

CITY OF WALTHAM
ZONING BOARD OF APPEALS

June 4, 2013

The Zoning Board of Appeals held a public hearing at 7:00 P.M., Tuesday, June 4, 2013 in the Public Meeting Room of the Arthur Clark Government Center, 119 School Street, Waltham, MA. In attendance were Chair Barbara Rando and members Glenna Gelineau, Mark Hickernell, Oscar LeBlanc, Gordon LaSane and John Sergi.

The chair called the meeting to order at 7:00 P.M.

Mrs. Rando: Tonight we have one continued case before us, and two new cases. Case No. 2013-07, WIS, Inc., 311-313 Moody Street, Case 2013-06 Anthony and Louis Antico, Prospect Hill Road, and Case 2013-09, Denis and Joanne Mahoney, 98 Hibiscus Ave.

The members sitting on the first case are Mr. LeBlanc, Mr. Hickernell, Ms. Gelineau, Mr. LaSane and I am Barbara Rando, Chair.

The first action this evening is for a motion to accept the minutes of the meeting of May 21, 2013.

On motion of Ms. Gelineau, seconded by Mr. LeBlanc, the board voted to accept the minutes of May 21, 2103.

Will the clerk please read the petition in Case No. 2013-07?

The clerk then read the petition of WIS, Inc., in an application for a variance to allow the construction of an addition to and use of a building on the lot known as 311-313 Moody Street, Said building is to be used as a place of worship/assembly. This building will provide no parking spaces on the lot and has an existing frontage and width that does not conform. The addition will have a rear yard setback of 22.60 feet. Location and Zoning District: Moody Street, 311-313 Moody Street; Business C Zoning District.

Mrs. Rando: May we hear from the Petitioner or the Petitioner's representative, please.

Philip B. McCourt, Jr., 15 Church Street, Waltham, the Petitioner's representative came forward.

Mr. McCourt: Last time we were here, we answered many, many question but there needed to be a couple of clarifications.

The first one was, I think it was Mr. Hickernell who recognized in the petition that I presented in the brief and it's the prelude to the findings of facts and everything, I obviously had taken it from an incorrect source, so I corrected that rather egregious typographical error. However, I point out to you that both the application as submitted and the ad bore the correct information.

Secondly we spent some considerable time, among other things, in the answering questions of discussing the Dover Amendment, so in my brief I added a discussion of the Dover Amendment which essentially allows that a church or educational uses in the town can be allowed although the various boards of any town including this one, obviously, have a right to look into make sure, in general, that we have provided some of the correct items here. For instance, height in this particular case and setbacks and those sort of things all actually meet the ordinance. The actual width and frontage on the lot is nonconforming as it has existed for probably the last hundred years and is not being changed by this petition. The one real advantage that's asked for is that is absolutely needed is that there is a small deviation of about

two and one half feet of the rear of the building to allow this addition. So instead of being twenty five feet from the rear, it will be like twenty two and a half feet from the rear. The prime reason for that is to allow adequate handicap access to the lot and this addition, part of its use is not only to provide the additional space, but is obviously to allow one to come into that entrance and to proceed without the need of an elevator when you come down into the main part of the structure. So that's an ADA requirement and we decided to do it by a walkway rather than a lift and Mr. Costa can explain that to you.

You might say the other noted item and the one that bears, I suppose, discussion is the fact of parking. In fact, in the ordinance that treats membership clubs and churches and light facilities that say that the board has to look at these items which obviously is the main reason why we are here other than that last variance that I met mentioned is that in this particular case it's very unique. It's in the Business C Zone. Its under 19,000 square feet. It never had parking and under the law we don't have to provide any parking. That's pretty clear under Article V, in the sections that discuss the Business C parking, so I gave as one example which isn't obviously a church but it was the Embassy Theatre. When we did that in order to take down the old Waltham Tribune building and constructed the theatre, one of the things was that that building was under 19,000 sq. feet. But one of the other requirements is that you would replace the parking you had on the lot. That happened to be in that case six spaces and that is in the rear of the building. Other than that we wouldn't have had to provide any. In this case there was no parking ever on this lot, so we don't have to provide any space whatsoever. We have the good fortune, and I think it works well, that we abut a municipal lot of over three hundred spaces. So parking could hardly be an issue, at least in our opinion. In that sense, that we feel that do we meet all of articles in relation to that. Now I can further discuss, if anyone wants me to read the items in relation to the Dover Amendment, but it's really looking of whether to apply the ordinance differently then what we have to do would be an unreasonable situation. And in this case, since parking is not required under our ordinance to request there be parking, really frankly, in my opinion, would be not reasonable. And as I say, we need to either by legal nonconformity or by actual conformance the other aspects of the zoning in relation to this building would be so exception of the rear yard variance. I have provided you tonight, if you will, the revised brief in which the basic revision was to correct that beginning paragraph that recites the actual petition

and to put in writing what we discussed in length the last time, the Dover Amendment and some of its applications, particularly the test case, there was a Boston College case and various tests that go along with that. I also provided you with a copy of the layout of the building, interior layout of the building, which had been shown last time. And I have Al Costa here, the Architect, who could either describe or answer any questions about that.

On the second page it shows the design of the entrances. This is basically a one and a half story building in any case. So this was the Landing which you may recall which was a former restaurant building on this site and which the petitioner has purchased, but the front door because of various reasons, the door facing onto Moody Street would basically be a secondary access to the building to meet fire codes and other items, but the main entrance will be just beyond that little patio area where the extension begins and that shows also on page 2. That won't be seen as much not that we won't have anyone see it but it will not be seen from the street. There will be a minor small sign on the front that just identifies the building and then a symbol and sign on the back. Any sign on this site that we project for this site all have to meet the code. That is there is no request for any variance in relation to signs.

We also discussed the hours of worship. I have here a table which might be helpful and just clarify that. (Mr. McCourt distributed a table of the times of worship to the board and went over it with the board.)

I think that, as was explained by the President of the Society, and by other members who later on spoke in relation to it, the Islamic Society basically goes to prayer five times a day. Now, obviously not everyone goes at all these times but that would be the ideal. They last ten or fifteen minutes, if that, except the one o'clock one at times could last up to forty five minutes. So they have the different names of the prayers and the times, and the summer and winter times of arrival. Essentially this rather small religious mosque is to provide for local people, and many of them workers right on Moody Street, to be able to have an opportunity to meet some of this prayer schedule. Many of them walk either to work or certainly to this worship themselves. In fact, it's actually encouraged in their religion that they might do that but that doesn't mean that others that come from a distance wouldn't come by car. And you can see on Saturdays and

Sundays they do have children's classes between the hours of nine and ten. The total number of people at any one time is rather limited. Currently, I think maybe ten would be a large number at the prayers during the day, and early evening maybe fifteen, and then there would be a few more particularly on Friday afternoon when that is a special time in prayer. So that shows the daily prayer time. You might say a little different than what might be services in other churches or temples, but the number of people that come and the hours don't interfere much with what's going on there.

So based on actually the location of the building, the size of the addition, the meeting virtually every requirement of the zoning, other than that rear yard setback and taking into account that actually no parking is required for this sort of building in a Business C Zone and more importantly, perhaps taking into account and consideration, the fact that it abuts a municipal parking lot of more than three hundred cars, we respectfully request that you consider granting the use and the variance requested.

Mrs. Rando: Attorney McCourt, I did a lot of research on this in the past week, and I don't think you had to mention the Dover Amendment because that type of activity is allowed in that Business C Zone, first of all. Second of all, I don't think you had to mention the parking here, either. I don't think you needed a variance for parking.

