

FOR THE
CITY OF WALTHAM
ZONING BOARD OF APPEALS

GENERAL HEARING

February 9, 2016

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
Michael Cotton
Glenna Gelineau
Sarah Hankins
John Sergi

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Waltham Zoning Board of Appeals/2-9-16/2

I N D E X

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A T T A C H M E N T S

Legal Notices: Case No. 2015-09
2014-29
2016-01

Case No. 2015-09:
Extension Request Letter

Case Number 2016-01
Brief
Proposed Finding of Facts
Proposed Decision, as Amended
Building Plans
Petition of Abutters

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P R O C E E D I N G S

BARBARA RANDO, CHAIR: Good evening.
The Zoning Board of Appeals for Tuesday, February 9,
2016 is called to order at 7:00 p.m.

Tonight we have an extension of time,
one continued case, and one new case before us.

The extension of time is on Case 2014-
29, Zottola, 300 College Farm Road;

and Case Number 2015-09, Louis J.
Antico and Anthony J. Antico, Prospect Hill Road, and
that is for overturning the decision of the Building
Inspector;

Case 2016-01, James A. and Michelle M.
Cristofori, and that address is 678 Trapelo Road, and
that's for a variance and to amend an existing
decision.

The members sitting this evening are
Mr. Sergi, Mr. Hickernell, Ms. Gelineau, Mr. Cotton,
and I am Barbara Rando.

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1 **Case Number 2015-09: Louis and Anthony Antico,**
2 **Prospect Hill Road.**

3

4 BARBARA RANDO, CHAIR: Would the Clerk
5 please read the petition in Case 2015-09?

6 MARK HICKERNELL: (The Clerk reads the
7 above-mentioned petition into the record. See
8 Attached.)

9 BARBARA RANDO, CHAIR: Thank you.

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

12 ATTORNEY BRIAN GROSSMAN: Thank you,
13 Madam Chair, members of the Board. Brian Grossman on
14 behalf of the Petitioners Antico.

15 We appreciate the Board's continuance
16 in November so that we could have time to review the
17 submission that was made that evening from the
18 Building Inspector's counsel. As it was noted, the
19 continuance request last time, when only four Board
20 members were present, I hadn't had a chance to even
21 review it and I certainly wasn't going to be in a
22 position to respond. I've had a chance to review it
23 now. My expectation at that point when we requested
24 the continuance back in November was that another

1 round of briefing and supporting statements may be
2 necessary.

3 Having reviewed it, and this was to
4 Mr. Sergi's point at the last hearing, I resisted the
5 lawyerly urge to drop another 15 pages or so on the
6 Board because, quite frankly, I didn't need to.
7 Counsel's latest submission dated in November
8 essentially continues to argue a point on which she
9 and I agree. If a Building Inspector erroneously
10 issues a building permit or makes an interpretation
11 of an ordinance and then realizes it, depending upon
12 the applicable statute of limitations of six to ten
13 years, he's not estopped from seeking to enforce the
14 ordinance. None of the cases by counsel involve that
15 circumstance because that's not what happened here.
16 That's not what our argument is. The argument we
17 have made to this Board repeatedly is the Board made
18 a prior unappealed decision that very carefully and
19 very thoughtfully went through the criteria to
20 determine whether or not the existing tower and the
21 existing uses were pre-existing nonconforming or not.
22 The Board found in granting the request for a
23 petition to replace the pre-existing nonconforming
24 tower and uses that it in fact was. And that

1 decision went unappealed. And that is, in part, what
2 we have based our argument on is that you don't need
3 to revisit this again.

4 Attorney Learned said I haven't cited
5 any cases for the proposition that actions by an
6 individual municipal official are treated differently
7 than an action by the Board. But, all I was doing
8 when I did that in my November statement was
9 effectively stating a clear fact of delineation
10 between the types of cases that exist in this area.
11 There's the line of cases Attorney Learned has given
12 you, which, yeah, we agree, if a Building Inspector
13 erroneously issues a building permit and a couple of
14 days later realizes he's made a mistake, he can
15 revoke that building permit. But there is a second
16 line of cases, and those are the cases that I have
17 cited and some of those cases Attorney Learned has
18 cited as well, that talk about the effect of a
19 Board's decision and whether or not it has
20 preclusive effect or not. And the fact that those
21 cases even exist and the fact that we're talking
22 about them make very clear then the delineation
23 between a municipal official action like the Building
24 Inspector versus the potential preclusive effect of

1 an action by the Board. And we've given you cases.
2 Some of the early cases say it's not clear. We think
3 that there may be a preclusive effective. They seem
4 to be leaning that way. The latest case I've cited,
5 the *Kuolas* case, seems to be continuing the trend
6 toward finding preclusive, in fact that case does,
7 find preclusive effect by the Board.

8 And it's a very important distinction
9 because the Board, as we talked about before, is a
10 quasi-judicial board. And so its actions are
11 reviewed differently than the actions of the Building
12 Inspector. In fact, the first step in appealing the
13 action of the Building Inspector is not to go to
14 court, it's to come to you. He's made a mistake.
15 He's wrongly denied my building permit. Or, he's
16 wrongly issued a building permit. Board, please make
17 a decision. Here's the evidence. The appeal from
18 this Board goes to a court. We have procedures.
19 There's a difference between the actions of the
20 Building Inspector and the actions of a quasi-
21 judicial board.

22 And the cases under Section 17 of 40A
23 are very clear. And we talked about this before. If
24 someone fails to challenge a decision, even a

1 possibly erroneously one within the 20 days after
2 this Board has filed its written decision with the
3 City Clerk, they have lost the right to the appeal.
4 Even if they file that appeal within the 20 days and
5 forget to notify the City Clerk within those 20 days
6 and they do it on day 21, you've still lost that
7 right to your appeal. And, effectively, that's what
8 we have here. And those are the cases that I've
9 cited to you in terms of potential preclusive effect
10 or preclusive effect of the Board, of a Board
11 decision.

12 If we follow Attorney Learned's theory
13 of inclusion, there would be no point in that. If
14 this Board were to make a decision and grant a
15 special permit and it goes on appeal and someone
16 operates under the terms of that special permit,
17 someone could go to the Building Inspector and say,
18 "I think this is wrong. I think they are illegally
19 operating and I think they needed something else,"
20 or, "I don't think the special permit was properly
21 granted." In that instance, under Attorney Learned's
22 theory, there would be nothing to stop the Building
23 Inspector from ceasing a use that you've authorized
24 and that went on appeal. And if the use is being

1 done in accordance with what you have granted, the
2 appeal, or a collateral attack on that, like asking
3 the Building Inspector for enforcement, is improper.

4 The appeal must come within the 20 days. Otherwise
5 -- and the cases bear that out, including the *Kuolas*
6 case that I've cited to you. If there's a question
7 about the legality of the use, or there's a question
8 about whether or not the Board should have acted the
9 way they did, or should have come out the way they
10 did, those issues need to be resolved within those 20
11 days. If you don't do it, you've lost that right.
12 And to try and collaterally attack that use is
13 improper.

14 And in the *Kuolas* case that I've
15 cited, what happened was you had a three-family use
16 being used by a prior owner. I'm going to run
17 through this quickly. I know you've read the
18 submission I made. But it's very instructive.

19 BARBARA RANDO, CHAIR: Did you send
20 this information to us recently?

21 ATTORNEY BRIAN GROSSMAN: Yes. No,
22 no, no, no. This is from my November submission.

23 So, what you had were prior owners
24 obtained a special permit to convert a pre-existing -

1 - what they argued was a pre-existing nonconforming
2 three-family use to a four-family use. The Board of
3 Appeal granted the special permit to allow the
4 modification of the pre-existing nonconforming use
5 from the three-family to the four-family. They found
6 it was pre-existing nonconforming and then they
7 allowed the change to the four-family.

8 The property gets sold. Three years
9 later, the abutters come along and go to the Building
10 Inspector and ask him to require the owners that have
11 been authorized by the Board of appeal through a
12 special permit to operate this four-family house to
13 require the new use as a single-family. And the
14 Building Inspector said, "No, there's a decision on
15 record. I'm not going to do that. The decision of
16 record authorizes the use."

17 The Plaintiffs appeal to the ZBA. And
18 the ZBA upheld the refusal of the Building Inspector
19 to enforce citing the conclusive nature of the prior
20 unappealed decision. The abutters then appealed that
21 to court and asked the court to allow them the right
22 to offer additional evidence as to whether or not
23 that original special permit should have been
24 granted, whether other relief such as a variance,

1 which had been considered by the Board but found
2 unnecessary, was required. And the court rejected
3 that as a collateral attack on the unappealed
4 decision.

5 The way I understand Attorney
6 Learned's argument to be is that in this case that
7 result would be okay because the Building Inspector
8 looked at it and decided one way and said, "You know
9 what? There's an existing decision on record. I'm
10 not going to go against that. I think that's
11 correct." However, if you follow what she has argued
12 to you the other way, if that Building Inspector
13 decides differently and says, "You know what? I
14 think you're right," then as she sees it the Building
15 Inspector could still enforce and issue a cease and
16 desist order ceasing the use of the four-family that
17 the Board had authorized.

18 And it's important, again, to
19 understand the flow here. He's the zoning
20 enforcement officer as well as the Building
21 Inspector. So, when someone disagrees with his
22 decision, you're the Board of first recourse. After
23 that, Superior Court or the Land Court. What she's
24 arguing is no matter what your decision is, no matter

1 how old it is, no matter whether or not it was
2 appealed or not, if the Building Inspector decides
3 that despite the fact that something is being used in
4 accordance with a permit you have authorized, he can
5 put a stop to it. And it's just not the way the
6 cases bear out. If the use has been authorized by
7 the Board and its gone on appeal, then that use is
8 authorized. If someone wants to stop that, if
9 someone thinks the Board has made a wrong decision,
10 appeal within the 20 days. If you don't, you've lost
11 your right not just to appeal it directly, but to
12 appeal it by collateral attack.

13 And, effectively, that's what Mr.
14 Forte has done here. There was the prior unappealed
15 decision, understanding he wasn't the Building
16 Inspector at that time, but there was a Building
17 Inspector. It's an office. It's a position within
18 the City. His predecessor didn't appeal it. And
19 regardless of what came out of it, he takes, coming
20 late to the party, he takes the situation as he finds
21 it. And, as he finds it, there's a prior unappealed
22 decision of this Board that says the use is pre-
23 existing nonconforming. The tower was pre-existing
24 nonconforming. And we're going to authorize its

1 replacement and modification.

2 That's really all we're asking you to
3 do is to uphold your prior decision making a --
4 having seen the evidence -- and I understand that new
5 evidence may have potentially been brought forward.
6 However, that evidence was effectively in the control
7 of the City the entire time. It was in the control
8 of the Building Inspector's office the entire time.
9 If there was a disagreement over whether or not that
10 decision should have been granted, it needed to be
11 appealed within 20 days.

12 The other argument we've heard from
13 counsel is, well, we didn't need to appeal anyway
14 because there were these other issues and so it
15 didn't matter. We didn't have to appeal at the time.
16 Another case I've given you is *Elder Care*, cited in
17 my November filing, that talks about -- granted, it's
18 a constructive approval. But it's a constructive
19 approval and then the Board files a late appeal of it
20 and effectively argues, well, we didn't really need
21 to appeal anyway because the relief that is claimed
22 to be constructively granted would have exceeded the
23 authority. We couldn't have done it anyway. And the
24 court rejects that.

1 As counsel has admitted anyway, that's
2 some of the theories that she has advanced in terms
3 of, well, they didn't need to appeal because of these
4 other issues, so it couldn't have been built anyway.
5 First of all, it's speculation. She's admitted that
6 in the record. But, two, it's irrelevant to the
7 issue at hand, which is the Board made -- heard
8 testimony. It was provided evidence, saw that
9 evidence, and made a very specific decision with very
10 specific findings. And we go through that for you in
11 my November submission that talks about the exact
12 findings that the Board made with regard to the tower
13 and the existing uses.

14 The Board found that it was empowered
15 to grant or deny the special permit that was sought
16 by the Petitioner at the time, which was to modify
17 the previously nonconforming use;

18 that the tower was used for wireless
19 radio and telecommunication services, for various
20 vital services, including ambulance agencies, bus
21 services for handicap people, emergency vehicles, as
22 well as fire, police, and other agencies of the City
23 of Waltham;

24 the existing use of the tower, which

1 began in 1962, was not regulated as to height at the
2 time and was classified as a nonconforming use;

3 when the tower was extended to its
4 present height, the Petitioners were advised that
5 building permits were not required since the tower's
6 use was a pre-existing nonconforming structure;

7 the proposed tower would remain the
8 same height as the replaced tower, and will have
9 installed thereon the same wireless and
10 telecommunication equipment;

11 the Petitioners requested a special
12 permit from the Board of Appeals to alter, enlarge,
13 reconstruct, and extend the present tower all in
14 accordance with Article 3, Section 3.7222 of the
15 Zoning Board, which is the pre-existing nonconforming
16 section of the ordinance;

17 and that the Board of Appeals,
18 pursuant to 40A, Section 6, may enter a decision
19 allowing the alteration or extension of a
20 nonconforming use when the proposed extension or
21 addition is not substantially more detrimental or
22 hazardous to the surrounding neighborhood than the
23 existing nonconforming use or structure;

24 the Board also found the towers in

1 1960, '67, and '82 continuously used to broadcast
2 wireless radio and telecommunication.

3 So, in all those findings, and then
4 the ultimate decision of the Board granting the
5 request of the relief to modify and alter the pre-
6 existing nonconforming use, the Board had to find a
7 couple of things.

8 One, the existing tower was a pre-
9 existing nonconforming use, otherwise you couldn't
10 have granted the relief.

11 It authorized the uses. Again, those
12 uses had to either be -- either have to be permitted
13 or pre-existing nonconforming in order to allow those
14 uses to continue. And the Board made that decision
15 to allow the tower to be replaced and those uses to -
16 - those ongoing uses to continue on with the existing
17 tower.

18 And so we ask you to effectively
19 uphold the prior unappealed decision that this Board
20 has made and find that the existing tower is a pre-
21 existing nonconforming use or structure, and that the
22 existing uses are also pre-existing nonconforming.

