
3 the same.

4 We have two applicable sections of the  
5 zoning ordinance here. One of them is the section  
6 that the Building Inspector cited, which is the Table  
7 of Uses, and it's Section 3.4 for anybody who wants  
8 to read it. And, we're in a Residence A3 zone. This  
9 property, this 70,000 square feet of land, is in a  
10 Residence A3 zone. No question. So, the Table of  
11 Uses say you can't have a commercial use. Fair  
12 enough.

13 The zoning ordinance also has a  
14 section, which is 3.722, and that is the rights of  
15 nonconforming properties and uses. Now, these  
16 sections are juxtaposed. They're both in your zoning  
17 ordinance. One doesn't have priority over the other.  
18 They are both determined to be of equal weight. It's  
19 a function of which section of the ordinance you  
20 choose to use. I mean this is informative when it  
21 says under Section 3.722, rights of nonconforming  
22 structures, uses, and building, "Any use, structure,  
23 building, or land which, at the time of the passage  
24 of any applicable provision of this chapter,

1 constitutes a nonconforming use, including structures  
2 and buildings with a valid building permit issued  
3 prior to 1987 are entitled to continue in the use."

4 So, we're not making this up. We're  
5 not asking for something that isn't in the zoning  
6 ordinance as it is written. We're simply directing  
7 you to a different section of the zoning ordinance  
8 and asking you to give equal weight to the  
9 nonconforming use section of the ordinance. The  
10 neighbors would prefer that you address Section 3.4.  
11 They're both in the zoning ordinance. And this is  
12 why -- this is why we're here. You people have to  
13 make a determination as to which way you want to go  
14 on this.

15 But I do want to point out that this  
16 is not an invention. This is not something that Mr.  
17 Burgoyne conjured up. This is something that he has  
18 an absolute right to if he can establish that there  
19 is a continuing nonconforming use on his property.  
20 It doesn't have to be exact. It doesn't have to be  
21 proved to the mathematical certainty. It simply  
22 needs to follow the *Powers* test and it needs to stay  
23 within the penumbra of the cases that we've talked  
24 about here. It's not that hard, but it takes a

1 little -- it takes a little thinking and it takes a  
2 little work.

3 So, I'll stop here.

4 BARBARA RANDO, CHAIR: I have a couple  
5 of questions before we have the audience speak.

6 In 1953 when Ideal bought that piece  
7 of property from the City, they just continued to use  
8 that piece of land for storage; they didn't seek  
9 information to see if it was allowed? They didn't go  
10 for a variance knowing that it was in 1953  
11 residential?

12 ATTORNEY RICHARD DACEY: No.

13 BARBARA RANDO, CHAIR: They just used  
14 it? They just felt that they were entitled to use it  
15 or what was their reasoning?

16 ATTORNEY RICHARD DACEY: Well,  
17 unfortunately, Leo's dead. I think you can -- I  
18 think you can read between the lines here. The  
19 grantee on the deed was Ideal Concrete Block. This  
20 isn't an attempt on Mr. Burgoyne's part to buy  
21 something under a straw or a misrepresented name.

22 GORDON LASANE: He didn't buy it, did  
23 he? I mean he bid for that, right?

24 ATTORNEY RICHARD DACEY: Yeah.

1 GORDON LASANE: Okay.

2 ATTORNEY RICHARD DACEY: There was a  
3 bid. There was a bid.

4 GORDON LASANE: Okay.

5 ATTORNEY RICHARD DACEY: But,  
6 ultimately, the deed is to Ideal Concrete Block.  
7 It's perfectly obvious when you look at the history  
8 of this that this was a considered sale and that if  
9 the City had any indication that there was a problem  
10 with this, with Ideal bidding on this, well, you  
11 know, where was the City? I think it's also a fair  
12 question that we all know from our history of the  
13 City that the City in and of itself, because it is a  
14 municipal corporation, is not necessarily exempt from  
15 zoning. We're seeing that now with the Banks School.  
16 So, if the City wants to sell condominiums that were  
17 being converted from an old school building, they  
18 need to do something to change the Residence B zoning  
19 which permits two-family residences but not  
20 multifamily residences. So, the City is wrestling  
21 with this problem, the City Council. I see Councilor  
22 Romard here. He may have information on this, but  
23 this is a fact. The City is not exempt from zoning.  
24 So, if the City was running a gravel