Mr. McCourt: I don't think so either, Madam Chair. But that was with Patrick Powell, due to that 3.87. He insisted that we come because within that it says that you have the right to look at the whole construction of the building including parking, even though we recognize we don't need parking, we felt that we needed to mention it.

Mrs. Rando: Because it doesn't have to be one of your variances, because parking, the square foot of the building is 20,000 square feet, is it not?

Mr. McCourt: It is. We are not requesting a variance for that. Because from the review under Section 3.87 and a variance for a rear yard, that's - - -

Mrs. Rando: Okay, so we can take parking out of all of your - - - That's fine. Because under Section 5.231, parking is not required.

Mr. McCourt: Correct.

Mrs. Rando: There are a couple of other questions, but I'll see if other board members have any questions at this time.

Are there any questions, Mr. LeBlanc?

Mr. LeBlanc: No.

Mrs. Rando: Mr. Hickernell?

Mr. Hickernell: No, I find the petition in order. I have no questions.

Mrs. Rando: Ms. Gelineau?

Ms. Gelineau: I just have a concern as I did last time. Now, I drove by there every single day and I even drove in on my way tonight and there are three big trucks parked on that right of way. And there has been every single time I have driven by, there are trucks. I got out. Now their back door, I suppose this can probably be amended but their back door fronts on ruddy, deep puddles, you know. I'm sure you could probably pave that with permission from everyone, but still, it just seems very unsafe to me. You cannot walk between the trucks. You cannot come and go between the trucks. And I just can't believe that if you're hitting this spot five times a day, that there aren't going to be trucks parked there, that its going to be such an easy access to get in and out of. It seems very unsafe to me. Although the parking lot does abut the 300, it does not directly abut it. There's something between. You still have to go down a tiny little walk down the alley, the parking structure there, to come around to get in unless you come up on Spruce Street which you can never get in on Spruce Street because there's always something parked there or being unloaded there. So, we talked about last time, I think

Mr. LeBlanc mentioned, well, you can come around because Whitney Street comes up and you can come around and go in that way, but you can't because that's a one way. And even tonight, there was someone coming up it and I came this close to, it's a danger. You can't go down and take a right because there's cars coming up Whitney which is a one way.

Mr. McCourt: Down Whitney to the right? Well you can. It's a one way. It's been, well I've been here forty six years.

Ms. Gelineau: The one way coming into this back door. So if you want parking, or you're going to go turn down around or let someone off, I don't know how a handicapped person can even get in the door.

Mr. McCourt: It's within the building, the handicap - - -

Ms. Gelineau: You still have to get to the building in a narrow, dark, I mean you are going to be coming and going at dark times. The back door is the front door, strictly from a safety issue, there's a real concern to me and I am not a hundred percent comfortable with it. And even if you think they are going to be there in the dark, and as I said, those cars are just flying up the one way street and you can't make a right. The only way you can travel by car through that alley way is to come off of Spruce. I mean, all the trucks park there, always. I mean, it's an overburdened alley way. It's encumbered.

Mr. McCourt: If I was walking to the place, I would either go up Whitney Avenue and around and in, which you can do because the trucks, I think, are behind the market or if I am parking in the parking lot I have direct access to it and the trucks aren't in front of this door. We can make sure that they can't be. It is a way that several share so we can work with them to do that. But here's the other one and I think much more important point. If this was a retail place, or for that matter a restaurant, which it was for years, and of course used both front and back those concerns I think would be more relevant, not to say it's important to take all views of an issue, but it would be more relevant. When one goes to a church, to a mosque or a temple, you're going to your church, your mosque, your temple, your place of worship right, and you

quickly know, first of all where it is, how to get in and how to best access it. This isn't something where you are seeking out some retail person who is going to be coming in here. They are open, anyone can come, but the likelihood would be, I'm Catholic. I go to a number of Catholic churches. Here, I don't happen to go. I don't have anything against any other religion. I don't happen to go the Temple over there on Harvard and Russell Street. I don't go to Christ Church and all that and that sort of thing. I mean generally people who are affiliated with some denomination go to whatever place they are. They are very familiar with it. They know how to get in and out and those are generally the visitors to the place. And I am just looking for the bigger plan I have here of the back. I think there is Moody Street; I mean the whole parking lot is directly across I understand what you are saying about Whitney Way but parking begins almost immediately behind this building with the exception of the Post Office building which has a couple of parking spaces and dominated, so I mean you're really right there. So, I mean that's all I can say. I appreciate anyone considering some safety but I would say that we obviously lights too would be extended by law but would light the back in any darken times that they might need them. We can ask the other users of Whitney not to park trucks there. It's really between neighbors. It's been like that actually since Grover Cronin owned one of these buildings at one point. They use to own various properties along Moody Street from time to time. Whitney Place has been there for time and memorial.

Mrs. Rando: Attorney McCourt, why can't they use the front door?

Mr. McCourt: They can use it, it's just----

Mrs. Rando: Why can't they come in the front door? You say because it faces Macor and they are not allowed.

Mr. McCourt: I can't, from that religious point of view, I can't answer that. I think they could come in. Can you? Can't you?

Member of the Mosque: Madam Chair, actually we can use the front door. The idea is people who come in at time when the prayer is in progress. These people know what the time is

and they come in before we start praying we can use that front door. We can use that for exit and entrance. Only unless when the prayer is being held, that's when they come in late, they can't use it.

Mrs. Rando: Mr. LaSane, do you have any questions at this time?

Mr. LaSane: My remarks certainly mirror Ms. Gelineau's. The issue of public conveyance and public safety is paramount. I don't see vehicles mixing with pedestrians, at all. I think the team owes the Zoning Board of Appeals a plan to tell us how public and pedestrian traffic is going to be controlled. I think it's on the developers and I think it's on the corporation to present a logical pathway, set of directions, and mitigation plan for commercial vehicles around this prayer time. I just don't have a very good feeling without those plans being presented. I think more but to the point that the development plan is dictated around people and traffic and I think a schedule, a time table, marked zones, marked pathways, I don't think it should be left to the worshippers to find a convenient way or familiar way. I think the corporation has to direct people around trucks.

Mr. McCourt: Do you mean by providing them a written statement of how to get there?

Mr. LaSane: Marked pathways.

Mr. McCourt: Whitney Way is a private way that a number of people have rights over including this property, right? We could attempt to have others not want to use it, you know.

Mr. LaSane: But Attorney McCourt, we are talking about trucks and cars and people. They don't mix. We mark streets for traffic control. We put up stop lights for pedestrian control.

Mr. McCourt: But, there could be no stop sign.

Mr. LaSane: We are talking about having alley ways that are loading and unloading

zones for commercial vehicles, that, oh by the way, worshippers are going to travel. So, I mean, we need some predictability in all that.

Mr. McCourt: I am happy to try and do, but I do see what can be done. It's a private way shared by many. It worked for the restaurant, for all of those things. Do you see the plan, the plot plan?

Mr. LaSane: I do.

Mr. McCourt: You can see how it basically directs directly onto the parking lot. No one would come in here and drive down this think and park in that parking lot. No one would.

Mrs. Rando: I think that's the problem that the board doesn't see, the safety in it and who is going to be the policing agent?

Mr. McCourt: There's no police involved.

Mrs. Rando: That's what I am saying. Who's going to be the safety person to make sure that no one gets hurt with a truck? At the last meeting, I was told that if a large truck from the market was parked in that right of way a car could get by also. That's not possible because I tried. I agree with Ms. Gelineau and Mr. LaSane about the safety. There are children going to classes. You have celebrations where you make dinners on Fridays or I forget the day. And you are going to have people coming in and kids running excited and you've got these huge trucks and dark alley way. I'm concerned about that.