23 BARBARA RANDO, CHAIR: Attorney
24 Grossman, could you tell us this evening what exactly

1 we are voting on? What was the cease and desist
2 letter on? Was it not on a business in a residential
3 area for one thing, and something about --

4 ATTORNEY BRIAN GROSSMAN: I don't want
5 to misquote it. So --

6 BARBARA RANDO, CHAIR: -- an unsafe
7 tower? Pick up the microphone so the people at home
8 can hear you. I listened to your argument and I'd to
9 know exactly what do you think is before this Board
10 this evening in upholding the opinion of the Building
11 Inspector, not going back to conforming,
12 nonconforming, whatever. What is -- what are we
13 voting on this evening? Please tell the Board.

14 ATTORNEY BRIAN GROSSMAN: The appeal
15 is whether or not -- and the cease and desist order -
16 -

17 BARBARA RANDO, CHAIR: The cease and
18 desist.

19 ATTORNEY BRIAN GROSSMAN: -- is over
20 the -- so it's not having to do with the actual
21 removal of the tower. That's not part of the cease
22 and desist order.

23 BARBARA RANDO, CHAIR: That's in
24 court.

1 ATTORNEY BRIAN GROSSMAN: It's in
2 court.

3 BARBARA RANDO, CHAIR: Right. It has
4 nothing to do with us tonight.

5 ATTORNEY BRIAN GROSSMAN: The only
6 issue is whether or not the existing uses on the
7 tower, the commercial uses, are allowed to operate in
8 a residential district or not.

9 BARBARA RANDO, CHAIR: A business in a
10 residential, right. And what else? What's the
11 second part to the letter?

12 ATTORNEY BRIAN GROSSMAN: There was
13 another part to the letter that is not to this Board.
14 It has to do with the safety of the structure. But
15 that's an issue that is already in the courts on our
16 appeal and their appeal.

17 BARBARA RANDO, CHAIR: So, tonight,
18 what then are we voting on?

19 ATTORNEY BRIAN GROSSMAN: Whether or
20 not the existing uses on the tower are permitted, or
21 pre-existing nonconforming --

22 BARBARA RANDO, CHAIR: Right.

23 ATTORNEY BRIAN GROSSMAN: -- and,
24 therefore, can continue on --

1 BARBARA RANDO, CHAIR: Right.

2 ATTORNEY BRIAN GROSSMAN: -- or
3 whether or not they are illegal.

4 BARBARA RANDO, CHAIR: Say that again.
5 If they are allowed to have a business in a
6 residential zone is what's before us tonight?

7 ATTORNEY BRIAN GROSSMAN: Well,
8 whether those existing uses in the residential zone
9 are pre-existing nonconforming or not.

10 BARBARA RANDO, CHAIR: And they
11 weren't allowed in 1962 when the tower was built.
12 So, therefore, and they're not allowed today. So,
13 the argument is?

14 ATTORNEY BRIAN GROSSMAN: The Board
15 has already made the findings that those uses are
16 pre-existing nonconforming. And, therefore, the uses
17 are -- this is an impermissible collateral attack on
18 the prior appeal and decision of the Board, and those
19 uses are authorized by -- are authorized and
20 permitted.

21 MICHAEL COTTON: We already voted on
22 that, didn't we? We already voted on that the last
23 time. It should be there. And then they said stop
24 and desist.

1 BARBARA RANDO, CHAIR: Any other
2 questions besides Mr. Cotton? Mr. Sergi, any
3 questions at this time?

4 JOHN SERGI: Well, in your opinion,
5 you're saying that the 20 days elapsed, or whatever
6 the time period elapsed, he did not file his appeal
7 within the last -- within that time period of --

8 ATTORNEY BRIAN GROSSMAN: So, there's
9 two decisions from the Board. The 2015 decision --
10 so, the 2015 decision was appealed by the Building
11 Inspector, but there's a prior decision in 2013 that
12 was unappealed. And the 2013 decision and the 2015
13 decision almost mirror each other with the exception
14 of the change in the --

15 JOHN SERGI: But the one he appealed
16 was the 2015, correct?

17 ATTORNEY BRIAN GROSSMAN: Correct.

18 JOHN SERGI: Okay. And that's what
19 we're here tonight --

20 ATTORNEY BRIAN GROSSMAN: No. No.
21 So, we're not here on the 2015 decision at all. The
22 2015 decision has been appealed. Part of our
23 argument in the 2015 case is this same argument, that
24 effectively he's collaterally attacking later on,

1 impermissibly after the 20 days has run on the 2013
2 decision, that he's making an impermissible attack,
3 and we'll argue that to Judge Long. The issue here
4 is we have the unappealed 2013 decision. And that
5 unappealed 2013 decision made the findings that I've
6 given you, and find that the tower is pre-existing
7 nonconforming and that the uses are pre-existing
8 nonconforming.

9 BARBARA RANDO, CHAIR: Mr. Hickernell?

10 MARK HICKERNELL: I have no questions
11 at this time.

12 BARBARA RANDO, CHAIR: Ms. Gelineau?

13 GLENNA GELINEAU: No questions.

14 BARBARA RANDO, CHAIR: Mr. Cotton, any
15 other questions?

16 MICHAEL COTTON: No. Since it's been
17 there for 50 years, I don't understand how all of a
18 sudden it's illegal. The case you brought up a
19 minute ago about it being unsafe, have you had
20 engineers there to satisfy that?

21 ATTORNEY BRIAN GROSSMAN: There have
22 been engineers. There's been the Survey Review
23 Board. All of that's moving into the court --

24 BARBARA RANDO, CHAIR: We haven't

1 received any information from any engineer --

2 MICHAEL COTTON: We weren't aware of
3 that.

4 BARBARA RANDO, CHAIR: -- as to the
5 safety. I think it was requested at one of the
6 meetings.

7 ATTORNEY BRIAN GROSSMAN: Since it's
8 not part of this case, submitting it into the record
9 --

10 BARBARA RANDO, CHAIR: No, but I mean
11 even when it was part of the case we did not receive
12 it.

13 ATTORNEY BRIAN GROSSMAN: It was never
14 part of the case.

15 BARBARA RANDO, CHAIR: We asked for
16 it. I think Mr. Hickernell did, if you want me to
17 look back. But, we didn't receive it.

18 And I thought there was no statute of
19 limitations on an enforcement action that is in
20 violation of use. So why are you saying the 20 days?
21 I don't understand if there's no violation. And I
22 did not think that was our Building Inspector at the
23 time.

24 ATTORNEY BRIAN GROSSMAN: Regardless

1 of whether or not it's the same Building Inspector or
2 not, it doesn't matter. It's the office of the
3 Building Inspector.

4 BARBARA RANDO, CHAIR: Oh, no, because
5 if the Building Inspector that's in that office
6 happens to make a mistake, it's a mistake, and it can
7 still be overturned.

8 ATTORNEY BRIAN GROSSMAN: So, there's
9 a couple of different statutes of limitation we're
10 talking about. One is the six-year statute of
11 limitation. So, if the Building Inspector
12 incorrectly issues a building permit and the use --
13 and there is a use authorized under that building
14 permit, so he authorizes a gas station, the gas
15 station is permitted. The use is authorized by the
16 building permit. Everything is installed and used
17 according to what the building permit required.
18 That's the six-year statute of limitations. After
19 that, there is not an enforcement -- there is not --
20 an enforcement action, even against the use, cannot
21 be maintained.

22 The issue is when you have uses not
23 authorized by -- if you have a use not authorized by
24 a building permit, then the use is not -- doesn't

1 gain that statute of limitations protection although
2 a structure does. After 10 years, an illegal
3 structure, if it was built without a building permit,
4 it's no longer subject to enforcement to removal.
5 But that's not the same for the use within that
6 structure. So, if somebody puts up a barn and
7 they're using it as a stable, then after in year 11,
8 well, the barn may not be able to be ordered to be
9 removed; the use of the stable, if it's not a
10 permitted use, can be ordered to be ceased.

11 However, that's what Attorney Learned
12 has been arguing in terms of enforcement that, well,
13 what you have is this use that doesn't have a statute
14 of limitations attached to it. The only problem with
15 that is we have the decisions by the Board. And the
16 decisions by the Board then make specific findings,
17 including whether or not the use is pre-existing
18 nonconforming, how long it's been there, what those
19 uses were. When that decision is not appealed within
20 the 20-day appeal period, then there are rights that
21 are conferred or granted to the Applicant. And a
22 subsequent collateral attack, very much like what
23 happened in *Kuolas*, the case I've cited to you, a
24 subsequent collateral attack, even if it might

1 actually be correct, is improper because what you
2 needed to do if you thought that the Board's decision
3 originally was improper was you needed to file an
4 appeal of that Board's decision within 20 days.

5 And so that's what I was talking about
6 where once you have that decision, that decision
7 means something and it stands for something. And
8 after that, if it hasn't been appealed, even an
9 enforcement action would be improper so long as the
10 use is being used in accordance with that decision.
11 It's the three-family, four-family decision part of
12 *Kuolas*. And that's why we keep saying what we have
13 is a decision that makes very clear findings that was
14 unappealed by this Board. And, therefore, those
15 findings now are set, and we don't need to keep going
16 back and re-proving them, and re-proving them, and
17 re-proving them. The Board has made a decision. It
18 made specific findings. Those findings were
19 necessary to the decision to grant a pre-existing --
20 the modification to the pre-existing nonconforming
21 use that was being proposed. The Board made those
22 findings and they granted the permit. And now what
23 you have is effectively later on a collateral attack
24 on the very uses that this Board found were pre-

1 existing nonconforming.

2 And if you follow Attorney Learned's
3 argument to its end, no matter how many times the
4 Board would make a decision that says a use in a
5 particular property is legal, we believe it to be
6 legal, whether it's pre-existing nonconforming or
7 otherwise, every time someone complains the Building
8 Inspector could bring an enforcement action because
9 he's not estopped from bringing an enforcement
10 action, except he is because of the existence of the
11 unappealed decision.

12 BARBARA RANDO, CHAIR: Does anyone
13 have any questions on that of Attorney Grossman?

14 JOHN SERGI: No.

15 BARBARA RANDO, CHAIR: Hearing none.
16 Is that all you have?

17 ATTORNEY BRIAN GROSSMAN: Yes.

18 BARBARA RANDO, CHAIR: All right.
19 Thank you.

20 Would the Building Inspector or
21 Attorney Learned like to rebut?

22 ATTORNEY MICHELLE LEARNED: Thank you.
23 Attorney Learned. I'm representing the Building
24 Inspector here in this matter.

1 I want to start briefly by clarifying
2 a couple of points that are very relevant here.

3 First, my opposing counsel keeps
4 saying, "Attorney Learned's argument, Attorney
5 Learned's argument, Attorney Learned's argument." I
6 need to remind the Zoning Board that it's the law,
7 the legal precedent, the cases. In November, on
8 November 23rd, 2015, I submitted every case that
9 supports the Building Inspector's ability and power
10 to enforce the City's zoning. He has that power,
11 that obligation, to enforce zoning for the public.

12 This Board, when you review an appeal
13 of a cease and desist, you step in the shoes of the
14 Building Inspector. You have the power, you have the
15 obligation, to enforce the City's Zoning Ordinances.
16 What the landowner's counsel has asked you to do is
17 disregard the Zoning Ordinance that was in effect in
18 1962 all the way to today's date because they came to
19 you in 2013 and misled you. They came to you and
20 gave you facts and assumed that the tower was a
21 nonconforming structure. But today, through these
22 proceedings, all of these public hearings, you have
23 in front of you the actual documents that show this
24 is a noncomplying commercial use occurring in a

1 residential zone definitively.

2 If you look back at what the Building
3 Inspector provided you in July, you have a copy of
4 the building permit application for Permit Number
5 567, and the corresponding street card which is kept
6 in the regular course of business and is maintained
7 by the Building Department. What that document shows
8 you is that in 1962, a 75-foot tower was authorized
9 for personal use. That is what would be given
10 grandfathered protection, the personal use 75-foot
11 tower. But what the landowner and opposing counsel
12 is asking you to do is protect, provide grandfathered
13 status, to something that was never legal under our
14 Zoning Ordinances. It has always been illegal to
15 conduct commercial activity on that property from
16 1962 to today's date.

17 The Building Inspector provided you,
18 and it's Exhibit 2, back in July, the relevant
19 provision of the Zoning Ordinance in effect in 1962,
20 which enumerated that any permitted accessory use
21 shall not include any activity conducted for gain.

22 He also provided you relevant
23 provisions of the City Building Code in effect in
24 1962 that say radio antenna or the like are included

1 in the definition of structure and that the Building
2 Code is applicable to structures. So, back in 1962,
3 and any date after that point, when the landowner
4 changes the use from personal use to commercial use -
5 - and we actually submitted some evidence of that
6 through leases and whatnot back in July -- but the
7 opposing side has conceded that they are conducting
8 commercial use, you know, wireless telecommunications
9 activity at the property, at any point from 1962 to
10 today's date the commercial use in a residential zone
11 has always been noncompliant, illegal.

12 There's nothing to grandfather. There
13 is nothing that was once legal that deserves
14 protection. That's what the concept of
15 grandfathering is; when you have something that they
16 were once permitted to do under the Zoning Ordinances
17 and the Zoning Ordinance changes and you're not
18 allowed to do it anymore, then we say, "Yeah, we
19 should let them continue that use. That's what the
20 law says." But because you have misused your
21 property and you have conducted illegal activity at
22 the property for 50 years doesn't make it legal. And
23 there has been no case cited by the landowner's
24 counsel that says or speaks to or somehow says that

1 the Building Inspector can't enforce the zoning.
2 That's what he's doing. And there's no case that
3 he's cited that has said you, as the municipal Board,
4 can't enforce zoning.

5 There's a long body of law that I've
6 given you that says he's not estopped from any
7 municipal action or officer. That's you in 2013. If
8 you take his argument, he's saying that when a board
9 finds out it made an error, when it was misled with
10 misleading facts, that this board can't correct
11 itself.

12 The other important factor here is in
13 2013 it's a lapsed unappealed decision. And that's
14 very important for you. They didn't go out and build
15 it within the requisite period of time. They didn't
16 build to their detriment on that special permit. It
17 lapsed. And what that means is when you were
18 examining the prior 2013 decision to see if it has
19 any preclusive effect, you would be reading out all
20 the provisions of the statute that deal with lapsing
21 special permits. And this -- and that's not how the
22 law works.

23 If you look to page two of the
24 submission that my -- my November 23rd submission to

1 the Board, I specifically went through each of the
2 cases that the landowner's counsel had cited to tell
3 you and show you why they aren't binding with you.
4 And my opposing counsel references *Kuolas* as the
5 podium here tonight. *Kuolas* is not the same as what
6 is before you. *Kuolas* deals with a private citizen
7 and their appellate rights. It has no bearing or no
8 preclusive effect to the building official's ability
9 to enforce zoning or your ability to enforce zoning.