1 pit, if the City was using this property for storage,  
2 then if this represented a problem for somebody then  
3 where were the violation notices then? The truth of  
4 the matter is that the City is the one who appears to  
5 have changed -- to have made the biggest change in  
6 use from a gravel pit to a storage area. When the  
7 gravel was exhausted, they're the ones who altered  
8 the use of the property from the active gravel pit to  
9 the passive storage use. And then they sold it.

10 Now, did the City seek any permissions  
11 to alter their nonconforming use? Because, to be  
12 candid with you, the City was fully protected, even  
13 if it was subject to zoning, the City was fully  
14 protected because they owned this property and used  
15 it as a gravel pit since 1897. They could use this  
16 property forever as a gravel pit. That's not a  
17 problem. I mean we didn't get zoning in Waltham  
18 until 1925, '27. Okay. So I mean the City could  
19 have continued the nonconforming gravel pit forever.  
20 They didn't. They changed the use.

21 BARBARA RANDO, CHAIR: My second  
22 question is I was reading the affidavits and they  
23 said that Monk Mahoney's trucks went up and down  
24 Varnum Park.

1 ATTORNEY RICHARD DACEY: Mm hum.

2 BARBARA RANDO, CHAIR: When was that  
3 closed, the egress to Ideal?

4 ATTORNEY RICHARD DACEY: Oh, the  
5 egress? That's recent.

6 BARBARA RANDO, CHAIR: How recent?

7 JOHN BURGOYNE: I think that's, to the  
8 best of my knowledge, I think it's been closed for  
9 quite some time.

10 ATTORNEY RICHARD DACEY: But not back  
11 to --

12 BARBARA RANDO, CHAIR: No, no.

13 ATTORNEY RICHARD DACEY: Not back to  
14 19 --

15 BARBARA RANDO, CHAIR: In the '60s,  
16 the '70s, the '80s, '90s?

17 JOHN BURGOYNE: I think it was  
18 probably the '70s, somewhere in there, the '80s.

19 ATTORNEY RICHARD DACEY: I mean some  
20 of those '70s pictures may be helpful. I don't know.  
21 We can take a look and see if you can see a picture  
22 in there. There's pictures from '69, '74, '77.

23 BARBARA RANDO, CHAIR: Mr. Sergi, do  
24 you have any questions at this time?

1 JOHN SERGI: No, not at this time.  
2 BARBARA RANDO, CHAIR: Mr. Hickernell?  
3 MARK HICKERNELL: Not right now.  
4 BARBARA RANDO, CHAIR: Ms. Gelineau?  
5 GLENNA GELINEAU: No.  
6 BARBARA RANDO, CHAIR: Mr. LaSane?  
7 GORDON LASANE: No.  
8 BARBARA RANDO, CHAIR: All right. Is  
9 there anyone in the audience in opposition to this  
10 petition that would like to stand and be recognized,  
11 give their name and address for the record?  
12 Come up to the microphone, please.  
13 I would just ask you not to repeat  
14 something that's already been said just for time.  
15 Name and address, please.  
16 RICHARD ANDERSON: Yeah, just one  
17 second, please.  
18 BARBARA RANDO, CHAIR: Mm hum.  
19 RICHARD ANDERSON: I have just one  
20 more thing back here. Thank you.  
21 Madam Chairman, honorable Board  
22 members, Attorney Dacey, my name is Richard Anderson.  
23 I'm here tonight on behalf of my mother who lives at  
24 251 Bacon Street, Waltham, and has approximately 100



1 feet of property that directly abuts the property of  
2 Ideal Concrete Block. I have laryngitis so I have to  
3 apologize. I'm here as her oldest son. I am not a  
4 resident of Waltham, however, nor am I an attorney.