Mr. LeBlanc: It's impossible for us to tell people how to go into your own building.

Mrs. Rando: That's right.

Mr. LeBlanc: That's what we are trying to do. It's an existing right of way and there's no there's no way the law can enforce telling people what door you go in, do you go in the front

door or the back door. Do you want to go to a Catholic Church and say I want you to use the rear door or where do you want to go? Our thing is to vote on the status not to say you've got to use it this way. We are going to put these things on. You're telling somebody how they are living. I don't see where we got any right to say to somebody you can't use your back door. And it's not up to us to take the kids. They are not going to go to church at one o'clock to pray with these kids at night. Most of the stuff, the family things are during the day.

Mrs. Rando: In all due respect, Mr. LeBlanc, on Section 1.1 of the Zoning Code the purpose of our zoning board is the promotion of health and safety. That we have to take into consideration. That is your opinion but the safety of people and children are top on mine and according to this - - and I am not telling them what doors to go in. I am concerned about the safety.

Mr. McCourt: Have you ever been to St. Charles Church?

Mrs. Rando: Many times.

Mr. McCourt: Well you can see that that's directly on the street without any parking. Have you been to the church in Lakeview? Have you been to the temple down the street here that use to be the IBEW? Not only do those places not really have a lot of adequate parking - - -

Ms. Gelineau: All those places have parking.

Mrs. Rando: We are not talking about parking. We are talking about safety.

Mr. McCourt: Let me speak to my people because I think that we could not resolve - - -

Mr. Hickernell: May I say something, Madam Chair.

Mrs. Rando: Go ahead.

Mr. Hickernell: When this property was the Iguana Cantina, I took my family there including my children dozens of times, front door, back door, small children, it was never a problem. I felt very safe and secure. I think the board is in danger or going beyond its briefing.

Mrs. Rando: I also have been into the restaurant, not since the market. I think the market came after the restaurant, didn't it, and the trucks were not there at the time.

Mr. LaSane: Well I'll tell you. I was over at the market today around one o'clock and I have to tell you I walked down the alley off of Spruce Street and in tandem were two large commercial trucks. I had to squeeze down beside them. I did not feel comfortable walking in that manner to get down that alley.

Mr. Hickernell: I would suggest that if any worshippers don't feel comfortable, they would stop going to this place of worship.

Mr. LaSane: We are not addressing that. We are addressing the development of a place of worship tonight.

Mr. Hickernell: There's nothing to develop. It's there. There's a property there. I'm not sure what you are talking about.

Mr. LaSane: In my mind part of development is downtown public safety and having a public safety plan and a safe and secure walkway and directions and signage that make sure the public knows at this hour services are starting. You can't come in this door or that door and signs and the pathways that are clearly marked and delineated provide that direction. I don't see any of that here.

Mr. McCourt: So, do you want a sign on the door that says that?

Mr. LaSane: That's your problem and I think your architect knows what I am talking about.

Mr. McCourt: We can add a sign to the door that services are basically now, but I don't see how we can control the parking.

Mr. LaSane: I'm talking about developing a house of worship, not a restaurant as it has been in the past. We are talking about a completely different set of public safety issues and I don't see them being addressed here. I think hearing people talk about the good old days of the restaurant and everything is cool back then. That's not what we are talking about tonight. We are talking about a house of worship; different use; different design guidelines and criteria.

Mr. McCourt: Better use from the point of view of public safety, but - - -

Mr. LaSane: I don't see it being addressed anywhere here.

Mr. McCourt: I don't understand. It's on the public way on the front and it's on a by right way out back and it abuts a public parking lot. I mean, I don't know what more we can do. We certainly can't do anything with construction that would change any of those factors. I mean, we could ask the neighbor of the trucks or something to move, I don't know. I don't know what to do.

Mrs. Rando: Also, Attorney McCourt, at the last meeting, one of the members said that they came to get out of the house to be in a group and right after the prayer everyone took off and they didn't have the friendship and camaraderie that he was looking for. I've been driving by Park Street or Park Ave and that's a perfect safety little place there and they do congregate outside after prayer or Friday nights, or whatever. And if they do that here, it just adds to the safety issue.

Mr. McCourt: A lot of people on Moody Street on many nights and certainly on Friday night. There they have the benefit of the Unitarian Church Park if they want to go over and stand in that, I suppose, but that isn't available downtown.

Mrs. Rando: If there is anyone who hasn't spoken at the last meeting unless they have some new information, please come up because you spoke before. So any new person that would like to come in favor, please come up at this time.

Mehdi Haoulani, 72 Beaver Street, Waltham: I think the issue is religion because our people are in favor of safety for our children and the people. The issue is very simple. There is a truck parked there. The issues are over. You tell the gentleman to move the truck from there because it's only one truck.

Ms. Gelineau: There were two there tonight. There have been as many as three for the past several weeks.

Mr. Haoulani: Just for delivery in the morning between 7 - - -

Ms. Gelineau: No, not deliveries. Parking. One was the Penske truck.

Mr. Haoulani: It's the mattress place. Anyway it is possible to put a sign, no parking? It's very simple.

Mr. LaSane: Why do you mention it's the mattress place? Why do you say that's an exception or something?

Mr. Haoulani: Because I have been there.

Mr. LaSane: But why is it an exception that it's a mattress place truck? No it's a vehicle a vehicle that impedes public access.

Mr. Haoulani: And the other problem is that we prepare the budget to pave that section to make it even, even thinking about asking for a speed bump. When the building is open, there will be spotlights. They will illuminate that area like Christmas tree.

Ms. Gelineau: At 4 A.M.?

Mr. Haoulani: No, it would be sensed so if somebody walks by it, it will trigger the sensor and it will be illuminated. I don't think there's a big, big issue with safety if all the proper action is taken way in advance. I mean parking; if a truck is parked there you cannot have another car driving by. There is no way. But if you put a sign that there's no parking in that area, they don't park.

Mrs. Rando: Wouldn't that be great if everyone just followed the signs. Is there anyone else?

Abdallah Ddumba: I happen to have been the leader of the congregation for the last ten years. I'm a graduate of Brandeis University. I'm connected to this community. On the issue of safety is very, very paramount, but I'm seeing the congregation since day one. Part of what our teaching is to instill discipline in this site. From my past experience we have all obeyed safety and we have children, the numbers just growing. We have never been any problem in worshiping in other place which is small place and now we are encouraging people to be obedient to all the laws and regulations and also to consider their life as valuable as some other people's life is valuable. And because of that, I do ask the committee to please allow us to go forward because we are in support of discipline and safety in our community. Thank you very much.

Mohamed, 101A Newton Street, Waltham: We are responsible for our children. We take care of them. We protect them and we know they are going to a safe place. I want you to give us a chance of opportunity to get that place because the place now is very small and it's not good for us now. Our community is bigger now. We need our place and the constitution gives us the right to worship to the best place. Thank you so much.

Siraje Musiitwa: As far as safety is concerned, we are much aware of that and we do have families, children, and we have been implementing that all along and we shall continue to

do so. Safety is always my first priority. I am taking care of elders and safety is my first priority, at work, at home, and I am going to incorporate that in the members of my society and the community. We shall continue to do that. Please grant us permission to use the place. Thank you.

Aisha Kanota, Somerville: I just want to let you know that I understand safety was your main concern. I've been in this community, our community, for like over thirteen years. We started in a small house for worship. We came here on Lexington Street; we had a small area of worship. The community grew bigger. Where we are worshipping right now is a house and now the community has just grown larger. We have a lot of people from different culture who are Muslims, so the place that we are worshipping from right now is just small and now we have classes for children which we didn't have before. But now our children have an opportunity to learn their religion on Saturdays and Sunday.