10 On page three of my submission, I went
11 through many cases that help you see that the lapsed
12 2013 special permit is not preclusive, does not bar
13 you from reaching the factual determination that is
14 actually before you tonight. There are appellate
15 court cases. The one court that my -- that the
16 landowner's counsel has referenced is a Land Court
17 case that has persuasive authority, not binding
18 authority, on the courts. Whereas, I've provided
19 numerous appellate court decisions that have binding
20 authority.

21 *Petrillo v. The Zoning Board of*
22 *Appeals* is a 2006 case with a Massachusetts Appeals
23 Court expressly stating, "We explicitly do not decide
24 that all decisions of a zoning board of appeals on

1 special permits, variances, or otherwise qualify as
2 final determinations because of various provisions in
3 the zoning enabling act, 40A, that bear on finality."
4 And they provided examples: the automatic lapse of
5 special permits for lack of substantial use, in 40A,
6 Section 9, the 14th paragraph; the similar lapse of
7 variance rights and certain provisions for re-
8 establishment of those rights in 40A, Section 10, in
9 the third paragraph; and the potential for further
10 consideration of application and the potential for
11 reconsideration upon matters initially denied, 40A,
12 Section 16.

13 MARK HICKERNELL: So, do any of those
14 exceptions or circumstances cited by the Appeals
15 Court apply here?

16 ATTORNEY MICHELLE LEARNED: They
17 certainly do because this was a lapsed decision,
18 special permit decision. They didn't build. They
19 had a two-year must commence within a year, and must
20 complete within two years, and that didn't occur.
21 And it didn't occur because in order to build this --
22 rebuild the tower -- I think they were trying to move
23 it over eight feet at the time -- in order to do
24 that, they would have to put four footings in city

1 parkland. So, not just I'm having the activity in
2 the residential zone that's a commercial activity,
3 but now I'm using the city parkland.

4 *Lopes v. Board of Appeals of*
5 *Fairhaven*, which is also an Appeals Court case, where
6 the court has said, and already decided, and I'm
7 quoting, "The application of claim or issue
8 preclusion principles, in the event of a lapsed
9 variance," and it's very comparable to a special
10 permit, "would undermine the purpose of the lapsed
11 provision: to force the applicant to justify the
12 variance he seeks unassisted by the earlier
13 proceedings." The Court explains that, and I'm
14 quoting, "The applicant must prove anew the existence
15 of each of the statutory conditions for a variance.
16 The application of collateral estoppel principles
17 would directly defeat that policy."

18 In the *Building Inspector of Lancaster*
19 *v. Sanderson*, which is a Supreme Judicial Court
20 decision, that's the highest court in our state court
21 system, that case demonstrates that the ZBA is not
22 required to continue to apply an erroneous finding
23 made in a prior decision. In *Sanderson*, the SJC held
24 that the building inspector in the town was not

1 estopped from enforcing the zoning bylaw that land
2 classified as either residential or residential
3 recreational could not be used as airports or airport
4 runways even though in 1970 the Lancaster Zoning
5 Board of Appeals had granted Sanderson a variance
6 authorizing him to extend his airport runway for a
7 distance of 60 feet on the property. The SJC
8 considered the facts establishing his construction
9 and use of the extended airport runway without
10 obtaining any permit or variance and concluded that,
11 and I'm quoting, "Insofar as the zoning bylaw is
12 concerned, the defendant's extension of his airport
13 runway in Lancaster beyond the distance of 600 feet
14 that was permitted by the variance granted to him in
15 1970 was unlawful." When you do something that is
16 not -- that is contrary to the zoning ordinance, it
17 cannot be grandfathered.

18 On page four I gave many cases that
19 talk about when one of your decisions does have
20 preclusive effect. So, here we have the fact that
21 it's a lapsed decision. These cases say that even
22 when it's not a lapsed decision, if you don't
23 actually litigate a particular issue it cannot have
24 preclusive effect. And that's what happened in 2013.

1 Nobody came to you and gave you the -- certainly not
2 the landowner. And it's the landowner's obligation
3 to establish the nonconforming protective use. And
4 what he did instead back in 2013 is provided,
5 assumed, it's a nonconforming use and you have the
6 power, Zoning Board, to expand that under the various
7 ordinances of our zoning.

8 The public didn't get proper notice.
9 And the cases that I gave you on page four of my
10 submission speak to that issue of how important it is
11 for the public to be able to weigh in on what is
12 occurring at the special permit hearing. And in
13 order for something to have preclusive effect, they
14 needed to know what was going on. So, my opposing
15 counsel mentions, oh, 20 days, and should have
16 appealed, well, that's if the notice said there's a
17 dispute over whether it's a lawful nonconforming or
18 an illegal noncomplying structure.

19 He argues that it should have
20 preclusive effect but there were no facts put before
21 you. The minutes -- I believe are in your records --
22 the minutes don't show any sort of discussion of
23 whether it was a nonconforming or noncomplying
24 structure or use. It just was assumed in the draft

1 findings of fact that were put forward by the
2 landowner. It wasn't actually litigated. And there
3 are cases here that show even in circumstances where
4 a special permit has not lapsed or it's intact that
5 it wouldn't meet the actually litigated prong to have
6 preclusive effect.

7 So, what we have here is commercial
8 tower use occurring in a residential zone and the
9 effects of that commercial tower use on the
10 landowners, on the residentially zoned property of
11 those abutters, but also on the city park goers,
12 because the commercial activity that is associated
13 with this commercial use, the trucks and service
14 vehicles for the tower, infringe on the public's
15 right to use Prospect Hill Park. They had built a
16 gate that actually barred citizens from using -- from
17 walking trailways. The trailways that used to be
18 named, and nice little paths, have been enlarged, a
19 road has been made, tar wrapped around trees, to
20 accommodate commercial vehicles that travel through
21 the city park for the commercial use that's occurring
22 in a residential zone.

23 And that's what this Building
24 Inspector is enforcing that zoning ordinances

1 designed to protect the public from such commercial
2 activity occurring in a residential zone. There is
3 nothing about the 2013 decision that can somehow bar
4 you or prevent you from reaching -- from fixing an
5 error. The law is very clear that the Building
6 Inspector, that a municipality -- it goes on. The
7 case laws say a municipality is not limited to a
8 building inspector, is not estopped from enforcing
9 its zoning laws, for this very reason because
10 sometimes mistakes happen and they need to be cured.
11 And that's what we're asking this Board to do. We're
12 asking you to look at Exhibits 1 through 8 that were
13 submitted back in July that clearly evidence the
14 commercial activity occurring in the residential zone
15 was never nonconforming, has always been
16 noncomplying, and cannot occur under today's zoning.

17 Does anybody have any questions?

18 BARBARA RANDO, CHAIR: Mr. Sergi, any
19 questions?

20 JOHN SERGI: No, not at this time.

21 BARBARA RANDO, CHAIR: Mr. Hickernell?

22 MARK HICKERNELL: Yes. Attorney
23 Learned, the *Petrillo* case you cited, the language
24 says, "We explicitly do not decide that all decisions

1 of a zoning board of appeals qualify as final
2 determinations." We make a couple dozen decisions a
3 year, are any of them final determinations?

4 ATTORNEY MICHELLE LEARNED: Well, when
5 a matter is actually litigated, and when somebody
6 goes to the Building Department and gets the building
7 permit to construct what this Board authorized under
8 the special permit, that's when Chapter 40A kicks in,
9 and he can issue the decision -- I'm sorry -- issue
10 the building permit, or if he thinks that something
11 was done incorrectly he would not issue the building
12 permit and the appellate process would happen. So,
13 the statute of limitations, as our Chair pointed out
14 earlier, does not prevent the Building Inspector or
15 this Board from enforcing a use violation that is not
16 -- that has not been authorized by a building permit.

17 So, in the event that you issued a
18 special permit, it didn't lapse, you actually
19 litigated -- they came before you and actually put,
20 for example, if the building -- if Exhibits 1 through
21 8 were before you, particularly 1 and 2, right,
22 Exhibits 1 and 2, if you had the building card, if
23 you had the actual Zoning Ordinance that was in
24 effect back then and you made a decision and it was

1 in error, but not based on misleading information,
2 and no one appealed, and it went to the Building
3 Inspector -- that's the extra check and balance --
4 and the Building Inspector issues the building
5 permit, then it would have binding effect within
6 those six years of the issuance of the building
7 permit. The statutory scheme is set up to ensure
8 that the Zoning Ordinances are enforced. And so the
9 case that you mentioned, *Petrillo v. Zoning Board of*
10 *Appeals* is an Appeals Court case that's saying wait a
11 second. If we were to say that the zoning board
12 decision had binding preclusive effect, all those
13 other provisions that I read out loud when I was
14 quoting from the case in the statutory scheme would
15 be negated. And to not -- and they were not prepared
16 to do that in that case.

17 So, maybe there's an interesting
18 intellectual issue here about whether or not the 2013
19 decision somehow precludes, doesn't preclude. That's
20 for the courts to decide. I submit to this Board
21 it's not a method to prevent you from fixing an
22 error. You have before you the building permit. You
23 have before you the street card. You have before you
24 the Zoning Ordinance in effect at the time. And you

1 have the Zoning Ordinances in effect to today's date.
2 All of that evidence shows that there is a
3 noncomplying use of the structure. There is
4 commercial activity occurring in a residential zone
5 illegally. And that's what you have to decide. And
6 you have to decide it either way.

7 The second issue could be delayed for
8 a court. He doesn't lose the ability to argue, "Oh,
9 but it has preclusive effect." He can make those
10 arguments to the court. It simply cannot prevent
11 you, or bar you, or keep you from making that initial
12 factual determination, not a legal determination.
13 That's for the courts. You're here to decide
14 factually. It's not any different from many of the
15 cases that come before you. Is the use that's
16 occurring on the property, was it nonconforming or
17 noncomplying, based on the evidence that's before you
18 today? And it's clearly a noncomplying use. Did
19 that --

20 MARK HICKERNELL: You answered my
21 question, yes. Thank you.

22 BARBARA RANDO, CHAIR: Ms. Gelineau,
23 any questions?

24 GLENNA GELINEAU: Attorney Learned, is

1 there any merit to the fact that -- I mean they're
2 operating this tower, but it's not a clandestine
3 function. I mean they're not in -- they're not doing
4 anything in secret. It's been out there literally
5 outdoors for the entire city, building inspectors,
6 city officials, mayors, for 60-plus years. And no
7 one -- I mean no one ever -- again, I understand your
8 argument, but is there any merit in that, to the fact
9 that they weren't doing anything in secret or hiding
10 anything?

11 ATTORNEY MICHELLE LEARNED:
12 Respectfully, when you don't notice, give notice to
13 the public as to your actions in the way the law
14 requires, and when a building permit --

15 GLENNA GELINEAU: What would you have
16 had them do over the past 60-plus years? What would
17 you have them --

18 ATTORNEY MICHELLE LEARNED: What
19 everybody else in the City does. You have a
20 structure, a 293-foot commercial communications
21 structure, that up until the date of the cease and
22 desist inspections were never properly inspected, the
23 inside, to see if the wiring was correct, to see if -
24 - each one of the pieces of equipment that go onto a

1 tower are supposed to go through the City Council.
2 So, your question is, okay, so it was standing there
3 and it was being done. The law is designed so that
4 when we discover it, when the Building Inspector
5 discovers it, he's entitled and obligated to enforce
6 the zoning. And part of, oh, well, you could see it,
7 that's probably why -- and, again, I'm saying this,
8 speculating. You're asking me to sort of speculate.
9 But that's part of the reason why it went unnoticed
10 perhaps. It's so blazon, the audacity to use the
11 City parkland is so -- that I'm sure it lulled people
12 into not thinking it wasn't properly authorized. But
13 when it comes to somebody's attention, the Building
14 Inspector, and he digs out the building application,
15 Exhibit 1, and he sees, oh, oh, personal use only, he
16 can't turn his back on that piece of evidence. It's
17 his obligation to all of the residents, to the
18 citizens, to the abutters, to make sure that what's
19 standing is allowed to be standing and operating
20 under current zoning. So, he can't turn his back.

21 GLENNA GELINEAU: Okay. Thank you.

22 BARBARA RANDO, CHAIR: Mr. Cotton, any
23 other questions?

24 MICHAEL COTTON: No. No.

1 BARBARA RANDO, CHAIR: All right.
2 Thank you.

3 ATTORNEY MICHELLE LEARNED: Thank you.

4 BARBARA RANDO, CHAIR: Do you have
5 something further? Go ahead.

6 ATTORNEY BRIAN GROSSMAN: I don't
7 think it comes as much of a surprise that I have a
8 response.

9 BARBARA RANDO, CHAIR: I'm sorry.

10 ATTORNEY BRIAN GROSSMAN: I said I
11 don't think it comes as much of a surprise I have a
12 response.

13 The issue, as Attorney Learned has
14 framed it, is enforcement, enforcement of the Zoning
15 Codes. The separate issue, and the issue identified
16 in *Petrillo*, in the cases I've cited, is this, we're
17 not just talking about an interpretation of the
18 Zoning Ordinance. We are talking about an existing
19 Board decision. And for as many times as Attorney
20 Learned wants to tell you that it is definitively,
21 absolutely, there is no question the 2013 decision
22 has lapsed, that issue is also addressed in my
23 November 16 filing. And it comes up for two reasons.
24 A special permit and variance are treated very

1 differently for lapse purposes. A variance lapse is
2 if you don't apply for it, for an extension, and it's
3 not granted within the 30 days after the application,
4 it lapses, gone, vapor. A special permit decision,
5 on the other hand, in fact, is not required. And
6 people often do for various reasons, and I've done it
7 for clients as well to -- it kind of belts and
8 suspenders it and make sure that you have something
9 in-hand that says, "No, we're granting an extension.
10 We find good cause."