5 This whole process started as a result  
6 of my mother's concerns -- and, I'm not sure I  
7 mentioned, she's 91 years old -- concerns regarding  
8 what the activities that were taking place on the  
9 property here, what's been referred to as 17 AFT.  
10 Varnum Park.

11 As a result of my mother's discussions  
12 and discussing the matter with my other family  
13 members, I was not sure as to what the actual proper  
14 usage of that lot on 17 AFT. Varnum Park was.

15 GLENNA GELINEAU: Excuse me, sir. Can  
16 you just tell me like what year, or month, or date  
17 that was that you started that?

18 RICHARD ANDERSON: It was approximate  
19 -- well, prior to the Building --

20 GLENNA GELINEAU: When did she get  
21 concerned, just month and year?

22 RICHARD ANDERSON: Well, she was  
23 concerned because they were filling in --

24 GLENNA GELINEAU: Just do you know the

1 month or the year? Do you remember?

2 RICHARD ANDERSON: It was last year,  
3 probably last spring.

4 GLENNA GELINEAU: Okay, so spring of  
5 2013.

6 GORDON LASANE: Did you mention  
7 insurance?

8 RICHARD ANDERSON: I'm sorry, sir?

9 GORDON LASANE: Did you mention  
10 insurance?

11 RICHARD ANDERSON: I don't believe I  
12 did.

13 GORDON LASANE: Okay.

14 RICHARD ANDERSON: Insurance?

15 GORDON LASANE: Yeah.

16 RICHARD ANDERSON: Oh, no.

17 GORDON LASANE: Okay.

18 RICHARD ANDERSON: As a result of her  
19 concerns and my being unable to get any information  
20 regarding what the intentions of the landowners were,  
21 I approached the Building Inspector because I had  
22 some concerns about the valid -- whether that was a  
23 valid usage of that particular property.

24 I want to point out that I moved there

1 in 1955 at age eight years of age along with my  
2 parents. That was the first home that they purchased  
3 in that timeframe.

4 I've done a -- as a result of this, I  
5 found, as Attorney Dacey finds, being an attorney is  
6 an interesting concept. I found that as I became  
7 curious and did a forensic research of this property,  
8 I became quite intrigued with its long history. And,  
9 as a result, what I would like to do is pass out some  
10 information that was received through my research.  
11 Excuse me.

12 BOARD MEMBERS: Thank you.

13 RICHARD ANDERSON: All this  
14 information was gained through public records. This  
15 was no easy task because this is the first attempt I  
16 had ever -- or first time I had ever gotten involved  
17 in this kind of research work.

18 As I began to delve into it, I found  
19 it was very difficult to obtain any of the old  
20 records with the City of Waltham. But, through  
21 persistence, hopefully some of the information I have  
22 here today will be helpful to this Board and give us  
23 all a better understanding of what some of the  
24 history of this property was.

1           My first approach will be just maybe  
2 we can go through. I tried to set this up. I've  
3 never been before this type of Board before. I'm not  
4 sure what the decorum is. Please excuse me lack of  
5 experience.

6           BARBARA RANDO, CHAIR: You're fine.

7           RICHARD ANDERSON: With this book,  
8 first of all, Section 1. It's clear that was a plan  
9 of the property secured from the Engineering  
10 Department. It's a 1953 plan drawn by Herbert F.  
11 Howe for the sale of this property in 1953. It  
12 contained 68,308 square feet of land.

13           Section 2, I'd like to address the  
14 cease and desist order issued on August 6, 2013. As  
15 a result, as I said earlier, of my being unclear as  
16 to what the usage of this land would be and not being  
17 able to get any answers, the Building Inspector went  
18 out, inspected this property, and sent this letter,  
19 cease and desist, violation at 236 Lexington Street,  
20 Waltham. And, basically, my sense of reading this is  
21 the Inspector found no business activity or storage  
22 of merchandise is allowed in residential sections of  
23 the property. And, therefore, he ordered a cease and  
24 desist.

1 I will comment, some of the  
2 information, again, it was public. But some of it  
3 went back and forth between Mr. Dacey and the  
4 Building Department at the time.