Mrs. Rando: How many people?

Ms. Kanota: How many people? Of the children?

Mrs. Rando: No, altogether.

Ms. Kanota: I don't have that number but the community is around over a hundred now.

Ms. Gelineau: I think they told us last week, thirty.

Ms. Kanota: I just say maybe over. I wasn't like particular but I've seen the community has grown larger as other cultures are coming to worship because we are getting a larger place. So this new area which we have been craving for, for a long time and now we finally got a place, we are going to get a bigger area. We are just asking for you to help us get this place. We know safety is the main issue but this little area we are having now, we have been trying not to have any problems since we started that little place so we are just asking if you would help us.

Member of Church: Thank you for opportunity tonight. We have been members of Waltham Community for over twenty years. We are not strangers to this place. We have been raising our kids in Waltham. We have been shopping in Waltham. We have put our business in Waltham. We do almost everything in Waltham.

Mrs. Rando: Were you always at Park Ave. for the twenty years?

Member: For the twenty years we never had a place until like ten, twelve years ago we open that one because we are in small room scattered around. We are praying from our houses.

Mrs. Rando: So, is this one group that has separated from the other group?

Member: No. This is the same group since we opened there. I think since we have been members of the Waltham community and I remember one time at my business our Mayor McCarthy came over to visit to see what was going on there and we have been going to her office just in case if we need some help here and there. I believe profoundly and deeply that this community with your help to move from Park Street 16, to the new place. I know you have addressing the issue of safety which is important to everybody like other members who have spoken before. I've been there to that restaurant but when people are coming in and out, the safety issue wasn't a problem. As far as we are concerned, there is no way we are going to put people in danger either from the trucks or from the cars. I can guarantee that nothing will every happen to that place, God willing.

Mrs. Rando: Is there anyone in opposition to this petition? Seeing none, is there anyone seeking information? Seeing none, Mr. McCourt?

Mr. McCourt: I spoke to the person who owns the Indian Market, who is here and very involved with the congregation and he would agree that upon the issuance of a certificate of occupancy, obviously this has to be built should it be granted that he would not have any of the trucks in Whitney Way. He's right here and he will say that for you.

Mrs. Rando: And where is he going to park his trucks?

Mr. McCourt: Well, I think that's his problem not ours.

Mrs. Rando: Well there's cars parked with people using the market all the way on Spruce.

Mr. McCourt: If you'll notice, they're developing a loading zone time in the front along Moody Street scattered by Councillor Logan. Councillor Logan actually worked with these people coming here, so he's very close with the Indian Market. So they are working out a plan. He agreed that they would not put any trucks.

Syed Raheen, 30 Oliver Street, Framingham: I own the Indian Market. I can agree to move the trucks and find a way to park the spot somewhere on Moody Street, again make sure they do not park there during the day times so they don't get into the way of the people coming to the mosque and anything I can do to get this thing approved and it will help my business too, in other words, because all these people have been customers, so I can't lose them just because of my truck. Thank you.

Mrs. Rando: Well, Mr. McCourt, what do you wish to do? Shall we continue with the Proposed Findings of Facts?

Mr. McCourt: Yes.

Ms. Gelineau: Can I just ask, I know looking at it; it says occupancy seventy people and they hope to grow. It sounds like, if they haven't already, they are going to outgrow this space pretty quickly.

Mr. McCourt: I can only make for some knowledge and experience, Our Lady's Parish has over seven thousand families. I suggest that they not all come to church. Upon the completion of the building, there will be an occupancy permit as in any public space which

includes a place of worship, like a restaurant and all of that of the number of people that can occupy and they would have to deal with that. And if they have to move on at some point, perhaps they will, but at the moment this was a tremendously viable opportunity for them.

Mr. LaSane: At the last meeting, it was represented that there wouldn't be any community uses, weddings and such.

Mr. McCourt: That is correct.

Mr. LaSane: Will there be a kitchen built in the building?

Mr. McCourt: There might be something where you could have a coffee or something. Is there a kitchen? Yes, there is. A very small kitchen. There's a bath and a kitchen.

Mr. LaSane: So does someone want to restate that there probably could be some weddings and community events there?

Mr. McCourt: Well, let me do this a little bit in reverse because this gives you the answer, I believe.

Mr. LaSane: What I am driving at is I also heard at the last meeting that there would be no more than thirty or forty people at a time in the building.

Mr. McCourt: And I think that is correct. This lady talked about the whole society like I just pointed out about that particular church.

Mr. LaSane: Well let's talk about numbers. How large is the community and how many people at a time will be using the building?

Mr. McCourt: I think that thirty is more like it that they are accommodating at any one time and that would be probably on Friday.

Mr. LaSane: So the community is over a hundred people?

Mr. McCourt: No, I don't know that answer. Abdul, what would you say? I have no idea.

Abdul: Thank you very much Madam Chair Lady: Actually what the lady talked about as she said it started like a small community then they expanded it. Usually when we have big meetings we always rent halls. Sometimes we go to the French Hall at Christmas and holidays. We don't do any weddings.

Mr. LaSane: You don't allow weddings?

Abdul: No, we don't allow weddings in the mosque. They can only be husband and wife and the witnesses and our preacher to be part of the prayer, maybe about six or seven people. After that they go to reception wherever they want. They get a bigger hall with the music and everything. So we don't do it in the mosque.

Mr. LaSane: What about deaths?

Abdul: They are always performed in a funeral home.

Mr. LaSane: Is a body every brought to the mosque?

Abdul: No, we never do anything like that.

(At this time Mr. McCourt read the conditions from the Proposed Decision.)

Mrs. Rando: All right, you can continue with your Proposed Findings of Facts.

Mr. Hickernell: Madam Chair, since the Proposed Findings of Fact have been on file in

the Law Department for some time, I move that we waive the reading. Mr. LeBlanc seconded the motion and the board voted to waive the reading of the Proposed Findings of Fact.

On that note there are changes here that I would like to see in the Findings of Fact and the Decision. As you said on the petition, in the first one, This is a petition to allow the construction of a building, I want it to stop, ah - - -

Mr. McCourt: What was that Madam Chair?

Mrs. Rando: The first page of your Findings of Fact and Decision.

“Said building to be three stories high. The ground floor and I would like you to put Parish, Office, Storage on the second floor and the same on the third floor because you said here the garage space on the ground floor.

Mr. McCourt: Yes, but Madam Chair, I think you’re not reading the Revised one from this evening.

Mrs. Rando: Is this the one that I had on my computer this afternoon?

Mr. McCourt: I don’t know about this afternoon. I submitted it a week ago. This is the one that I past out tonight also, hard copy, tonight. In every place it says “Revised”. In front of every title it says Revised. What you’re reading, I understand why you would want to correct it but it has been corrected. That was just a miswriting of the petition which was my mistake. The one in the front, it bears today’s date, June 4th.

Mrs. Rando: Do you have a number 3, “The property is abutted by two businesses”? You don’t need the parking, you have to say, because there’s no residential is the reason that parking is not required.

Mr. McCourt: This is a statement of fact. You had to review this under 3.87 and I think

it's a fact that should be in there.

Mrs. Rando: No. I think that if you have residential, which you are not going to have, then you don't need parking.

Mr. McCourt: I understand that. It's purely a statement. In the ordinary I would easily agree, but this is just a statement of fact of where the building is located. It doesn't have parking and it abuts a city parking lot. I mean if you absolutely vote to take it out, I'll have to but, ah - - -

Mrs. Rando: But there's no required, just put there's no required parking.