11 In *Nielsen v. Planning Board of*
12 *Walpole*, the court held that no affirmative extension
13 is required to preserve rights under a special permit
14 beyond two years if good cause exists for the permit
15 grantee's failure to commence a substantial use under
16 the permit within the two-year period. So, while she
17 says, "It's gone beyond two years. They haven't used
18 it. It's gone," it's not necessarily true because
19 there was in fact very good cause to not exercise the
20 rights that were granted under the 2013 permit.
21 She's given you a couple of them. They realized that
22 the footings, the new proposed ones, would be on City
23 park property. Then they got the plan that led to
24 the 2015 decision to give you a self-support instead

1 of the guide tower. It was, of course, prudent to
2 not go ahead with that construction with the 2013
3 decision while they awaited the ultimate outcome of
4 the 2015 decision, which, as we also all know is
5 still actually pending because this Board granted it,
6 finding, again, for the second time that the use was
7 legally pre-existing nonconforming and the structure
8 was legally pre-existing nonconforming. That's still
9 pending with the Land Court.

10 So, the issue of whether or not it's
11 lapsed is still open. The 2015 decision actually
12 amended it so that would again -- the application was
13 sought to amend the 2013 decision. We were granted
14 that. So that, again, would speak to the fact that
15 perhaps that 2013 decision is not definitively lapsed
16 as Attorney Learned would have you find.

17 The issue of estoppel is this: if the
18 Board issues a special permit -- I'm going to take it
19 out of the pre-existing nonconforming for a minute.
20 If the Board issues a special permit, makes all the
21 requisite findings, and the Building Inspector looks
22 at it and disagrees, he has two options. He can let
23 it go or he can appeal it within the 20 days. If he
24 doesn't appeal it within the 20 days, he can't later

1 come back and say, "I disagree with that decision. I
2 think the Board was wrong. I think you need to stop
3 your use." That decision effectively becomes part of
4 the zoning. That decision, issued by this Board,
5 which whose authority supersedes the Building
6 Inspector's. You are the administrative body that
7 when someone disagrees with the Building Inspector on
8 a matter of zoning, you are the ones who decide. So,
9 if he makes a decision and he says, "I think that
10 use, you've been using the property in this manner,
11 and I think that isn't proper, I'm going to issue a
12 cease and desist order." And if we come to this
13 Board and you decide that the use is permitted or
14 that you've already granted a special permit to allow
15 it and it's being used in accordance with the special
16 permit and that's all there is to it, what she's
17 saying is he can come back again and again and again
18 and again and again because he's quote "not estopped
19 from seeking to enforce the Zoning Ordinance,"
20 because he believes in his heart of hearts that the
21 special permit should not have been granted.

22 If that's the issue, that issue,
23 whether or not the special permit should or should
24 not have been granted, that issue needs to be

1 litigated within the 20 days or it needs to be -- the
2 appeal needs to be filed within the 20 days. Once
3 that decision goes unappealed, everyone needs to live
4 with it. That's what *Kuolas* tells you. And that's
5 exactly what *Kuolas* did. And the distinction that
6 Attorney Learned tries to make is this as well. That
7 talks about the rights of a private citizen. The
8 private citizen can't seek enforcement because they
9 didn't appeal within the 20 days. That doesn't stop
10 the Building Inspector. So *Kuolas'* is pointless.
11 *Kuolas* would absolutely be pointless because it would
12 depend on the whim of the Building Inspector. If
13 those same Plaintiffs go to the Building Inspector
14 and he agrees with them, even though they would not
15 have any private right to cause him to enforce it, to
16 enforce the zoning ordinance as they see it, because
17 he agrees with them he can enforce it. That's what
18 she's held. But, because he disagreed with them and
19 said, "No, no, no, I haven't seen the written
20 decision. I've seen the special permit and the
21 special permit authorized the four-family instead of
22 the three-family and so I think it's authorized,"
23 then the Plaintiff's rights -- the Plaintiffs don't
24 have an appeal right. And that just can't be what

1 Kuolas stands for. It can't be that basically the
2 whim of the Building Inspector, based on the
3 decision, whether he agrees with a particular
4 plaintiff or not, decides whether or not that
5 particular special permit that went unappealed can be
6 used or not because Kuolas makes clear that that's
7 not the case.

8 Again, I want to talk about the issue
9 in terms of she's talking about, well, the preclusive
10 effective that she was talking about variances.
11 Again, variances automatically lapse. If you don't
12 renew, if you don't get an extension, they just
13 automatically lapse.

14 What she talked about a few minutes
15 ago, special permit, very, very, different. The
16 lapses are not automatic and no extension needs to be
17 granted, although applicants, you know, again, out of
18 an abundance of caution, certainly are generally well
19 advised to at least ask for one. And so that's why
20 when you talk about cases that may or may not have
21 preclusive effect when you're looking at a variance
22 versus a special permit, when you're talking about
23 the lapse of a variance that's why there's that
24 difference because once that variance is gone you

1 have to re-establish it. There's no other way to do
2 it, versus a special permit which has the good cause
3 period. And that good cause period can extend beyond
4 two years. It can extend for a period of whatever
5 period of time precludes you from utilizing that
6 special permit.

7 In terms of the 2013 decision, and
8 then the 2013 appeal process, and, quote, "They
9 didn't litigate that issue," oh, they absolutely did.
10 The issue of the valid evidence before you is not
11 what -- is not what it means by the issue needs to be
12 actually litigated. It means the issue had to be in
13 as part of the decision. It had to be a necessary
14 part of the decision. There is no escaping what the
15 2013 decision and what the 2015 decision involved.
16 The Board had to consider whether or not the uses
17 were legally pre-existing nonconforming or not.
18 That's what the whole petition was about. And so
19 this idea of notice as well, absolutely the notice
20 was proper. First of all, the Board made a finding
21 that it had given proper notice. But, second, the
22 issue that had been noticed was the modification of
23 the pre-existing nonconforming use. It described the
24 project. It described the tower. And so it put

1 people on notice that if you want to know what's
2 going on with that property, with that tower, you
3 need to come to a public hearing. And if you don't,
4 or you ignore it, and you ignore the fact that the
5 written decision got issued, and the 20 days runs,
6 you have lost certain rights. That's what that means
7 by proper -- by notice and by actually litigated.
8 You actually had to decide those issues: Was the
9 tower legally pre-existing nonconforming or not?
10 Because if it wasn't, you couldn't have granted the
11 relief. Were the uses legally pre-existing
12 nonconforming or not? If they were not, if the Board
13 found they were not, couldn't have granted the
14 relief, and you did. And so those issues, despite
15 the -- you could argue with the evidence -- but
16 despite the fact that -- you can argue about the
17 evidence, but despite that fact, the issues
18 themselves were absolutely in front of you. There's
19 no escaping it. That's what the whole petition was
20 about.

21 BARBARA RANDO, CHAIR: Attorney
22 Grossman, if the Board did not receive all of the
23 information, the correct information in making the
24 decision, the 2013 decision, it does not stop us from

1 fixing an error.

2 ATTORNEY BRIAN GROSSMAN: First of
3 all, you made very specific findings.

4 Second, the building permit that she
5 references was part of both records in 2013 and 2015.
6 There was evidence before you in 2013 and 2015. And,
7 I would suggest again it, in effect, does -- there is
8 a preclusive effect, should be -- there is a
9 preclusive effect to the Board's prior decision. And
10 to constantly revisit the record of a pre-existing
11 nonconforming use every time it comes up puts a
12 landowner in a very difficult position. If in 2015,
13 they come to you and they get a special permit for a
14 pre-existing nonconforming use, and they establish
15 that the use was a restaurant, and then 40 years
16 later they go to modify that restaurant and they come
17 back as a pre-existing nonconforming use --

18 BARBARA RANDO, CHAIR: But did they do
19 it by permit? Did they get a permit? Did the
20 Building Inspector do it and did they follow the
21 permit procedure?

22 ATTORNEY BRIAN GROSSMAN: In this
23 example, yes. So, my point is they get a point in
24 time where they say, okay, we conclusively

1 established 40 years ago that we have a lawfully pre-
2 existing nonconforming use. The Board decided that
3 fact. The evidence that someone may preserve to
4 prove that case later, they already have that. And
5 so then when they go back to change that restaurant
6 to something else and they say, "No, no, it was never
7 legally pre-existing nonconforming," well, the Board
8 decided it 40 years ago that it was.

9 So, the way -- I can see you shaking
10 your head, but there is -- 40A wants finality. It
11 wants it on both fronts. It wants landowners to
12 understand what their rights are both as property
13 owner and abutter. And that's why you have that
14 drop-dead date of 20 days. There is no exception for
15 it. It is jurisdictional. And if you disagree with
16 the Board's decision, you think they've decided
17 wrong, you don't think they have the right evidence
18 in front of them, you don't think they have enough
19 evidence in front of them, or perhaps you think they
20 have no evidence in front of them at all, if that's
21 your theory you need to advance that theory by
22 appealing the decision within 20 days. After that,
23 it's an impermissible collateral attack and that's
24 exactly what you have here.

1 JOHN SERGI: But Attorney Grossman,
2 isn't that going to be decided in the courts?

3 ATTORNEY BRIAN GROSSMAN: Ultimately,
4 it may be. I will tell you, you know, Attorney
5 Learned has said if it's -- if it doesn't go in Mr.
6 Forte's way, they will appeal. And I would expect if
7 it doesn't go our way, we'll appeal it. That doesn't
8 relieve the Board from the obligation of making the
9 decisions it needs to make. And for Attorney Learned
10 to say, "Well, all you need to do is make a fact --
11 just make a factual decision. Don't worry about the
12 legal arguments. The court will handle those," well,
13 that's not fair. We have a legal issue in front of
14 you. This Board handles legal issues, because it's a
15 quasi-judicial board, all the time, is something
16 legally pre-existing nonconforming; is the
17 interpretation of the ordinance correct; what's the
18 proper interpretation of the ordinance; is this use
19 permitted; is that use prohibited. This Board makes
20 those decisions all the time, makes a legal and
21 factual, and sometimes they may be truly legal,
22 decisions. And to say, "Well, don't worry about the
23 legal decision because you don't need to decide
24 that," that's not right. We're asking you to decide

1 it. It's our petition. I'm telling you we're asking
2 you as a matter of law to answer that question and
3 make that decision: What is the effect of your 2013
4 decision?

5 BARBARA RANDO, CHAIR: Are you
6 finished?

7 JOHN SERGI: Mm hum.

8 BARBARA RANDO, CHAIR: Mr.
9 Hickernell?

10 MARK HICKERNELL: I don't have anymore
11 questions for Attorney Grossman. I would say that I
12 think it's a closer issue than either side has
13 admitted and I appreciate the very able presentation
14 by both attorneys.

15 BARBARA RANDO, CHAIR: Ms. Gelineau?

16 GLENNA GELINEAU: No questions.

17 BARBARA RANDO, CHAIR: Mr. Cotton?

18 MICHAEL COTTON: No questions.

19 BARBARA RANDO, CHAIR: Attorney
20 Learned, would you again please address the 20-day
21 appeal for the Board? I'm sorry, but I'd like to
22 clarify that.

23 ATTORNEY MICHELLE LEARNED: It is true
24 that our Zoning -- that the Zoning Enabling Act, 40A,

1 is concerned about finality. It is equally true that
2 the statutory scheme of 40A is concerned that the
3 zoning laws aren't ignored. The obligation of a
4 litigant to appeal within 20 days is when that
5 litigant -- and this is private citizen litigant --
6 is informed of the decision through the public
7 notice. Yes, they have an obligation to appeal
8 within the 20 days. That actually has no impact on
9 this case. We have an -- yes, it's an unappealed
10 decision that lapsed. He says there's good cause
11 elements. He hasn't presented good cause. They
12 didn't make an application to you for good cause. He
13 was -- they were required to build, commence
14 building, within a year and conclude within two
15 years. That didn't occur. So, that 2013 decision
16 has lapsed.

17 There's case law that I provided that
18 specifically references special permits. He says,
19 "Oh, variance law is..." No, I gave you the cases
20 discussing special permits. I did give you a
21 variance case, too, because it attests to the fact
22 that you have the power to correct errors. The key
23 fact that you must remember is that you're stepping
24 in the shoes of the Building Inspector when you

1 review his cease and desist order. That means you
2 have the power and obligation to enforce zoning, and
3 that you're not estopped from anybody, any municipal
4 actor or municipal officer's actions. And that would
5 mean you are not estopped by that previous 2013
6 decision.

7 The final thing that I'd really like
8 to stress is that I'm not saying let the court
9 decide, you know, you don't have to -- I'm saying you
10 can't let the landowner's argument about a 2013
11 lapsed decision bar you from deciding the factual
12 issue if you decide both. But you can't skip the
13 first prong before you is did the Building Inspector
14 provide you with evidence to show you that the
15 activity and use occurring at the property is an
16 illegal commercial activity? You can't skip that.

17 It's your obligation and
18 responsibility to enforce zoning. And what the
19 landowner's counsel is asking you to do -- I wish I
20 had the book with me. I wish I could hold it up.
21 It's a square little black book. It says, you know,
22 "Zoning in the City of Waltham, Zoning Ordinances,
23 1962." They're asking you to ignore that law.

24 The Zoning Enabling Act, 40A, does not

1 somehow elevate the 20-day issues of finality above
2 the zoning ordinances that have been enacted by a
3 community to protect its citizens. That defies
4 logic. To say to you that you can't correct an error
5 defies logic.

6 I provided you with ample case law
7 that shows the courts have set up a system so you
8 don't have to act in a way that is contrary to logic.
9 You can fix mistakes because the public is entitled
10 to have the zoning ordinances upheld.

11 So, my brother counsel's argument
12 about 20 days and finality, yeah, the zoning
13 ordinances -- the Zoning Enabling Act cares about
14 that, but it cares equally, and with the ample case
15 law that exists, it cares that we let municipalities
16 fix, cure, remedy any mistakes that have been made by
17 their predecessors. And that's what we urge you to
18 do.

19 Did I answer it?

20 BARBARA RANDO, CHAIR: I think you did
21 for me.

22 Mr. Sergi, does that answer any
23 questions that you may have as far as the 20-day
24 lapse?

1 JOHN SERGI: Yes, it does. Thank you.

2 BARBARA RANDO, CHAIR: Mr. Hickernell?

3 MARK HICKERNELL: I have no further
4 questions.

5 BARBARA RANDO, CHAIR: Ms. Gelineau?

6 GLENNA GELINEAU: No questions.

7 BARBARA RANDO, CHAIR: Mr. Cotton?

8 MICHAEL COTTON: No questions.

9 BARBARA RANDO, CHAIR: Thank you.

10 ATTORNEY BRIAN GROSSMAN: Madam Chair,
11 I'd like to make one point.

12 BARBARA RANDO, CHAIR: I'm sorry?

13 ATTORNEY BRIAN GROSSMAN: I'd like to
14 make one final point.

15 The appeal right under 40A is not
16 solely a private citizen right as Attorney Learned
17 would have you believe. It includes the building
18 inspector, other municipal boards. And so, again,
19 when you're talking about does something have a
20 preclusive effect, did they have an opportunity to
21 appeal, unless I'm to understand Attorney Learned to
22 say that the Building Inspector had no standing to
23 appeal the 2013 decision, then, yes, it has an effect
24 on him, too. It becomes, in effect, part of the

1 zoning she keeps asking you to enforce.