5 There's a letter dated November 18,  
6 2013 regarding 236 Lexington Street, cease and  
7 desist. The Building Inspector is qualifying his  
8 position. He says, "The history of the locus is  
9 shown to have had some evidence of prior  
10 nonconforming use. However, it is the determination  
11 of this office that insufficient documentation exists  
12 to show that the current level of activity always  
13 existed and has also remained constant without  
14 interruption."

15 If we go to Section 3, it's a letter.  
16 I believe it's in Mr. Dacey's packet, but I wasn't  
17 sure what was going to be produced. I'm trying not  
18 to repeat things here. But, September 30<sup>th</sup> of 2013,  
19 he queried the public record request from CPW  
20 Department. And, "Regarding your request of  
21 information from the Consolidated Public Works  
22 Department, I have researched our files and could not  
23 find any recorded information as to what sort of  
24 material/gravel the City stored at this parcel prior

1 to the property sale of 1953."

2 The next, in Section 3, the next issue  
3 will be maps. Maps are very difficult, especially  
4 with what I consider wetlands in the early eras.  
5 Today, we look at our wetlands as a real natural  
6 resource. But, years and years ago, it was  
7 problematic for building and for flooding and so  
8 forth.

9 But the reason I wanted to point out  
10 these maps, the first one is April of 1923. If you  
11 look at the first map, somewhere around the numeral  
12 20 on Dale Street, if you look in that general area,  
13 you'll see this particular piece of property. It  
14 says, "City of Waltham, 63,308 square feet." And  
15 then you see the property of James Bell out front. I  
16 believe that the Burgoynes purchased the property  
17 from the Bells in latter years. But if you look at  
18 these maps, you'll see stone walls running down along  
19 the property line probably in the northern section,  
20 according to the compass on the map. And you'll also  
21 brooks going down through there. They go in behind  
22 the property, they veer off. One of the brooks  
23 actually went down to what was Plimps Pond at the  
24 time. The other brook, it seems that it kind of

1       stagnated and laid in there. And I think that one of  
2       the early affidavits referred to the filling in of  
3       the athletic field. One of the gentlemen had a job  
4       there. And so that would indicate there is wetlands  
5       in that area.

6                       The second map is the Assessor's Map  
7       of 1923. Again, in Section 20, I'd like you to be  
8       aware of or observe if you would please the various  
9       water wetlands and so forth. And this particular  
10      brook behind this property used to drain down to an  
11      area that's across from the police station. It used  
12      to be Plimps Pond down there. And prior to  
13      environmental rules, that pond was filled in. Moe  
14      Black's was a viable business there for years and  
15      years. And then -- excuse me -- as the pond got  
16      filled in, obviously the buildings came into  
17      existence.

18                      The last map is 1941, closer to the  
19      date of sale of the property. And, again, if you  
20      look in the area, there is an indication that the  
21      brooks still run in and throughout all that property.

22                      The next thing I'd like to point out  
23      is the zoning regulations of 1952. I went back and  
24      researched those zoning regulations. And in regards

1 to page 11, Section II, nonconforming use, "No  
2 nonconforming use, which shall have been discontinued  
3 for more than one year, shall be resumed." That's  
4 the zoning regulation back in 1952. This property  
5 was sold to the Burgoynes -- and I believe this was a  
6 recodification of the 1925 I think zoning regulations  
7 that had that same order within it. But this is a  
8 recodification in 1952. Keep in mind, the City of  
9 Waltham had started to take bids on this land. It  
10 was an interesting history, old family names in the  
11 neighborhood. The Santamarias who own land next to  
12 the Burgoynes, were bidding on it, and also Mr.  
13 Burgoyne, and I believe a gentleman named -- pardon,  
14 my voice is going -- D'Angeo was bidding on it. That  
15 bidding process started in 1951. The City announced  
16 the property was for sale. My believe is that the  
17 City no longer had a use for that property, had not  
18 used it and was not using it. Keep in mind that in  
19 1925 that section was zoned residentially even though  
20 initially in 1897, we're talking one point -- an  
21 acre-and-a-half, an acre-and-three-quarters maybe,  
22 well, 69,000, 68,000 square feet -- the city had used  
23 that as a gravel pit. I would assume the gravel  
24 viability in that acre-and-a-half of land had long



1       been dissipated prior to the 1951 date when they  
2       advertised or began to take bids on the property.