Mr. McCourt: I can add that after what I just stated, right.

Mrs. Rando: For religious purposes. Also, the variance requested - - -

Mr. McCourt: No. It's not anything to do with religious purposes. There's no parking required under the Business C Zone. I've said that, I think, down below.

Mrs. Rando: Right but I'd like it - - -

Mr. McCourt: You'd like it a number 3?

Mrs. Rando: Yes.

Mr. McCourt: So, "there is no parking requirement - - -

Mrs. Rando: Because it's not residential.

Mr. McCourt: No, because it's not more than 19,000 sq. ft.

Mrs. Rando: You also said the variance is needed for lot frontage and width. You don't

need that.

Mr. McCourt: Well, I don't know. Maybe I am being over cautious after all these years. I'm just really stating the fact that the frontage and the width is legal nonconforming, you know, and we are asking that that be confirmed and that the rear yard be granted. I mean, I don't like to be, but should this have to go along to a different forum, I think these are very important to have in there.

Mrs. Rando: A couple of other corrections I saw. "The proposed building shall conform to all other requirements of the zoning ordinance and the variance requested is reasonable based on the proposed religious use."

Mr. McCourt: What number is that one?

Mrs. Rando: Six. And you also stated the FAR. Why did you bring up the FAR?

Mr. McCourt: I am just saying it meets FAR.

Mrs. Rando: Well this lot is not subject to FAR regulations because it's the lot size.

Mr. McCourt: There's a FAR requirement in the Business C zone. We do not have to conform but I mean that's just a statement of fact later on so if someone was pulling this apart as they reviewed it, someone would say, gee no one mentioned FAR. Well, yes we are. We met that requirement to the extent that it would be applicable just like we met the height requirement.

Mrs. Rando: Well you could add that this lot is not subject. You can keep the building and the addition to conform to the by right FAR but this lot is not subject to the FAR because it's the lot size.

And article 4, section 411 requires a side yard of 0 feet for business use and 10 feet for residential use and a rear yard of 15 feet for business use. Is that for Business C or Business AB?

Mr. McCourt: Which one is that, now?

Mrs. Rando: This is - - -

Mr. McCourt: (Referring to the plan) Side yard, the required is 0 feet, the existing is 0 feet and the proposed for the thing is 0 feet. FAR by right is not applicable and it wouldn't be applicable here. Maximum height 65 feet, not applicable here. Rear yard is 25 feet, the existing is 59.35, our request is for 22.60 rather than 25.

Mrs. Rando: And you did put that "the use of the building shall be for religious purposes only. Premises shall not be used for any residential, commercial purpose or activity. Correct?

Mr. McCourt: Absolutely.

Mrs. Rando: Conditions if we grant it: Use of the building shall be used for religious purposes only. The Premises shall not be used for any residential, business, or commercial purposes or activity. The premises shall not be rented or leased out to any group organization or third party for any non-religious purpose or activity. The premises shall not be used for any activity open to the general public for which admission shall be charged. Correct?

Mr. McCourt: Yes, that's correct. And I don't mind putting in there that the owner of the abutting Indian Market has represented that he will not use the alley way for parking once the certificate of occupancy is issued.

Mr. Hickernell: Mr. McCourt, you can put that as a proposed findings of fact, I suppose, but we can hardly condition anything on this property with what an abutter represents.

Mr. McCourt: Good point. I would agree with that so maybe we would add that as a finding of fact that after the public hearing the owner offered to eliminate trucks once the certificate of occupancy for this use is issued.

Mrs. Rando: On the Proposed Decision?

Mr. Hickernell: Since the Proposed Decision has been on file in the law department I will make a motion that we waive the reading of the Proposed Decision.

Mr. LeBlanc seconded the motion and the board voted to waive the reading of the Proposed Decision.

Mrs. Rando: Do I have a motion on the Proposed Findings of Fact, as amended?

Mr. Hickernell: I make a motion that the Proposed Findings of Fact as amended be adopted as the board's Finding of Fact. Mr. LeBlanc seconded the motion. The roll being called: Mr. LeBlanc, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. LaSane, abstain and Mrs. Rando. Yes.

Mrs. Rando: Do I have a motion on the decision as amended?

Mr. Hickernell: I make a motion that the Revised Decision be adopted as the Board's decision. Mr. LeBlanc seconded the motion. The roll being called: Mr. LeBlanc, yes; Mr. Hickernell, yes; Ms. Gelineau, no; Mr. LaSane, abstain, and Mrs. Rando, no.

Mr. Hickernell: I will make a motion for reconsideration of our last vote keeping in mind the likelihood of a successful Dover Amendment petition and the possibility of attorney's fees accruant to the petitioners in successful action against the Zoning Board of the City.

Mr. LeBlanc seconded the motion and the roll being called: Mr. LeBlanc, yes; Mr. Hickernell, yes; Ms. Gelineau, abstain; Mr. LaSane, abstain and Mrs. Rando, yes.

Mrs. Rando: So it does not pass.

(Mr. Hickernell was checking Robert's Rules to see if the members could abstain.)

Mr. Hickernell: I will make a motion for a five minute recess so I can consult Robert's Rules. Mr. LaSane seconded the motion and the board voted to take a five minute recess at 9:25 P.M.

The board reconvened at 9:30 P.M.

This has not happened before. The last vote was to allow the board to reconsider their vote. Therefore, the motion passed so we are going to vote again.

Mr. Hickernell: I would like to make a motion to speak to the motion, Madam Chair. So I make a motion that the Revised Proposed Decision be adopted as the board's decision. And in terms to speaking to the motion, I would urge all the members of the board and of the community who are maybe watching along to review the language of the Dover Amendment which governs this and that states "No zoning ordinance shall regulate or restrict the use of whatever structures for religious purposes or educational purposes provided however that such land or structures may be subject to reasonable regulations concerning the bulk and height or structures in determining yard sizes, lot area, setbacks, open space, parking and building covered requirements." And I thank the board members to consider whether their objections to this project, to this petition, have anything to do with that limited set of circumstances that the Dover Amendment gives us any discretion over. And I further consider to ask you to consider the likelihood of litigation stemming from an adverse decision. And I say that with great respect and I know that everybody has reviewed the Dover Amendment prior to coming here and I don't mean to disparage that. I think that focusing tightly on that language is what is at stake here. Thank you. So I've made a motion.

Mrs. Rando: First of all may I say, as a board member, that I am insulted by that remark. I am very well aware of what the Dover Amendment means and I think we all are, and I don't think we are basing our decision on anything except what we think is best for their community, their children and their safety. Does anyone else have anything to say to that remark before we

go further?

Mr. Hickernell: I do, as I said, and you know I have been just trying to focus on the language of that Amendment and I certainly am sorry that I insulted the Chair.

Mrs. Rando: I believe we have to, even in the Dover Amendment; it has to do with safety. We have a motion to reconsider our vote by Mr. Hickernell. Do I have a second?

Mr. LeBlanc seconded the motion.

Mr. Hickernell: The motion to reconsider has been passed by a simple majority. This is a motion to adopt the Revised Decision.

Mrs. Rando: Correct. A vote by Mr. Hickernell, seconded by Mr. LeBlanc, how do you vote Mr. LeBlanc?

Mr. LeBlanc: Yes.

Mrs. Rando: Mr. Hickernell?

Mr. Hickernell: Yes.

Mrs. Rando: Ms. Gelineau?

Ms. Gelineau: No.

Mrs. Rando: Mr. LaSane?