2 One other. She's saying, "Well, you
3 have to decide the facts first. You can decide the
4 legal issues second." It doesn't necessarily have to
5 work that way and, in fact, shouldn't. Courts do it
6 all the time. They look at an issue and, on motions
7 to dismiss, when Plaintiffs -- when Defendants argue,
8 "Look, this issue has already been decided by the
9 court. Your prior decision has preclusive effect.
10 You, Your Honor, you, the court, do not even need to
11 reach the merits of this case of the claims they have
12 made because they were decided or should have been
13 decided in the prior litigation." The courts look at
14 that first. And that's why we're asking you to look
15 at that issue first because if the decision has
16 preclusive effect, there is no reason to get to the
17 factual question that she's asked you to decide.

18 Thank you.

19 BARBARA RANDO, CHAIR: Thank you. All
20 right. We've heard both attorneys, the arguments.
21 Does the Board have any other questions or anything
22 they'd like to say at this time?

23 (No response.)

24 BARBARA RANDO, CHAIR: None. Hearing

1 none. All right. I'm ready for a motion. Do I hear
2 a motion? All right. I will make a motion. After
3 listening to both attorneys, and taking into
4 consideration what Attorney Learned said as far as us
5 having the power to fix mistakes, and since 1962, or
6 at 1962, they were not allowed to have a business,
7 and to this date they're still not allowed to have a
8 business in a residential zone, so, hearing that
9 argument, does anyone want to make a motion? Then I
10 will make a motion to overturn the decision of the
11 Building Inspector and grant the Petitioner's
12 request. Do I have a second?

13 MICHAEL COTTON: I'll second that.

14 BARBARA RANDO, CHAIR: Do you want me
15 to read that again?

16 GLENNA GELINEAU: I just want you to
17 clarify what you're saying.

18 BARBARA RANDO, CHAIR: I'm making a
19 motion to overturn the Building Inspector's decision
20 and grant the Petitioner his request.

21 MARK HICKERNELL: Grant the appeal of
22 the cease and desist order?

23 MICHAEL COTTON: What's his request?
24 What is his request?

1 BARBARA RANDO, CHAIR: If you vote
2 yes, you will be overturning the Building Inspector's
3 decision and giving Mr. Grossman and the Anticos the
4 right to continue.

5 MICHAEL COTTON: I would second that.

6 BARBARA RANDO, CHAIR: I have a second
7 by Mr. Cotton.

8 I would just add that the City of
9 Waltham uses this. It was always for the police, the
10 fire department. Over the years, how would they not
11 know it was there? Five mayors, six building
12 inspectors, a little late in my estimation. That's
13 it.

14 BARBARA RANDO, CHAIR: Okay. We have
15 a motion on the floor to overturn the Building
16 Inspector's decision and grant the Petitioner's
17 request. And you have a second.

18 How do you vote, Mr. Sergi? If you
19 vote yes, you're overturning the Building Inspector's
20 decision.

21 GLENNA GELINEAU: So, in theory, if we
22 vote yes we're not upholding the cease and desist.

23 BARBARA RANDO, CHAIR: If you vote no,
24 you're upholding the Building Inspector's decision to

1 cease and desist. If you vote yes on my motion,
2 you're overturning the Building Inspector's decision.

3 MICHAEL COTTON: And granting the
4 tower.

5 GLENNA GELINEAU: And granting.

6 BARBARA RANDO, CHAIR: And granting
7 the use on the tower.

8 GLENNA GELINEAU: Upholding our
9 decision.

10 BARBARA RANDO, CHAIR: Mm hum.

11 GLENNA GELINEAU: Okay.

12 BARBARA RANDO, CHAIR: How do you
13 vote, Mr. Sergi?

14 JOHN SERGI: Well, listening to both
15 of the arguments of the counsel, and I have to
16 commend you both for, you know, presenting a
17 reasonable case, and the arguments, and the rationale
18 behind both positions, I just can't help to think
19 that this Board has been manipulated over the years
20 with this case. There is facts that have been
21 uncovered here that were not known before and they're
22 just coming to light now. And, in a way, I feel like
23 we've been manipulated by both the Petitioner and the
24 City, so I can't see a right decision here, a yes or

1 no as being correct. The only thing that I can rely
2 upon is that this Board did make a decision in the
3 past. And we did have facts. And it was a public
4 meeting at the time. And, for the City to come up
5 now and say, "Okay, there was errors and such," that
6 goes beyond us I believe. And that's my opinion.

7 So, I agree with the Chair.

8 BARBARA RANDO, CHAIR: So, what is
9 your vote?

10 JOHN SERGI: Yes.

11 BARBARA RANDO, CHAIR: Yes. Mr. Sergi
12 votes yes.

13 Mr. Hickernell?

14 MARK HICKERNELL: No.

15 BARBARA RANDO, CHAIR: Ms. Gelineau?
16 Yes would be to overturn the Building Inspector's
17 decision and grant the Petitioner his request,
18 Antico's request.

19 GLENNA GELINEAU: I don't mean to be -
20 - I just want to be clear that I'm saying the right
21 thing. So, if I vote yes?

22 BARBARA RANDO, CHAIR: Then the
23 Building Inspector, we're not upholding his decision.

24 GLENNA GELINEAU: We're not upholding

1 the cease and desist?

2 BARBARA RANDO, CHAIR: Right.

3 Correct.

4 GLENNA GELINEAU: Then I vote yes.

5 BARBARA RANDO, CHAIR: You vote yes.

6 Mr. Cotton, how do you vote?

7 MICHAEL COTTON: It's been very
8 confusing, but the thing that turned me is -- and
9 both of them give very good decisions -- but to say
10 in '62 that he violated it, I mean that's all they
11 had in those days was self-use. You can't say he
12 violated it. And to say he trespassed on City land
13 to get to it, well, how did you expect to get there,
14 by helicopter? Everybody in the town knew about it.
15 You know, let's put this on here. Let's get on here
16 with auxiliary. Let's do this. I just I have to
17 vote yes.

18 BARBARA RANDO, CHAIR: So that is a
19 what? That's a yes?

20 MICHAEL COTTON: Yes.

21 BARBARA RANDO, CHAIR: Okay. We have
22 Mr. Sergi voting yes, Mr. Hickernell no, Ms. Gelineau
23 yes, Mr. Cotton yes, and Ms. Rando no.
24 Unfortunately, you do not have four yes votes, so

1 your petition does not carry. So, the Building
2 Inspector's opinion is upheld.

3 Does everyone understand? Attorney
4 Grossman, do you understand?

5 MICHAEL COTTON: We turned over the
6 decision of the Board.

7 BARBARA RANDO, CHAIR: So the cease
8 and desist order stands.

9 MARK HICKERNELL: Motion for a five-
10 minute recess.

11 BARBARA RANDO, CHAIR: Motion for a
12 five-minute recess. Do I have a second?

13 MICHAEL COTTON: Second.

14 BARBARA RANDO, CHAIR: Second. All in
15 favor?

16 ALL BOARD MEMBERS: Aye.

17 BARBARA RANDO, CHAIR: Opposed?

18 (No Board members opposed.)

19 BARBARA RANDO, CHAIR: Five-minute
20 recess. Thank you.

21 //

22 //

23 //

24 //

1 **Case Number 2014-29: 92-94 Trapelo Road Realty**
2 **Trust, Mario and Ciro Zottola, 300 College Farm Road.**

3

4 BARBARA RANDO, CHAIR: We are going to
5 start now with the extension of time in Case 2014-29,
6 Zottola, 300 College Farm Road.

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

9 ATTORNEY PHILIP MCCOURT: Yes, Madam
10 Chair, members of the Board. Philip B. McCourt, Jr.
11 representing 92-94 Trapelo Road Realty, which is just
12 the name of the entity that owns this property,
13 asking for an extension of time for the variance
14 granted early last year for 300 College Farm Road.
15 It's an elevation one.

16 This extension in no way changes
17 anything that was granted, no alteration or anything.
18 It was just that you'll remember how bitterly cold it
19 was that day. And then they couldn't get in to do
20 some work and now they're doing it. And summer came.
21 And, at any rate, we still, and it was part of the
22 grant of the variance, it has to go to the City
23 Council in order to build any one of these units.
24 So, we're just in the process to file that. It takes

1 some time to get the signatures and everything in
2 relation to that. So, we'd ask that this variance,
3 just as granted, you know, as I say, no changes or
4 anything, be extended from January 22nd, 2016, which
5 was the date on which it was filed with the City
6 Clerk, to July 22nd, 2016.

7 BARBARA RANDO, CHAIR: Is this the
8 first extension you've asked for?

9 ATTORNEY PHILIP MCCOURT: Yes, it is.

10 BARBARA RANDO, CHAIR: Are you on the
11 docket for a special permit with the City Council or
12 are you asking for it first?

13 ATTORNEY PHILIP MCCOURT: Well,
14 because of delays in the various departments and
15 everything in the City, we need one more signature in
16 order to file it. So, we have every signature with
17 the exception of the City Engineer.

18 BARBARA RANDO, CHAIR: And you'll have
19 it by July?

20 ATTORNEY PHILIP MCCOURT: Oh, well,
21 we'll not only have it, but we have to file and then
22 have a hearing before the City Council, which I would
23 say that while we can't presume obviously what they
24 will do, this is like adding three, you know, small

1 units to the three that exist out there. So, the
2 current variance has nothing to do with granting the
3 three units. It just raises the elevation so the
4 building is set up right, prevents any drainage on
5 the woman next door, and just would look right. It's
6 just like an agreed elevation. It does not grant the
7 right to construct the buildings.

8 BARBARA RANDO, CHAIR: I remember the
9 very cold day that we made the site view.

10 ATTORNEY PHILIP MCCOURT: Right. That
11 was a Sunday morning, too.

12 BARBARA RANDO, CHAIR: Yes, it was.

13 All right. What is the wish of the
14 Board? Any questions for Attorney McCourt?

15 JOHN SERGI: No questions.

16 BARBARA RANDO, CHAIR: No questions.
17 Hearing none. Sarah, no questions?

18 SARAH HANKINS: No questions.

19 BARBARA RANDO, CHAIR: What is the
20 wish of the Board? Do they wish to extend it six
21 months from January 22nd, 2016 to July 22nd, 2016?

22 JOHN SERGI: Yes.

23 BARBARA RANDO, CHAIR: Is that a
24 motion?

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1 JOHN SERGI: I make a motion, Madam
2 Chair.

3 BARBARA RANDO, CHAIR: A motion by Mr.
4 Sergi. Do I have a second?

5 SARAH HANKINS: Second.

6 BARBARA RANDO, CHAIR: Second by Ms.
7 Hankins.

8 How do you vote, Mr. Sergi?

9 JOHN SERGI: Yes.

10 BARBARA RANDO, CHAIR: Mr. Hickernell?

11 MARK HICKERNELL: Yes.

12 BARBARA RANDO, CHAIR: Ms. Gelineau?

13 GLENNA GELINEAU: Yes.

14 BARBARA RANDO, CHAIR: Ms. Hankins?

15 SARAH HANKINS: Yes.

16 BARBARA RANDO, CHAIR: And the Chair
17 votes yes. Your extension has been granted from
18 January 22nd, 2016 to July 22nd, 2016.

19 ATTORNEY PHILIP MCCOURT: Thank you
20 very, very much.

21 BARBARA RANDO, CHAIR: You're welcome.

22 //

23 //

24 //

1 **Case Number 2016-01: Michelle and James Cristofori,**
2 **678 Trapelo Road.**

3
4 BARBARA RANDO, CHAIR: All right.
5 Would the Clerk please read the petition in Case
6 2016-01, Petitioner James A. Cristofori and Michelle
7 M. Cristofori on 876 (sic) Trapelo Road.

8 MARK HICKERNELL: (The Clerk reads the
9 above-mentioned petition into the record. See
10 Attached.)

11 BARBARA RANDO, CHAIR: Thank you. I
12 think I made a mistake. It's 678, and I think I said
13 768.

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

16 ATTORNEY JOSEPH CONNORS: Thank you,
17 Madam Chair, members of the Board. Attorney Joseph
18 M. Connors, Jr. on behalf of the Petitioners. My
19 office is at 404 Main Street here in Waltham.

20 Tonight, with me is James Cristofori
21 and his wife Michelle, and Michelle's mother Virginia
22 Mula, who is the current resident on the property at
23 678 Trapelo Road.

24 I do have a brief that was submitted

1 to the Board electronically. And I also have -- I
2 submitted a copy electronically of the building
3 plans, but I have a paper copy for the Board members
4 as well.

5 So, as the legal notice stated, the
6 property is at 678 Trapelo Road here in Waltham.
7 It's a single lot of land today. And I didn't bring
8 my easel. I thought we'd be downstairs. But I'll
9 just hold this up to you so you can see that this is
10 on Trapelo Road. And if you're familiar with Trapelo
11 Road, it's probably right here is Woburn Street and
12 the fire station. It looks like you're heading
13 towards -- west on Trapelo Road. So, it's almost a
14 little bit opposite the corner of Woburn Street and
15 the fire station there.

16 So, highlighted in red is the property
17 at 678 Trapelo Road. And then we have showed the
18 detail here. And the detail in red is the footprint
19 of the home that is proposed. And, actually, you can
20 see underneath a hash mark, a lighter color, the
21 footprint of the home that's presently there on site.

22 And so the Petitioner, as stated in
23 the legal notice and stated in my brief, are seeking
24 a variance for a rear yard setback of six feet. I've

1 also, you know, submitted to you a copy of the floor
2 plan, which shows you that the house itself -- I mean
3 there's elevation at the second plan that will show
4 you the main house will be a two-and-a-half story
5 house which will look west, and then behind that is a
6 two-car garage, single-story, and to the rear of that
7 would be a bedroom and a room for Mrs. Mula, who is
8 going to continue to live on the property. So, Jim
9 and Michelle will live in the main house with their
10 three children, and Virginia will live at the back of
11 the house in a bedroom that they propose to construct
12 for her.