3               The next number of pages are City  
4       Council meetings. And I put Waltham City Council  
5       meeting, September 17, 1951. Pardon. Excuse me. "A  
6       communication was received from the Mayor submitting  
7       an offer in the amount of \$800 which was received  
8       from another abutter, Stephen Santamaria, for land  
9       owned by the City and located in Varnum Park. This  
10      land contains 69,853 square feet." And it was  
11      further referred.

12              So, there was a bidding process,  
13      evidently. And as you go through the City Council  
14      meeting minutes, it started in '51. The sale was  
15      consummated in 1953. So, there was that period of  
16      time the City had put the property up for sale. My  
17      sense is the utilitarian value had decreased or they  
18      would not have put it up for sale. And, therefore,  
19      two years later, or approximately two years later,  
20      the sale was consummated.

21              Then we have an October 22<sup>nd</sup>, 1951 City  
22      Council meeting. Again, it talks about they were  
23      notifying the bidders that the Finance Committee  
24      recommended the following city properties be sold at

1 public auction and present -- excuse me -- present  
2 interested bidders be notified of the time and place  
3 of the auction: 69,853 square feet.

4 Then we go to the Waltham City Council  
5 meeting of May 11, 1953. And some of this is tough  
6 to decipher. But, "The Committee on Finance reported  
7 and recommended the adoption of the following order."  
8 And it was City Council order number 17544, and it  
9 was for the sale of the 68,308 square feet of City-  
10 owned land, parcel number 14 on Varnum Park, for  
11 \$2,300 to Mr. Burgoyne.

12 Attorney Dacey referred to it earlier,  
13 that is a copy of the deed. And then the next page,  
14 in the middle, the deed was recorded on the purchase  
15 on September 2<sup>nd</sup> of 1953.

16 Now, we go to Section 4. Your Honor,  
17 I -- Your Honor -- excuse me. Old habits. Board  
18 members, if you would, never having been through this  
19 before, and having gone and read the packet that Mr.  
20 Dacey had submitted for this Board at a prior date,  
21 my sense was that we're talking affidavits, he said,  
22 she said. And, hopefully, and I'm sure, everybody  
23 has attested as they saw things in those days.

24 I went around. I moved in when I was

1 eight years of age. I'm 67 now and it's getting more  
2 difficult to find credible individuals that can  
3 attest to what was taking place back in the early  
4 '50s. So, I went and got an affidavit from Barbara  
5 Speth Shorette. She lived at the property next to my  
6 mother's. And it would have -- their property  
7 probably has the most footage or frontage on that  
8 City of Waltham's piece of property. Actually, their  
9 rear yard backed up to this what they refer to as a  
10 gravel pit.

11 If I may digress a little, when I  
12 moved in at age eight, it was a great neighborhood.  
13 It still is. That was our playground. We were down  
14 there constantly playing in what we later referred to  
15 as the snake pit. The reason we called it the snake  
16 pit is because there were some individuals in the  
17 area that were very nature-oriented and it was a  
18 place that abounded in snakes.

19 My memories when I was eight years of  
20 age, left my back yard, went down into the property,  
21 there had been a gravel pit there or some semblance  
22 of a gravel pit. There were high sides on both  
23 sides. It probably went up about 15 feet to the base  
24 of the lot. When I moved in, there were saplings

1 growing in this particular area. I moved in a year-  
2 and-a-half after the Burgoynes purchased the  
3 property. The base of the gravel pit had saplings  
4 probably an inch-and-a-half to two inches wide  
5 growing up in it.

6 As you left my back yard, there was a  
7 brook that went from a swamp across the street on  
8 Bacon Street, percolated on Prospect Hill, came down  
9 into that stream. Some of the runoff from Bacon  
10 Street also drains into that stream, albeit not a 12-  
11 month-a-year stream. In very warm weather, the swamp  
12 dries up, the water level drops, and the water  
13 doesn't go through there. This time of year if you  
14 go, you can see quite a bit of water in there.