Mr. LaSane: To reconsider?

Mrs. Rando: No. To accept the Proposed Decision.

Mr. LaSane: I still have to abstain.

Mrs. Rando: And the Chair votes no, not that it matters, because we still have to have the four votes and you do not have it. So, thank you very much. We are sorry. We hope you can find a place where everyone can be safe.

Mrs. Rando: We are going to take a two minute recess so we can get ready for the next case.

On motion of Mr. Rando, seconded by Ms. Gelineau, the board recessed at 8:35 and then reconvened at 8:40 P.M.

Mrs. Rando: We are back in session. May I say that the members sitting on the next two cases are Mr. LeBlanc, Mr. Hickernell, Ms. Gelineau, Mr. Sergi and the Chair.

Will the clerk please read the Petition in Case No. 2013-06, Anthony J. Antico and Louis J. Antico, Prospect Hill Road?

The clerk then read Case No. 2013-06, Petition of Anthony J. Antico and Louis J. Antico for a Special Permit to alter or expand a nonconforming structure. The locus is a parcel containing 214,800 square feet of land with an existing structure and wireless communication equipment situated thereon, are pre-existing nonconforming use. The Petitioners propose to alter or enlarge the existing nonconforming use by altering the location of the tower within the complex and restructuring, using and maintaining a new tower thereon. Location and Zoning District: Prospect Hill Road; Residence A-2 Zoning District.

Mrs. Rando: May we hear from the Petitioners or the Petitioners' representative, please?

Edward T. Bigham, Jr., Attorney At Law, 564 Main Street, Waltham, the Petitioners' representative came forward.

Mr. Bigham: As the petition said, we have a request before the board, not on a variance but on a petition to allow the petitioners to alter, reconstruct and move a tower that they presently own on Bear Hill Road to a new location eight feet from the present tower. (Mr. Bigham then read his brief into the record.)

Mrs. Rando: Attorney Bigham, how many people have keys to this gate?

Mr. Bigham: Only two. Mr. Anthony Antico and his brother and his brother doesn't use it at all because he is in the office. He doesn't use it. He's the one that has the key and he doesn't let it out of his sight.

Mrs. Rando: And did you state that there were, in fact, some emergency antennas on that?

Mr. Bigham: Oh, yes.

Mrs. Rando: That was necessary for Waltham.

Mr. Bigham: You have ambulance services. You have Salvation Army. You also have backup, police and fire, still on that tower so that the City of Waltham is still getting use of the tower because there's another agency that has their own transmitter there. There are people there who serve the general public and there are others that use it for their own business.

Mrs. Rando: So if this tower was non-complying, did anyone address Mr. Antico in the past, few building inspectors that we had to tell him to take it down?

Mr. Bigham: Madam Chairman, since 1962, there has never been a complaint filed against any of the city officials relative to the existence of the tower. As I understand it, and I should correct myself, this case was handled by another attorney, and correct me if I am wrong, a couple or three years ago. In that case there were some concerns raised by some abutters. I hope

that I have addressed those concerns. I have tried diligently to settle any questions that may arise with the abutters. And I've also talked to all of the people in the city and the building department and so forth and I think I settled all the issues. It's interesting to note, Madam Chairman, the present building inspector of whom I've had a pretty good relationship, if you notice on the plan and on the petition he doesn't refer to any specific part of the zoning ordinance, i.e., nonconforming or non-complying. He just says I'm leaving it to the board, without saying anything else; I'm leaving it to the board to have the board allow the petitioner to move the tower from one place to another. That's all he said, so that's a plus, I think. It seems to me that that, based on all the evidence that he's got, Walter Ohnemus's Affidavit, Mr. Antico's Affidavit all the surrounding facts, that he felt that was not an issue whether its non-complying or nonconforming.

Mrs. Rando: So, let me get this straight. So in 1967 and in 1982, Mr. Antico extended the tower to 293 feet without a building permit and you're saying that it is not illegal because Walter Ohnemus, who was the building inspector at that time, and I assume you're saying that Mr. Antico asked Mr. Ohnemus about it?

Mr. Bigham: There's no question about it. The Affidavit that Mr. Antico submitted under oath said that they went to the building department, he and his brother, and spoke to Mr. Ohnemus and that was the answer they got. If he had said to them, look, you've got to get a building permit, a new plan, they would have done it. I mean, there would be no problem. Why would they not do it?

Mrs. Rando: I'd just like to read Walter Ohnemus's Affidavit.

Mr. Bigham: Are we talking about the Affidavits Madam Chairman?

Mrs. Rando: Yes.

Mr. Bigham: They are in the back of the book. I think they are Exhibit M and N. M is the Affidavit of Anthony J. Antico and - - -

Mrs. Rando: I'll have the other board members ask questions while I'm reading this.

(There were no questions by the board members.)

Mrs. Rando: Wow, because without Mr. Ohnemus's Affidavit here, I would have said it was completely illegal. It says that it did not require any additional building permits. It's nonconforming.

Do you have anything else to add, Attorney Bigham?

Mr. Bigham: No, Madam Chairman, unless you have some questions that you would like me to answer. I hope I have covered them, Madam. to your satisfaction.

Ms. Gelineau: Mr. Bigham, is the impetus for the improved structure, I would imagine, largely as I see here, structural integrity and improvement to the benefit of ---. I remember the last time when they were here and I was asking, they were saying, there maybe some structural integrity but as people were climbing it, that was a real concern to me. I am in favor of improving and upgrading and having a newer one provides concern that there may possibly be structural integrity on the one that is there.

Mr. Bigham: The proposal that we made is from the company that built the original. As I understand it, this is a hundred percent better in terms of integrity, structural and sound.

Ms. Gelineau: Safety, because people do climb them, right? There's a safety factor, too.

Mr. Bigham: Everything they have done in terms of the proposal for the new tower, is structurally, much, much better than the present one. There's not going to be safety hazards at all.

Ms. Gelineau: And its all improvements that are beneficial not really a financial - - - It's

to improve the structure.

Mr. Bigham: Are there any other questions?

Mr. Sergi: Along those lines, counselor, it also would be updated to current standards, I would assume. Maybe the construction, they are going to do it within our current building codes, not 1960.

Mr. Bigham: Absolutely.

Mr. Sergi: I would assume that.

Mr. LeBlanc: So basically, it's going to be a lot safer with the hurricanes and windstorms.

Mr. Bigham: Well, the way I understand it, this is so well constructed that there isn't any possibility that it could come down even in a windstorm. That's what they tell me and these people know more than I do. I'm just a lawyer, what do I know about it. They tell me these things and they're engineers. so I have to rely on what they say.

Mr. LeBlanc: I assume they have to go by Federal Standards.

Mr. Bigham: Oh, yes. And of course the FAA has something to say about this, too, you know. So we have to get back to them.

Mrs. Rando: Is there anyone in the audience that is in favor of this petition that would like to stand and be recognized?

John DeCola, 28 Willard Street, Waltham: The tower is right behind me. I see it every day. I was here three and a half years ago and I was against a new tower. Well, when I saw the hurricane come up, I think it was named Sandy, it came up the coast and I said, geeze, I hope it

doesn't come to Waltham because it will knock over the tower. So I am in favor of a new tower with the modern technology. Thank you.

Mrs. Rando: Is there anyone else in favor that would like to stand and be recognized? Seeing none, is there anyone in opposition?

David Kehs, 76 Midland Drive, Waltham came forward.

Mrs. Rando: Where is that in location to the tower?

Mr. Kehs: It's in North Waltham. It's on the other side of Route 128.

Mrs. Rando: You're not a direct abutter?