13 So, we're in a Residence A-2 Zoning
14 District -- excuse me, A-3 Zoning District. Lots in
15 Residence A-3 Zoning District are required to have
16 9,600 square feet. This locus has a lot area of
17 12,490 square feet as surveyed, or, as referenced in
18 the deed, 14,664. The lot was created in 1962. A
19 single-family residence was constructed in 1963.
20 Lots in a Residence A-3 Zoning District are also
21 required to have 70 feet of frontage. But, you'll
22 notice in this case that our frontage -- it's a long
23 skinny lot -- our frontage is 15.39. Here is our
24 frontage here, 15 feet, 39 feet of frontage. And

1 this was granted by the Zoning Board of Appeals in
2 1961. So, as a part of that 1961 case, the shorter
3 limited frontage was approved.

4 The required setbacks in the A-3
5 Zoning District are front yard 25 feet, side yard 15
6 feet, and a rear yard 30 feet. So, in order to
7 construct the single-family that the Cristoforis
8 propose, they need two forms of relief. One is a
9 variance for the rear yard under 4.11 where 30 feet
10 is required, six is proposed; and, two, they're
11 seeking to amend the 1961 decision because the
12 decision cited the setbacks of the home in 1961 and
13 those are changing. So, still, the only relief we're
14 looking for there is a rear yard setback. But that
15 particular decision articulated all the setbacks, and
16 we're going to vary from that, so I didn't want any
17 problem with varying from that without requesting an
18 amendment to that 1961 decision.

19 So, I cited the jurisdiction of the
20 Board under Chapter 40A, Section 10. You're
21 authorized to grant variances so long as they are not
22 for a use prohibited under the ordinance. In this
23 instance, a single-family residence and an attached
24 garage is a permitted use in a Residence A-3 Zoning

1 District. The Board is also authorized to amend a
2 decision. And I cite a case, *Huntington v. Board of*
3 *Appeals of Hadley*, which states that the Board may
4 make substantive changes to a decision provided that
5 they, you know, go through the public process of
6 notice and publication, etc., so that the procedure
7 is followed as it was before in 1961.

8 So, under Chapter 40A, as the Board
9 knows, we need to establish that there are unique
10 circumstances in this instance which relate to shape,
11 topography, soil conditions, or even the structure at
12 the locus. It's our argument that the shape of this
13 particular locus is a unique circumstance under
14 Chapter 40A.

15 I have attached several exhibits to
16 the brief, okay, which set out -- actually, Exhibit A
17 is a copy of the most recent deed to Mr. and Mrs.
18 Mula. But it references that the property is Lot C
19 on a plan going back to 1962. It says, "Lot C
20 contains 14,664 square feet of land, more or less,
21 according to the plan."

22 I also attached as Exhibit B the 1961
23 decision by the Zoning Board of Appeals. So, in that
24 decision, the Petitioner appeared before the Board.

1 And, at the time the locus was considered locked --
2 excuse me, not locked, but 676 Trapelo Road. And the
3 Petitioner requested permission to subdivide a larger
4 lot of land into three lots, Lots A, B, and C. And
5 with the approval of Lot C, which is our locus, they
6 approved a 15.35 feet of frontage. And they also
7 stated, "Also to locate a house which will face west
8 on Lot C, 32 feet from the easterly lot line, 15 feet
9 from the southerly lot line, 78 feet from the
10 westerly lot line, and 15 feet from the northerly lot
11 line."

12 And then in Exhibit C there's a copy
13 of the street card, which shows that in -- it
14 reflects the Board of Appeal's decision in 1961. And
15 then in May 29, 1963, a permit was granted to
16 construct a house on the lot.

17 And the I also attached Exhibit D,
18 which is the subdivision that was contemplated and
19 approved in the Zoning Board of Appeals decision.
20 And this was also noted as an Approval Not Required
21 plan. That was approved by the -- or endorsed by the
22 Board of Survey and Planning of the City of Waltham.
23 And this was recorded at the Registry of Deeds. So,
24 again, that shows our lot as C at 14,664 square feet,

1 although our surveyor now says it's only I think it
2 was 12,498 square feet. But really the difference is
3 insignificant in that the lot area required is 9,600,
4 so we're well above that.

5 So, we believe, and the history of the
6 lot shows, that it's an approved lot in 1961 by the
7 Zoning Board, by the Planning Board. It was recorded
8 at the Registry of Deeds. There was a building
9 permit issued to construct a single-family home on
10 it. But we believe that that shape of the locus, you
11 know, creates a unique circumstance for the
12 Petitioners under Chapter 40A.

13 The lot, as I say, has limited
14 frontage of 15.39 square feet. The main area of the
15 locus, the lot area is set back 140 feet from Trapelo
16 Road. So, that setback diminishes buildable area by
17 about 17 percent because if you measured the distance
18 100 feet back times 15.35, that's about 2,154 square
19 feet, which is about 17 percent of the lot, which is
20 -- acts as a driveway and is unbuildable. It's just
21 the lot area, that although we have a lot of lot
22 area, it is not part of the buildable lot area for
23 the Petitioners.

24 I also cite that the north boundaries

1 of the locus, okay, we have 64 and 65 on one side and
2 60 on the other. And it goes in a southeasterly
3 direction. I have it northwesterly, but it's
4 southeasterly. Either way, it's going to the same
5 degree. South 55, 22, and 58, and that's parallel to
6 the lot lines down the bottom, the southerly lot line
7 of 143. But what we don't have is we don't have any
8 of these angles coming together at right angles. So,
9 the corners of the lot do not meet at right angles,
10 and the eastern boundary line is 75 feet and the
11 western boundary line is 74.41. So, we have kind of
12 a rhomboid-shaped locus, meaning the lot area that we
13 have unequal sides all around. We do not have a lot
14 that meets at right angles. And we also have the
15 easterly and westerly boundary, which is
16 approximately about half the length of the lot as you
17 travel from east to west. Okay? So, that
18 complicates where the Petitioners can construct a
19 home.

20 And one of the reasons for that is
21 that the Building Inspector is of the opinion that if
22 the house has frontage on Trapelo Road, then Trapelo
23 Road is its front yard. And so, therefore, if
24 Trapelo Road is its front yard, then he's going to

1 then deem that the opposite side of the front is the
2 rear. And so that's how we have a rear yard setback
3 here of six feet. Although, you'll see in the 1961
4 decision they approved a 15-foot setback here, which
5 I believe would probably be consistent with a
6 different interpretation in 1961 because the side
7 yard setbacks are at 15. If the Building Inspector
8 in 1961 deemed that this would be a side yard, he met
9 the requirements of the ordinance in 1961.

10 But, you know, and I'm not saying this
11 Building Inspector, but I think all of the Building
12 Inspectors in the recent past have deemed that, you
13 know, where you have frontage, that's going to deem
14 to be your front door, and then the opposite of that
15 is your rear yard.

16 MARK HICKERNELL: Was that issue fully
17 litigated in the prior --

18 ATTORNEY JOSEPH CONNORS: Not that I
19 know of. Not that I know of.

20 And you'll note that our side yards,
21 under this plan -- I mean where the pre-existing
22 house was, we're actually moving it a little bit
23 further away from the side yard, but we're 32.40 feet
24 from the bulkhead. But, really, technically, we

1 don't even need to measure that. We measure 32.40
2 feet from the corner of the existing home. So, even
3 though this is deemed to be our side yard, which only
4 requires a 15-foot setback, if it was the rear yard,
5 you know, we have more than enough to meet the
6 requirements of the 30-foot rear yard setback.

7 But, so I think that poses a problem
8 in that once we deem this the front yard and this the
9 rear yard, you know, in fact, the distance between
10 the perimeter lot lines is shorter from running north
11 to south. We have to kind of build a long narrow
12 house here and we're confined by the setbacks in that
13 area. And, also, we're confined by the fact that
14 we're losing about 17 percent of our lot area to the
15 driveway.

16 Now, it's not a nonconforming issue.
17 It's a permitted issue. The frontage is legal
18 because it was granted in 1961. So, you know, it's
19 an irregular-shaped lot.

20 SARAH HANKINS: Can you get into a
21 little more detail on how the irregular shape of the
22 lot affects the need for the variance? You know, if
23 there was a different shape, presumably, would they
24 need the variance?

1 ATTORNEY JOSEPH CONNORS: Well, if I
2 could take this and add it to the distance, you know,
3 add it to the rectangle or the rhomboid shape here,
4 then I'm going to pick up about 15 feet. So, I'm
5 losing 17 percent of this is going away if I get --
6 if this was all frontage on Trapelo Road, then I can
7 take this land here, if I can just turn it on its
8 side and tip it down, I'm going to pick up 15 feet.
9 So, I can move the house up 15 feet. I'm going to
10 pick up 15 feet in the rear. So, that would be, you
11 know, that would provide some relief. So, I'm losing
12 that.

13 And the other thing is that, you know,
14 in that this is the rear yard, so my front yard is 25
15 feet and my rear yard has to be 30 feet. So, for the
16 rear and the front yard I need 55 feet. Yet, if I
17 was able to turn the house around and face it in a
18 different direction, the length of this, so it's easy
19 to satisfy that if I had frontage here, saying the
20 house was -- if I was right on the street this way,
21 then I'd be able to slide it up and I'd be able to
22 take advantage of the length of the lot, as opposed
23 to here working north to south. The narrowness of
24 the lot is where my most demanding setbacks are.

1 Okay? So, the most demanding setbacks are the front
2 and the rear and, yet, that's the most narrowest
3 portion of the lot because that's 75 feet from here
4 to there. Whereas, if I was to turn it on its head,
5 it's 140 feet from here to there. So, I would say
6 that I have the most demanding setbacks in the
7 narrowest part of the lot of 75 feet.

8 SARAH HANKINS: If you would just
9 clarify for me, reading through the materials it
10 seemed that in 1961 how they were defining where the
11 front of the house was --

12 ATTORNEY JOSEPH CONNORS: Yeah.

13 SARAH HANKINS: And now they're
14 defining it as facing Trapelo. It looked like then
15 it was -- I think --

16 ATTORNEY JOSEPH CONNORS: I don't
17 think they were defining the face of the -- the front
18 of the house. They were stating that the house has
19 to look west. And I think the reason for that -- and
20 Jim was telling me this based on kind of his research
21 I think going back -- is that if you look at the lot,
22 you'll see here that if the house looks west this
23 way, it almost looks like it's on Temple Road.

24 SARAH HANKINS: Yes.

1 ATTORNEY JOSEPH CONNORS: So, I think
2 in 1961, they contemplated getting the right to
3 create a little driveway here so it would look west,
4 it would look onto Temple Road, and it would actually
5 have a driveway on Temple Road. But that never
6 worked out. So, and it's hard to tell from the '61
7 decision if, in fact, they were, you know, making it
8 a condition to look west or if that was kind of the
9 representation of the Petitioner to say that I wanted
10 it to look west so that when I get a driveway on
11 Temple Road then it makes sense, you know.

12 But now Jim comes to redesign a house
13 for this lot, you know, there's a condition that it
14 look west, but also he has a fundamental safety
15 problem with going down a 140-foot driveway.
16 Virginia has been backing out of this driveway for I
17 don't know how many years, and this is on Trapelo
18 Road. And so one of the ideas of creating -- so, if
19 you see from the building plans -- let me just show
20 you here. Sorry. I gave my copy away. So, this is
21 the view of the proposed house from Trapelo Road.
22 So, as you come down the driveway, you can go right
23 into the garage. Okay? So, that makes sense that he
24 can go right into the garage coming right off of a

1 long stretch of driveway. And then he's also
2 proposed to add some pavement to this side so not
3 only can he drive into the driveway, into the garage,
4 straight off of the 140-foot straightaway, but then
5 they can back out, and then turn around and come out
6 straight.

7 So, today there is no garage on the
8 property. They have a limited driveway here and they
9 ended up backing in and out, which is they believe a
10 dangerous condition.

11 So, I've cited the irregular shape and
12 the fact that it's more narrow from north to south
13 rather than from east to west. And, yet, that is the
14 most demanding setback requirements under the
15 ordinance.

16 You know, I cite in my brief also that
17 the front of the house is -- the house shall face
18 west, although the front of the house is deemed by
19 the Building Inspector to be on Trapelo Road.

20 And so the final issue is whether the
21 granting of the variance will result in a substantial
22 detriment to the public good or nullify or
23 substantially derogate from the intent or the purpose
24 of the ordinance.

1 The statutes states that desirable
2 relief may be granted without substantial detriment
3 to the public good and without nullifying or
4 substantially derogating from the intent or the
5 purpose of the ordinance. I cite *Cavanaugh v.*
6 *DiFlumera*. We believe that this variance will allow
7 a fairly large lot to conduct a new and modern
8 single-family dwelling on it for an extended family
9 with a garage, a two-car garage for motor vehicles.
10 And these are permitted uses in the Zoning District.

11 There shall be one single-family on
12 this lot, like there was before. The amenity that's
13 added is that, you know, we have the room for
14 Virginia. We also have a two-car garage so that, you
15 know, they can not only house their vehicles, but
16 then maneuver in and out of the residence so that
17 they can maneuver down Trapelo Road in a forward
18 fashion, which they believe is critical to this
19 because it is a busy street, as you well know.

20 And the other thing I mentioned is
21 that, you know, it's not a substantial derogation
22 from the intent of the ordinance because I believe in
23 1961 they granted or allowed a 15-foot setback there.
24 So, you know, we're changing it by nine feet, which,

1 you know, is not as much -- it's a small percentage
2 of a chance than you'd think about it if it was a 30-
3 foot required setback. But that's how they
4 interpreted it back in 1961.

5 And I also request that we amend the
6 prior decision. And I believe that we're really not
7 amending anything significant other than the rear
8 yard setback. The setback dimensions of the proposed
9 single-family shall differ from the setbacks proposed
10 in 1961. The house shall continue to face west with
11 a 36.4 setback for the easterly lot line, a six-foot
12 setback for the southerly lot line, 19.9 setback on
13 the westerly lot line, and 150 feet from Trapelo
14 Road, or 21.8 feet from the nearest portion of the
15 northerly lot line. All of these setbacks, except
16 for the southerly or rear yard setback, meet the
17 dimensional requirements of the Zoning Ordinance.

18 And so the amendment really is just a
19 restatement of the setbacks. It is difficult to
20 determine whether or not that 1961 decision was
21 stating it as a condition or simply facts on which
22 they were making the decision. But it does state
23 exactly what the setbacks were in 1961, so I felt it
24 was important to amend that decision to reflect the

1 setbacks that we have shown on this plan here.