15 Went through our back yard. It went  
16 along the outside of this property, went down towards  
17 Lexington Street between the Santamaria's property  
18 and the Burgoyne's property, and would percolate into  
19 the streams that I suggested earlier show on those  
20 maps in behind the Burgoyne property.

21 Over a period of time what happened is  
22 that fill was brought in. It was prior to  
23 environmental issues with --

24 (Five minute recess off the record.)

1 BARBARA RANDO, CHAIR: For obvious  
2 reasons, we are going to continue the case to  
3 Tuesday, March 25<sup>th</sup>. I'm not sure whether it will be  
4 upstairs or down here that night. We can put a sign  
5 on the door if it's upstairs.

6 AUDIENCE: Will it be 7:00 again?

7 BARBARA RANDO, CHAIR: Seven o'clock,  
8 correct.

9 MARK HICKERNELL: Make a motion to  
10 continue the case.

11 BARBARA RANDO, CHAIR: All right. So,  
12 I have a motion to continue Case 2013-28 to March 25<sup>th</sup>  
13 by Mr. Hickernell.

14 JOHN SERGI: Second.

15 BARBARA RANDO, CHAIR: Second by Mr.  
16 Sergi.

17 How do you vote, Mr. Sergi?

18 JOHN SERGI: Yes.

19 BARBARA RANDO, CHAIR: Mr. Hickernell?

20 MARK HICKERNELL: Yes.

21 BARBARA RANDO, CHAIR: Ms. Gelineau?

22 GLENNA GELINEAU: Yes.

23 BARBARA RANDO, CHAIR: Mr. LaSane?

24 GORDON LASANE: Yes.

1 BARBARA RANDO, CHAIR: And the Chair  
2 votes yes.

3 So, the meeting will be continued  
4 until March 25<sup>th</sup>. And I hope Mr. Dacey can make it  
5 that night. We're off.

6 Oh, one more motion is in order.

7 JOHN SERGI: Motion to adjourn, Madam  
8 Chair.

9 BARBARA RANDO, CHAIR: Motion by Mr.  
10 Sergi. Do I have a second?

11 GLENNA GELINEAU: Second.

12 BARBARA RANDO, CHAIR: Second. All in  
13 favor?

14 ALL BOARD MEMBERS: Aye.

15 BARBARA RANDO, CHAIR: Opposed?

16 (No Board Members opposed.)

17 BARBARA RANDO, CHAIR: The ayes have  
18 it. We are adjourned at 8:55.

19 (Whereupon, the public hearing was  
20 concluded at 8:55 p.m.)

21 //

22 //

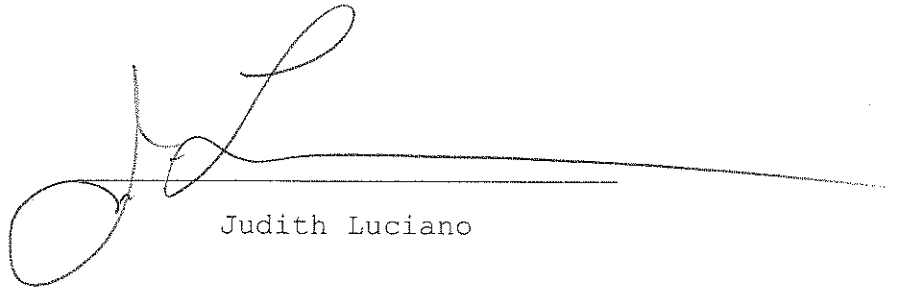
23 //

24 //

*Barbara Rando Chair*  
*4/1/14*

C E R T I F I C A T E

I, Judith Luciano, do hereby certify that  
the foregoing record is a true and accurate  
transcription of the proceedings in the above-  
captioned matter to the best of my skill and ability.

A handwritten signature in black ink, appearing to read 'Judith Luciano', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Judith Luciano