Mr. Kehs: I am not an abutter. I am a frequent visitor of Prospect Hill Park. My interest here is with the impact of this tower to Prospect Hill Park and it is a complete eyesore and it doesn't belong to be there.

I did not attend the hearing that you had four years ago which was essentially the same proposal, moving the tower by eight feet, but I did review the materials from that proposal and watched the video and I don't believe that all the points that came up there have been addressed today. And particularly, there were a lot of questions about the use of the commercial enterprise. It's a residential zone and commercial use has never been allowed since 1925 when the first ordinance was enacted. And I believe the board made a list of questions for the law department and that was one of them but since the petition was withdrawn they did not answer that.

Another issue would be the use of the access road. What we've heard is about an informal rumor between the city and the petitioners but nobody has a copy of that agreement. It was never filed with the Registry of Deeds. It was never filed in the appropriate process for distributing parkland and city land. And even at the time, it would be necessary to get the city council approval to give away rights to city land and state legislature approval. As an example,

you could look at Polaroid in the early sixties. Polaroid negotiated an easement with the City of Waltham allowing them to have a road going across the southern corner of Prospect Hill Park and they got that through the City Council and it was approved by the state legislature. It's still in effect today. You can go and read the council order. Whatever we have here, nobody knows. And all I have ever seen that in real estate, if it's not written down, it doesn't count. There was one area that was not discussed in the previous forum that I want to get to and that is the encroachment of this structure at Prospect Hill Park.

(Mr. Kehs submitted colored photos of the guy-wire anchors, Northwest of the tower, guy-wire anchoring, Northeast of the tower and plans. He went over them in detail with the board.)

Ms. Gelineau: Are you saying the anchors are over-encroaching?

Mr. Kehs: That's right and of course, the guy wires that are attached are over park property. So the anchors are in the park and it certainly detracts from enjoyment of people who are walking through the park and instead of seeing trees, they see this ugly thing.

Now, this gets to the question of standing. I noticed in the application, one of the points that the applicant has to provide is do they have standing to appear before this board and have their building get their approval. And for standing, they have to provide proof that they have control of the property. They have not shown anything about any kind of permission, contracts, license, easements, nothing that gives information to install the anchors in Prospect Hill Park. So for that reason, I think it should be, I am happy to see the tower taken down, but I don't want to see a new one be put up.

Mrs. Rando: Thank you. Is there anyone else in opposition? Seeing none, is there anyone seeking information? Seeing none, Mr. Bigham would you like to address that.

Mr. Bigham: I believe that this speaker said that he lived in Midland Road, is that what he said? I think that's beyond the three hundred feet necessary for a notice.

Mrs. Rando: Yes, he stated that, I think.

Mr. Bigham: The first thing he talked about and I think he talked about easements and he talked about Registry of Deeds and Recordings and I'm not sure what else. But let me enlighten the speaker.

When you talk about easements, there are several kinds of easements. And if he is talking about an easement where the city would grant an easement to the petitioners, that didn't take place because that would have to be a recorded deed. They would have to have it go to the city council and go through the whole process. However there is another easement that he doesn't know about or he doesn't recognize and that's a permissive easement. That doesn't mean that the city has to grant anything. The city gives a license. It doesn't have to be in writing, just a license to do something on their property. If it lasts for over twenty years, it's a permissive easement. Now could the city turn around and say to my clients, well you can't use the park anymore. I suppose it could but that would only cause a law suit to be brought by these people against the city because the city has let them, they're taking advantage of the tower for their services and the consideration is to use the park, that portion of it. Now I don't know how he got into it. He doesn't have a key so I don't know where he got up to the property, I suppose he could get there I've never seen it really that way. So I think that when he talks about easements, I think he's not in the same ballgame. When he talks about guy wires, this is a new tower and the company that is going to build it is going to have to comply to with whatever is available to my clients, from the City of Waltham or their own property or whatever.

It is interesting also to note that the petitioners put the first tower up and they owned a lot of the property that the guy wires are on. They then conveyed some of that property to the City of Waltham and the deal was that, hey, if the guy wires are there, we have a right to stay there and that's what happened. So, I'm not sure I understand exactly what he is driving at. I would assume that the board would take in a further consideration relative to the people who are most affected by the use of the tower. Certainly his comments were to not bring down the present tower. That's not going to come down because nobody going to take that tower down. If he's

saying that we can't build a new one, well I think he better look twice because this is the board that has to grant the permission. If they find that his arguments are persuasive and mine are not, then obviously we're not entitled to relief. On the other hand, this is the board's decision and I rest the case with the board.

Mr. Kehs: First of all, in order to take those pictures I was in Prospect Hill Park. The access road has a locked gate which is about a quarter of a mile from the property line and people can walk past there. Its also, if you go to the end of Greenwood Lane, there's a trail called the Pine Ledge trail which sends you right up the hill and it plops you between the tower and the gate. So it's not like you have to trespass on their property to get to that area. So I took those pictures when I was in Prospect Hill Park. Considering the easement, I think it's a prescriptive easement and that's sort of like adverse possession when you say you have occupied or used this for twenty years and then you somehow gain rights to it. In order to actually perfect that, you have to go to court. So you have to take the City of Waltham to court and say we really didn't have our rights guaranteed and we can always drive on this area. We'll use the area for the guy wire anchors. They have nothing in writing. Nothing to say, well we can do this. But again, there are specific points in the state law that prevent a taking of park land by prescriptive easement or adverse possession. And that would be, I believe, its Chapter 260, Section 31. So he says that by having it for twenty years he's automatically entitled to it. But it's not up to the board to try to decide that and this is a legal question and you could certainly take it to the Law Department.

Ms. Gelineau: Well, I agree with you but that would only be if it became contentious, that that would have to go before the court. You're right. But there is some merit to the fact that he's used it for twenty years and the City is well aware of it. They are allowing him to use it. And there must be some thread taking into consideration that he did in fact donate the land to the city. It goes a little further than saying you plunked your stuff on park land. So, again, he's stated that they understand that so when they put up the new tower and if they have to juggle their wires to conform, they are willing to do that. They'll have to get a permit for a new tower.

Mr. Kehs: I haven't seen any deeds where they granted land to the city. There should be

a public record if they are willing to provide this.

Mr. LeBlanc: Forty years ago, fifty years ago, they didn't do stuff on deeds and everything else. You went, and they let you do it. I mean, it's been there since 1962, there's been a tower there. They must have had some kind of agreement. The city didn't say don't put the tower up. It's almost fifty years old, and there may be no paperwork, but there must have been verbal agreements at that time.

Mr. Kehs: Well, as I pointed out, there was paperwork when the Polaroid agreement which was rather similar.

Mr. LeBlanc: That was handled different. That was an easement with the land transfer and they went through it. This was done before Polaroid was there.

Mr. Kehs: Well, I think that maybe we should have some documentation from the city right now to say its okay. I mean, I have been trying like meeting with the city councilors and saying what are you going to do about this. And they say you are have to wait for it to go to the Zoning Board. So, here we are.

Mrs. Rando: Sir, do you think you're the only one who has some fault with this tower? I mean, hasn't anyone called the building inspector. Hasn't anyone over, how many years has it been there?

Mr. Bigham: Almost 50 years.

Mrs. Rando: Hasn't anyone said why is that there? Who gave the right? Why isn't it taken down?

Mr. Kehs: Absolutely, people have done that. They went to the mayor.

Mrs. Rando: And what has been said? I'd like to know.

Mr. Kehs: My understanding is that they said it's sent to the zoning board.

Mr. LeBlanc: We'll vote on it tonight. We'll find out.