2 And I cite, as I said, I submitted
3 four exhibits that kind of layout the history of this
4 locus as to how it's, you know, it wouldn't be
5 permitted under today's Zoning Code, but it was
6 permitted in 1961, and a single-family home was
7 constructed on it. And the Petitioners are looking
8 to upgrade this property and to continue to live
9 there with Mrs. Mula.

10 How many years have you been there?

11 VIRGINIA MULA: Fifty years.

12 ATTORNEY JOSEPH CONNORS: Fifty.

13 VIRGINIA MULA: I moved in in '65.

14 ATTORNEY JOSEPH CONNORS: So, that's
15 the Petitioner's presentation. Oh, and I have
16 another thing. I forgot. I asked Jim to kind of go
17 around the neighborhood and talk to some of the
18 direct abutters. And so he did go out. And we --

19 BARBARA RANDO, CHAIR: Is it the
20 Villela?

21 ATTORNEY JOSEPH CONNORS: Which one
22 was that?

23 BARBARA RANDO, CHAIR: Villela. Is
24 that the one that I saw?

1 JAMES CRISTOFORI: No. Joe Villela is
2 on Temple Road.

3 ATTORNEY JOSEPH CONNORS: Temple. I
4 think the one that's going to be most affected is Mr.
5 Young, right?

6 JAMES CRISTOFORI: Correct.

7 ATTORNEY JOSEPH CONNORS: So, Mr.
8 Young is right here. So, this is where the setback
9 is going to be. It's going to abut Mr. Young's
10 property right here. And so that's --

11 BARBARA RANDO, CHAIR: I see. Is his
12 name on the paper? Is he in favor?

13 JAMES CRISTOFORI: Yes.

14 ATTORNEY JOSEPH CONNORS: Yeah. I'm
15 just looking at it. He's at 142 Temple Road.

16 JAMES CRISTOFORI: Yes.

17 ATTORNEY JOSEPH CONNORS: He's the
18 last one.

19 BARBARA RANDO, CHAIR: And what about
20 the Villela or the Heberts?

21 ATTORNEY JOSEPH CONNORS: Heberts?

22 MR. HEBERT: We're here.

23 ATTORNEY JOSEPH CONNORS: Is he here?

24 JAMES CRISTOFORI: He is.

1 ATTORNEY JOSEPH CONNORS: He's here.

2 SARAH HANKINS: He's here in the
3 flesh. And Neufeld?

4 AUDIENCE: He was here. He left.

5 ATTORNEY JOSEPH CONNORS: Oh, he was
6 here. He was overwhelmed by the excitement of the
7 first case.

8 So, I believe you got most of the
9 direct abutters, right?

10 JAMES CRISTOFORI: We did.

11 BARBARA RANDO, CHAIR: Vannasse is
12 here. Good. Joyce.

13 ATTORNEY JOSEPH CONNORS: I mean I
14 think you mentioned that there was one person in
15 Florida or something that was unavailable.

16 JAMES CRISTOFORI: Yeah, I heard it
17 was your cousin. Mark it must be?

18 AUDIENCE: He wasn't in Florida. He
19 was hiding in the house that day.

20 BARBARA RANDO, CHAIR: I see that
21 you've hit one of the statutory requirements for the
22 variance, which is the shape. You actually mentioned
23 the shape.

24 ATTORNEY JOSEPH CONNORS: Right.

1 Correct.

2 BARBARA RANDO, CHAIR: And that
3 actually is a rattach lot that wouldn't be allowed
4 today.

5 ATTORNEY JOSEPH CONNORS: Correct.

6 BARBARA RANDO, CHAIR: You wouldn't
7 see that today.

8 ATTORNEY JOSEPH CONNORS: Correct.

9 BARBARA RANDO, CHAIR: But, as far as
10 the hardship, doesn't it seem like a self-imposed
11 hardship? So, the six feet, I mean if you had made
12 the house a little bit smaller you could have
13 conformed. And is that the only variance that you're
14 going to need?

15 ATTORNEY JOSEPH CONNORS: That's the
16 only one we're going to need.

17 BARBARA RANDO, CHAIR: Then why
18 wouldn't you -- it's only six feet to the next yard.

19 ATTORNEY JOSEPH CONNORS: Right. But
20 I mean, as I said, right now, you know, they need to
21 be -- they need a front yard. They need a 30-foot
22 rear yard. So, if they were going to make it
23 conform, they'd have to eliminate 24 feet. Now, in
24 1961 they permitted 15 feet. So, you know, what

1 they're asking for is a nine-foot difference from
2 what was permitted in 1961 at a time when the
3 Building Inspector deemed this to be a side yard.

4 So, I understand that we're reaching
5 into the setback, but I would say that under normal
6 circumstances this is really not the rear yard. If
7 you look at the shape of the home, the rear yard is
8 the back portion as it goes down. This would be the
9 rear back here and that's where we have over 30 feet,
10 you know. So, depending on how you interpret it.
11 So, I would say that, yes, we're stepping into that
12 setback. But, really, the shape of the house and the
13 length of the house, it really isn't the issue. It's
14 just that the kind of the narrowness of the lot. And
15 because the house is, again, looking west, so the
16 main house is up here. The main house is up here.
17 And the only way to kind of create a main house, it's
18 approximately, you know, 27.5 feet and then by 43
19 feet. So, this is the main house. This is the
20 portion of the house that's going to be two-and-a-
21 half stories. You know, so in order for him to be
22 able to maneuver the driveway, get into the garage,
23 and be able to turn around, he needs to be pushing
24 the house back to allow that to happen safely. And

1 with the 30 yard requirement here, rather than here,
2 it just makes it a tight spot.

3 BARBARA RANDO, CHAIR: I agree. It's
4 a lovely house. And it is a rattach lot. But are
5 you telling me that anyone that comes in with an odd-
6 shaped lot can make a house the size they want and
7 say now there's a hardship. What's the financial
8 hardship?

9 ATTORNEY JOSEPH CONNORS: Financial
10 hardship?

11 BARBARA RANDO, CHAIR: That they have
12 to make the house smaller? And financial can't be
13 monetary. It has to be putting the room on the left-
14 hand side if you have --

15 ATTORNEY JOSEPH CONNORS: Well, it's a
16 practical hardship. So, I would say that the
17 practical hardship is that --

18 BARBARA RANDO, CHAIR: I'm sorry?

19 ATTORNEY JOSEPH CONNORS: It's a
20 practical hardship as opposed to a financial hardship
21 in that in order for them to safely maneuver in and
22 out of Trapelo Road, they believe that they need to
23 construct a driveway here. Okay? And they'd like to
24 create a garage, which is a permitted use in the

1 Zoning District. So, the only way that they can
2 maneuver safely in and out of this driveway and this
3 garage, so they can exit in a forward motion, is to
4 push the house back to give them that width of the
5 driveway. And so because of that, and because of the
6 requirement of 30 feet on this side of the house
7 when, you know, if you looked at the house
8 physically, this appears to be the rear yard, you
9 know, they're in a tight spot.

10 SARAH HANKINS: But the driveway and
11 the setback are two different issues. They could
12 solve the driveway issue without having anything to
13 do with the setback.

14 ATTORNEY JOSEPH CONNORS: Well, I
15 don't think so because the only way --

16 SARAH HANKINS: A smaller house.

17 ATTORNEY JOSEPH CONNORS: Well, yeah,
18 but it's still not --

19 SARAH HANKINS: I'm not an architect,
20 but I mean --

21 ATTORNEY JOSEPH CONNORS: No, but it's
22 the driveway still has to be the width of what it is
23 for him to get in and out of there safety.

24 SARAH HANKINS: Yes.

1 ATTORNEY JOSEPH CONNORS: So the only
2 way he can do that is to make the house smaller on
3 the back side because I think this is the dimensions
4 that makes it work safely. And so you'd have to trim
5 it off the back side, which he doesn't believe is an
6 unrealistic -- because I mean I could see you saying
7 that, you know, in some instances when you have, you
8 know, five bedrooms, perhaps that's, you know,
9 pushing the limit. But the bedrooms that -- the
10 fifth bedroom is for Mrs. Mula. And that's at the
11 rear of the house, which, again, is not -- doesn't
12 require a variance. So, it's this side of the house
13 that requires the variance.

14 You see in this portion of the house
15 we have a dining room, a living room, a family room,
16 and a kitchen. That's what they have on the first
17 floor. So, you know, that's the standard, you know,
18 layout of a modern family. And he has four bedrooms
19 upstairs. So, I understand what you're saying, but I
20 think that for him to design a house that's going to
21 accommodate his family in a modern structure, this is
22 the design that he'd like to build.

23 BARBARA RANDO, CHAIR: Well, I would
24 like to see -- because I have a problem with you

1 saying that because of the shape of the lot. That
2 means that anyone will come in here and say, "My lot
3 isn't the right shape. I need a bigger house. I
4 need to move it here. I need to move it there." And
5 that's not a hardship. The hardship is --

6 ATTORNEY JOSEPH CONNORS: The statute
7 is the shape.

8 BARBARA RANDO, CHAIR: The statutory
9 requirement.

10 ATTORNEY JOSEPH CONNORS: Yeah, the
11 statute states that shape is a hardship on which you
12 can justify a variance. And so --

13 SARAH HANKINS: If it is a hardship,
14 it's --

15 BARBARA RANDO, CHAIR: Excuse me.

16 SARAH HANKINS: I'm sorry.

17 BARBARA RANDO, CHAIR: Let me finish
18 one thought first please. Continue.

19 ATTORNEY JOSEPH CONNORS: So, Chapter
20 40A says owed to unique circumstances which relate to
21 shape, topography, or soil conditions. Okay.

22 BARBARA RANDO, CHAIR: Right. That's
23 one set of circumstances.

24 ATTORNEY JOSEPH CONNORS: So, I'm

1 saying the shape creates a hardship for him. So the
2 hardship is that we have a 15 by 140-foot driveway.
3 So, 2,100 square feet of his land area is non-
4 buildable. So, if I was able to take this, turn it
5 on its side, and add it to right here, if I took this
6 and added 15 feet right here, then I'm going to be
7 able to move this house 15 feet over.

8 BARBARA RANDO, CHAIR: It's still not
9 a hardship. It's still not a hardship. It still
10 would not be a hardship. Anyone that comes in here
11 and says, "I don't have the proper frontage," that's
12 not a hardship. That's just not a hardship. I would
13 like to see you take that out.

14 ATTORNEY JOSEPH CONNORS: I
15 respectfully disagree.

16 BARBARA RANDO, CHAIR: Excuse me.
17 Excuse me. I would like to see you take it out and
18 say that due to today's zoning, rattach lots are not
19 allowed. But because of a safety issue, where
20 rattach lots are no longer allowed, and because of a
21 safety issue on her trying to turn the car around and
22 drive out onto Trapelo Road, would be much more of a
23 hardship than the shape of the lot, in my opinion.
24 That's my opinion.

1 ATTORNEY JOSEPH CONNORS: Well, I
2 don't disagree with you. I think as a safety issue
3 it is a hardship. But that's not the criteria under
4 the statute.

5 BARBARA RANDO, CHAIR: Certainly the
6 shape of the lot wouldn't be either.

7 ATTORNEY JOSEPH CONNORS: But I
8 certainly think it has to do with whether or not
9 there's a substantial detriment to the public good.
10 And I would say that there is not.

11 BARBARA RANDO, CHAIR: That's another
12 statutory requirement. Right.

13 ATTORNEY JOSEPH CONNORS: And I would
14 say that there is not.

15 BARBARA RANDO, CHAIR: But you have to
16 have all five. So, hardship is one of them.

17 ATTORNEY JOSEPH CONNORS: Well, the
18 hardship relates to the shape of the house on the
19 lot. And so, again, the shape creates a hardship
20 which then affects where I can design a house safely
21 on this lot.

22 BARBARA RANDO, CHAIR: And any size
23 house that you want, which could be smaller. So, the
24 safety should be the --

1 ATTORNEY JOSEPH CONNORS: Well, I
2 mean, you know, I think the house that they've
3 designed is a modern home.

4 BARBARA RANDO, CHAIR: It's a lovely
5 home. It's a beautiful home.

6 ATTORNEY JOSEPH CONNORS: Right. But
7 I mean it has four rooms on the first floor. There's
8 a family room, a kitchen, and a living room, and a
9 dining area. So, that's four --

10 BARBARA RANDO, CHAIR: Attorney
11 Connors, I'm trying to help you out here. I do not
12 feel that you have a hardship the way you are stating
13 it.

14 MARK HICKERNELL: So can we say the
15 shape of the lot creates a safety hazard of the
16 current layout, and this reconfiguration will solve
17 the safety problem?

18 ATTORNEY JOSEPH CONNORS: Yes.

19 BARBARA RANDO, CHAIR: Much more of a
20 hardship.

21 ATTORNEY JOSEPH CONNORS: I agree.

22 SARAH HANKINS: How is safety one of
23 the hardships though?

24 ATTORNEY JOSEPH CONNORS: Well, the

1 hardship goes to the shape.

2 MARK HICKERNELL: The hardship is
3 based on the shape.

4 ATTORNEY JOSEPH CONNORS: The hardship
5 flows from the shape. And so if the hardship, the
6 shape, affects how we design a house, and if the
7 granting of the variance will result in substantial
8 detriment to the public good, and I'm saying that's a
9 criteria under the statute. I'm saying it's a
10 benefit to the public good. I'm going to be able to
11 design a site that is safe for their use of the
12 garage, safe for their exiting and entering the lot.

13 SARAH HANKINS: But how does the rear
14 setback, which is what you're looking for the
15 variance for, have anything to do with the safety?
16 Even if we accept the fact that the safety of Ms.
17 Mula and others getting in and out of the driveway is
18 sort of cause for a variance, I'm not sure how that -
19 - the six feet on this end relates to --

20 ATTORNEY JOSEPH CONNORS: Well, this
21 here, and putting the driveway here on the driveway
22 turnaround, pushes the foundation line of the
23 proposed home back to this direction. So that's how
24 it relates to it. I mean if I built the house right

1 here, then I'm going to, you know, move this
2 foundation over with it. You know, so I can't do
3 that. So the shape affects -- the shape here, and
4 what I need to do to safely maneuver in and out,
5 affects where I can situate this house on the lot.
6 So, I need it far enough back so my driveway is 21
7 feet wide so I can get in and out safely. If I can
8 just pull the house up 21 feet, then I would conform
9 to the 1961 decision and I wouldn't need it.

10 BARBARA RANDO, CHAIR: Mr. Sergi, any
11 questions?

12 JOHN SERGI: Just one. I'm satisfied
13 with the shape of the lot being a hardship.

14 The question I had is the abutter
15 that's most affected in the back, your house,
16 distance wise from the rear of the house from the
17 front of the house that's abutting it, what's the
18 distance between the two houses about?

19 ATTORNEY JOSEPH CONNORS: So, the
20 distance say from the proposed house to his house?

21 JOHN SERGI: Yes. Can I say it's at
22 least, you know, over 30 feet?

23 GLENNA GELINEAU: It looks like that
24 house is closer to --

1 ATTORNEY JOSEPH CONNORS: Yeah, I mean
2 we're six feet under the lot line. So, one inch
3 equals 20 feet on this scale here. So, it's not a
4 full inch, but it's at least more than half an inch.
5 So, I would say that it's at least 30 feet.

6 JOHN SERGI: Okay. All right. And
7 he's agreed to -- he's signed onto this and he
8 doesn't have a problem with this?

9 ATTORNEY JOSEPH CONNORS: Yeah, he was
10 the last signatory on the petition, Mr. Young.

11 JAMES CRISTOFORI: Yeah, Anne and
12 Shelly Young.

13 JOHN SERGI: Oh, okay.

14 ATTORNEY JOSEPH CONNORS: So his
15 address is on Temple Road.

16 JOHN SERGI: Are you planning to put a
17 fence there or any greenery or anything?

18 JAMES CRISTOFORI: We'll also, yes,
19 landscape that with either some greenery or a fence,
20 depending on what the neighbor would like.

21 JOHN SERGI: Okay.

22 JAMES CRISTOFORI: We'll work together
23 with them.

24 ATTORNEY JOSEPH CONNORS: Yeah, so we

1 can add that as a condition if you'd like. Greenery
2 or a fence will be installed based on the discussion
3 with the neighbors.

4 JOHN SERGI: I'm all set, Madam Chair.

5 BARBARA RANDO, CHAIR: Ms. Gelineau?

6 GLENNA GELINEAU: I'm good.

7 BARBARA RANDO, CHAIR: Ms. Hankins,
8 anything else?

9 SARAH HANKINS: No, thank you.

10 BARBARA RANDO, CHAIR: Is there anyone
11 in the audience that is in favor of this petition?

12 JAMES CRISTOFORI: Besides us?

13 BARBARA RANDO, CHAIR: No, count
14 yourselves.

15 GLENNA GELINEAU: You count.

16 BARBARA RANDO, CHAIR: One, two,
17 three, four, five people in favor.

18 Is there anyone in opposition? Seeing
19 none.

20 Is there anyone seeking information?
21 Seeing none.

22 All right. Attorney Connors, you may
23 continue with your proposed finding of facts.

24 JOHN SERGI: Madam Chair, may I make a

1 motion that we waive the reading of the finding of
2 facts since it's been on file and we've had a chance
3 to read it?

4 BARBARA RANDO, CHAIR: Motion to waive
5 the reading of the finding of facts by Mr. Sergi. Do
6 I have a second?

7 MARK HICKERNELL: Second.

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

10 How do you vote, Mr. Sergi?

11 JOHN SERGI: Yes.

12 BARBARA RANDO, CHAIR: Mr. Hickernell?

13 MARK HICKERNELL: Yes.

14 BARBARA RANDO, CHAIR: Ms. Gelineau?

15 GLENNA GELINEAU: Yes.

16 BARBARA RANDO, CHAIR: Ms. Hankins?

17 SARAH HANKINS: Yes.

18 BARBARA RANDO, CHAIR: And the Chair
19 votes yes.

20 Do I have a motion on the reading of
21 the proposed decision?

22 JOHN SERGI: Yes, in a similar
23 fashion, Madam Chair, I propose that we waive the
24 reading of the decision since it's been on file with

1 the Legal Department and we've had a chance to read
2 it.

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

5 MARK HICKERNELL: Second.

6 BARBARA RANDO, CHAIR: Second by Mr.
7 Hickernell.

8 How do you vote, Mr. Sergi?

9 JOHN SERGI: Yes.

10 BARBARA RANDO, CHAIR: Mr. Hickernell?

11 MARK HICKERNELL: Yes.

12 BARBARA RANDO, CHAIR: Ms. Gelineau?

13 GLENNA GELINEAU: Yes.

14 BARBARA RANDO, CHAIR: Ms. Hankins?

15 SARAH HANKINS: Yes.

16 BARBARA RANDO, CHAIR: And the Chair
17 votes yes.

18 Do I have a motion on the decision?

19 MARK HICKERNELL: Before we make a
20 motion, I think we should insert the amendment or the
21 --

22 BARBARA RANDO, CHAIR: Condition?

23 MARK HICKERNELL: Well, it's not
24 really a condition so much as an additional

1 rationale. I'm not sure how you wanted to phrase
2 that, Madam Chair.

3 BARBARA RANDO, CHAIR: Oh, well, the
4 way you stated it is perfect as far as the safety on
5 the --

6 MARK HICKERNELL: I wish I remembered
7 how I stated it then. Did you get it?

8 BARBARA RANDO, CHAIR: It has to do
9 with the shape of the lot.

10 SARAH HANKINS: The shape of the lot
11 creating the safety --

12 BARBARA RANDO, CHAIR: A safe
13 environment for them to turn around and drive out to
14 Trapelo Road, and it being a rattach lot, which is no
15 longer allowed in our zoning.

16 ATTORNEY JOSEPH CONNORS: So the
17 second part was that the rattach locus or rattach lot
18 is --

19 BARBARA RANDO, CHAIR: No longer
20 allowed in Waltham zoning. That was taken into
21 consideration, and then the safety, the shape of the
22 lot, and allowing the Petitioner to drive out in a
23 safe manner. That would constitute a hardship.

24 ATTORNEY JOSEPH CONNORS: Well, I've

1 added to the bottom of page one of my proposed
2 decision that the shape of the lot creates a safety
3 issue for the Petitioner which allows them to exit
4 the locus safely in a forward direction. Another
5 sentence: The locus is a rattach lot, which is no
6 longer permitted under the ordinance.

7 BARBARA RANDO, CHAIR: Mm hum.

8 ATTORNEY JOSEPH CONNORS: Both of
9 these issues create a hardship for the Petitioners.

10 BARBARA RANDO, CHAIR: Correct. Also,
11 the condition, we can put that on the decision if you
12 want. They agreed to the condition that he would
13 have greenery, bushes, or whatever.

14 JOHN SERGI: A separation of
15 evergreens or a fence between the closest neighbor.

16 BARBARA RANDO, CHAIR: And that would
17 be the responsibility of you to uphold that, to keep
18 it in good condition.

19 MARK HICKERNELL: Would it be
20 sufficient to say landscaping agreeable to the
21 abutter?

22 JOHN SERGI: Well, he's in agreement
23 with the abutter.

24 BARBARA RANDO, CHAIR: Is that all

1 right with you?

2 JAMES CRISTOFORI: That's fine.

3 BARBARA RANDO, CHAIR: You'll get
4 along with him and --

5 JAMES CRISTOFORI: Let's hope.

6 BARBARA RANDO, CHAIR: All right. Do
7 I have a motion on the decision as amended?

8 JOHN SERGI: Do we want to do the
9 finding of facts first?

10 BARBARA RANDO, CHAIR: Oh, did we do
11 the finding of facts? Oh, I'm sorry. Do I have a
12 motion on the proposed finding of facts?

13 JOHN SERGI: I make an motion that the
14 proposed finding of facts be adopted by the Board.

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

17 GLENNA GELINEAU: I'll second.

18 BARBARA RANDO, CHAIR: Second by Ms.
19 Gelineau.

20 How do you vote, Mr. Sergi?

21 JOHN SERGI: Yes.

22 BARBARA RANDO, CHAIR: Mr. Hickernell?

23 MARK HICKERNELL: Yes.

24 BARBARA RANDO, CHAIR: Ms. Gelineau?

1 GLENNA GELINEAU: Yes.

2 BARBARA RANDO, CHAIR: Ms. Hankins?

3 SARAH HANKINS: Yes.

4 BARBARA RANDO, CHAIR: And the Chair
5 votes yes.

6 Now, do I have a motion on the
7 decision as amended?

8 JOHN SERGI: I make am motion that the
9 decision as amended be adopted by the Board as well.

10 ATTORNEY JOSEPH CONNORS: Madam Chair,
11 may I just interrupt? I'm sorry. I just wanted to
12 amend my condition number 2. I state that 2B and I
13 identify the plans that I submitted, the building
14 plans. I noticed that I say six sheets. There's
15 actually seven sheets. And then I'd like to add the
16 date to it. At the time, I didn't have a date on it.
17 But I'd have it dated October 20, 2015, last revised
18 December 1st, 2015, just so there's clarification on
19 which is --

20 MARK HICKERNELL: I've got eight
21 sheets.

22 ATTORNEY JOSEPH CONNORS: You do? Do
23 I hear nine?

24 BARBARA RANDO, CHAIR: Want to count

1 yours again to make sure?

2 ATTORNEY JOSEPH CONNORS: Eight. I've
3 got eight.

4 JOHN SERGI: Yeah, I count eight as
5 well.

6 ATTORNEY JOSEPH CONNORS: The sheets
7 are sticky.

8 BARBARA RANDO, CHAIR: Did you say the
9 dates are on them or you didn't date them?

10 ATTORNEY JOSEPH CONNORS: I didn't put
11 it in my brief.

12 BARBARA RANDO, CHAIR: Oh, but they
13 are dated.

14 ATTORNEY JOSEPH CONNORS: So I am
15 requesting that we put it in, which would be dated
16 October 20, 2015, last revised December 1st, 2015.
17 It's in very small print. It's kind of hard to find,
18 but it's right here.

19 BARBARA RANDO, CHAIR: All right. I
20 will do it again.

21 Do we have a vote on the decision as
22 amended? I have a motion by Mr. Sergi. Second by??

23 GLENNA GELINEAU: I'll second.

24 BARBARA RANDO, CHAIR: Ms. Gelineau.

1 How do you vote, Mr. Sergi?

2 JOHN SERGI: Yes.

3 BARBARA RANDO, CHAIR: Mr. Hickernell?

4 MARK HICKERNELL: Yes.

5 BARBARA RANDO, CHAIR: Ms. Gelineau?

6 GLENNA GELINEAU: Yes.

7 BARBARA RANDO, CHAIR: Ms. Hankins?

8 SARAH HANKINS: Yes.

9 BARBARA RANDO, CHAIR: And the Chair
10 votes yes. It is granted.

11 Good luck.

12 One more motion is in order.

13 MARK HICKERNELL: I make a motion.
14 Actually, before we adjourn, can we discuss whether
15 we can meet next week?

16 BARBARA RANDO, CHAIR: That's fine.
17 We can do that. We need to send a letter in regards
18 to the 40B. And I need five members for about five
19 minutes. And I need to know 48 hours beforehand
20 because it has to be posted 48 hours before we meet.
21 It will take five minutes. And whatever day we can
22 all agree on would be great.

23 SARAH HANKINS: I'm available whenever
24 works for you guys. Absolutely.

1 JOHN SERGI: I'm flexible, Madam
2 Chair. So, just tell me.

3 BARBARA RANDO, CHAIR: How about
4 Wednesday?

5 JOHN SERGI: Wednesday. What time?

6 BARBARA RANDO, CHAIR: Wednesday at --

7 MARK HICKERNELL: Is Wednesday the
8 17th?

9 BARBARA RANDO, CHAIR: The 17th. Is
10 that bad for you? What's going on with you because
11 you're going out of --

12 MARK HICKERNELL: I mean if we can do
13 it, you know, at 8:30 or 9:00 in the morning, I can
14 make it most days, or if we're going to do it at the
15 end of the day that also works.

16 BARBARA RANDO, CHAIR: I can do it at
17 nine on Wednesday.

18 Mr. Sergi, is nine too early?

19 JOHN SERGI: No, I believe I can do
20 that as well.

21 BARBARA RANDO, CHAIR: Sergi,
22 Hickernell. Ms. --

23 GLENN GELINEAU: Yeah, that's fine.
24 Where? Here? Downstairs, upstairs?

1 BARBARA RANDO, CHAIR: Sarah?

2 SARAH HANKINS: Yeah.

3 MARK HICKERNELL: Did you say at the
4 Law Department?

5 BARBARA RANDO, CHAIR: We can even
6 meet right here. I'll just have her bring a letter
7 down and we'll meet in this room. The public meeting
8 room if it's open. We'll do the public meeting room.

9 JOHN SERGI: Okay.

10 GLENNA GELINEAU: Will you send us a
11 reminder?

12 BARBARA RANDO, CHAIR: I will.

13 JOHN SERGI: Yeah, please send a
14 reminder, Madam Chair.

15 BARBARA RANDO, CHAIR: All right. We
16 will be meeting, the five of us, on next Wednesday at
17 9:00 in the public meeting room and it will be posted
18 48 hours beforehand.

19 All right. Now, one more motion is in
20 order.

21 JOHN SERGI: Motion to adjourn, Madam
22 Chair.

23 BARBARA RANDO, CHAIR: Motion to
24 adjourn by Mr. Sergi. Do I have a second?

1 SARAH HANKINS: Second.

2 BARBARA RANDO, CHAIR: Second by Ms.
3 Hankins. All in favor?

4 ALL BOARD MEMBERS: Aye.

5 BARBARA RANDO, CHAIR: Opposed?

6 (No Board Members opposed.)

7 BARBARA RANDO, CHAIR: The ayes have
8 it. And we are adjourned at 9:35. Thank you.

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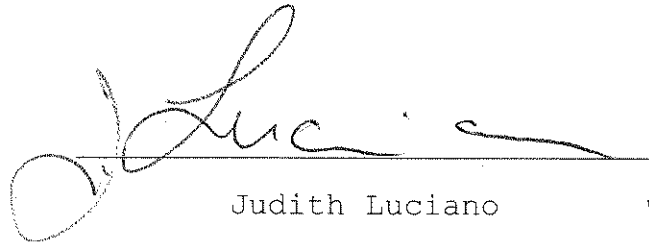
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C E R T I F I C A T E

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 cursive script, appearing to read 'Judith Luciano', is written over a horizontal line. The signature is fluid and somewhat stylized.

Judith Luciano