Ms. Gelineau: We are just voting on putting up a new one and moving it. We didn't vote on 1962 that they were allowed to do it and that they are there by right, which it is.

Mr. Kehs: That's a question that I should not try to answer but maybe you should try to answer this to see what the current city officials say rather than well, we are hearing it second hand from the attorney.

Mrs. Rando: Are there any other questions from board members?

Mr. Hickernell: I have a question for the petitioner's counselor. Is the new proposed tower going to continue to make use of the park land for the anchors of their wires?

Mr. Bigham: I doubt it, but I don't know that for sure. I think you have a right to use a portion of the land that they allowed them to use for fifty years. I think we can do that and if we didn't, then we'd find another way. But right now, as far as I am concerned what he's referring to on park land that permission was given by Austin Rhodes who was then the mayor and I'm sure he cleared it with the council.

Mr. Hickernell: Let's assume now that's true and legally sufficient. The new one, you don't know if it's going to be on the park land?

Mr. Bigham: I'm not sure about that but I would think if they are removing it about eight feet its going to be some place in that area. I'm sure of it and if we have to get permission from the council, we'll get it.

I want to make this one comment and I don't want to criticize the gentleman. Obviously

he's gone through a great deal of care to investigate something or other, I don't know. But anyway, when we get to the area of easements as Mr. Hickernell will tell you, it's not an easy subject matter. We had it in law school and sometimes people didn't understand it and unless you really studied it you really don't understand it. And there's a lot of case law on it. But he's talking about adverse possession. Adverse possession is one way of getting an easement but it takes time. In this case, we are not talking adverse possession. We're talking a permissive easement that has to do with a license or an agreement. And it's not a grant and it never can be. So the whole situation here is that it's been here almost fifty years and you have to look at all of the facts involved in this situation. You have very honest people that are doing business with the City of Waltham and you have very honest people who occupy positions within the city. I'm sure that if there was any shenanigans going on it would have been unraveled a long time ago. So if Mr. Ohnemus was in error in what he did, nobody has done anything about it; no administrative acts, no court action. I think the board has enough information they can make their own decision. And you've got to keep in mind, who does it benefit? Who does it hurt? It doesn't hurt that gentleman. He doesn't live anywhere near it.

Ms. Gelineau: Us giving you permission to erect it is sort of irrelevant to the fact that if you come across the need to get an easement or get permission, you'll do that.

Mr. Bigham: If that issue is raised, believe me we will do it.

Ms. Gelineau: There's not much we can do about it. That becomes your purview and you'll address it. Right?

Mr. Bigham: Yes.

Mrs. Rando: Does Mr. Antico have any plans of making this tower higher than what it is?

Mr. Bigham: Same size, same place.

Mrs. Rando: I mean in the future.

Mr. Bigham: No.

Mrs. Rando: Say in a few years if he wants to, do you feel he has the right to do it without coming back to the board, without a permit because - - -?

Ms. Gelineau: He would have to come back .

Mr. Bigham: Definitely. I would think they would have to go to the city council. Remember at the time when this was built there was no height restriction.

Mrs. Rando: You may continue with your Proposed Findings of Fact. Has everyone read the Findings of Fact and is ready to make a motion?

Mr. Sergi: Yes, Madam Chair. Counselor these are the same Findings of Fact that have been on file in the Legal Department. I make a motion that we waive the reading of the Proposed Findings of Fact since its been on file at the Legal Department.

Mr. LeBlanc seconded the motion and the board voted to waive the reading.

Mr. Sergi: It's the same decision that has been submitted prior, so I make a similar motion, Madam Chair, that we waive the reading of the Proposed Decision since it's been on file with the Legal Department.

Mr. LeBlanc seconded the motion and the board vote to waive the reading of the Proposed Decision.

Mrs. Rando: Do I have a motion on the proposed findings of Fact.

On motion of Ms. Gelineau, seconded by Mr. Sergi, the board voted to accept the

Proposed Findings of Fact to be the Findings of Fact of the board.

The roll being called: Mr. Sergi, yes; Ms. Gelineau, yes; Mr. Hickernell, no; Mr. LeBlanc, yes and Mrs. Rando, yes. The vote was 4-1 in favor.

Mrs. Rando: Do I have a motion on the decision?

On motion of Ms. Gelineau, seconded by Mr. Sergi, the board voted to accept the Proposed Decision and grant the Special Permit in Case No.2013-06.

The roll being called: Mr. Sergi, yes; Ms. Gelineau, yes; Mr. Hickernell, no; Mr. LeBlanc, yes and Mrs. Rando, yes. The vote was 4-1 in favor.

Mrs. Rando: So it is granted.

Would the clerk please read the petition in Case 2013-09?

The clerk then read the Petition of Denis C. and Joanne Mahoney in an application for a variance to allow the construction of a rear addition as part of a renovation of the single family dwelling. Location and Zoning District: Hibiscus Avenue, 98, Residence A-3 Zoning District.

Mrs. Rando: May we hear from the petitioner or the petitioner's representative, please.

Sean Corcoran, Esquire, 48 Weston Street, Waltham, the petitioners representative came forward,

Mr. Corcoran: Before I start, I was hoping to add a few things to my petition that I wanted to bring to your attention. First off is the Old Lot or Small Lot opinion granted by the building department on the property? The second item which I omitted from my scanned copy to the law department is the deed that shows the petitioners are the property owners. And upon reviewing my proposed findings of fact, and decision, there were a few errors in there and I was

hoping to give you new additions.

Mr. Corcoran then read his brief into the record.

Mrs. Rando: So you're saying they are going out rather than going up?

Mr. Corcoran: They are going out rather than going up.

Mrs. Rando: Because of the convenience.

Mr. Corcoran: It's more the convenience on the first floor. It's not adding new living space. And I did bring the builder, if you had any questions for him.

Mrs. Rando: I made a site view this afternoon, and I noticed the deck and all. But here it said, the size of the lot and location of the lot on the corner of two streets. I didn't see a street corner.

Mr. Corcoran: That might be in the part that I replaced. I apologize. When I was reviewing it and that's why I made the changes. To be honest, that was a ruminant of a prior petition that I had.

Mrs. Rando: Is there anyone in the audience in opposition to this petition? Seeing none, is there anyone in favor? (Five people raised their hands in favor who were direct abutters.) And there was no one in the audience seeking information.

All right, you may continue with your Proposed Findings of Fact.

Mr. Corcoran then read his Proposed Findings of Fact.

Number 4 was deleted from the findings and the board added a number 8 as follows:
"The lot has an Old Lot status."

Mr. Corcoran then read his Proposed Decision.

Under Conditions especially affecting, etc. "on the corner of two streets" was stricken.

Under all necessary permits etc, the board added to the last line "and completed within two years".

Mrs. Rando: Do I have a motion on the Proposed Findings of Fact as amended.

On motion of Mr. Sergi, since the Proposed Findings have been on file in the Law Department, and seconded by Ms. Gelineau the board voted to accept the Amended Proposed Findings of Fact.

The roll being called: Mr. LeBlanc, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. Sergi, yes and Mrs. Rando, yes.

Mrs. Rando: On the Proposed Decision?

Mr. Sergi: In a similar fashion, I vote to adopt the Proposed Amended Decision to be the Board's Adopted Decision. Ms. Gelineau seconded the motion and the roll being called: Mr. LeBlanc, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. Sergi, yes and Mrs. Rando, yes.

There being no further business, on motion of Mr. Sergi, seconded by Ms. Gelineau, the board voted to recess at 9:45 P.M.

Handwritten signature of Barbara Rando, chair.