

**CITY OF WALTHAM  
ZONING BOARD OF APPEALS**

**July 21, 2015**

The Zoning Board of Appeals held a public hearing at 7 P.M., Tuesday, July 21, 2015, in the Public Meeting Room of the Arthur Clark Government Center, 119 School Street, Waltham, MA.

In attendance were Chair Barbara Rando, and members Michael Cotton, Glenna Gelineau, Sarah Hankins, Mark Hickernell and John Sergi.

The Chair called the meeting to order at 7 P.M.

Mrs. Rando: Tonight we have two new cases before us. Case. 2015-08, Christopher R. and Katherine D. , 5 High Rock Circle, and that's for an appeal from the determination of the building inspector and modification of a prior variance. The second case is Case 2015-09, Anthony J. and Louis J. Antico. Prospect Hill Road, and that is for an appeal of a Cease and Desist Order by the building inspector.

First of all, I would like to welcome Sarah Hankins to the Zoning Board of Appeals. She's our new Associate Member and it's nice to have you.

The first action this evening would be to accept the minutes of July 7, 2015.

On motion of Mr. Sergi, seconded by Ms. Gelineau, the board voted to accept the minutes of July 7, 2015.

The members sitting on the following case are: Mr. Sergi, Mr. Hickernell, Ms. Gelineau, Ms. Hankins and Mrs. Rando.

**Mrs. Rando:** Would the clerk please read the Petition in Case 2015-08, 5 High Rock Circle.

The clerk then read the Petition of Christopher R. and Katherine D. Laughman in an appeal from the determination of the inspector of buildings and modification of a prior variance. The petitioners seek the installation of a propane connection and external propane storage for a detached, two-car private garage to allow owners to operate propane fired art glass working equipment as a personal hobby in the detached garage in addition to its use as a private garage. Location and Zoning District: 5 High Rock Circle, Residence A-2 Zoning District.

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

Katherine Laughman, appearing on behalf of herself and her husband, Christopher Laughman came forward.

**Ms. Laughman:** We also have with us tonight the Consulting Engineer who filed the application for the building permit, Mr. Steve Younis, who also represented us with our application before the State Gas Board and received approval from the Waltham Fire Department for the equipment that we are seeking to have installed.

**Mrs. Rando:** Who else besides the Fire Department?

**Ms. Laughman:** The State Gas Board. The application we have before you tonight is two-fold. We are initially appealing the determination of the building inspector that additional zoning relief is required to engage in the activity and to have the propane connection installed to our garage and in the alternative, we are seeking the modification of

the variance that we received in 2010 to construct the garage. I think that relief could be granted in either ground and will allow us to do what we are seeking to do.

If it would benefit the board, I will give you just a brief factual summary from the zoning history here. In 2010, we applied for and received a variance to construct a detached two car garage. The variance relief was for a single dimensional aspect which was the front setback. We are located on the corner lot of a cul-de-sac and the garage is constructed in what would be technically the side yard of our property but because we are a corner lot and the property has frontage on Silver hill Lane on that side, the front setback requirement for the zoning district also applies to the side yard. So there was a forty foot setback requirement. We were seeking to have the garage set back twenty feet instead of the required forty feet. That dimensional setback requirement was granted by a variance decision in 2010-20 and we proceeded to have a garage constructed in accordance with that zoning relief. There is included in the application package a foundation plan that shows that those dimensional requirements were complied with in the construction of the garage.

So the garage is erected. It is functional. We are currently using it to park vehicles, store our tools, household overflows. We use it to operate tools, yard equipment and those sorts of things. Included in your application are photos of the interior of the garage to give you a sense of how it lays out and the fact that the vehicles are parked in there. I think it's Exhibit 3 to your memorandum.

On March 10th of this year, we applied to the building department for a propane connections to the detached garage and the reason for the connection is that we would like to operate some hobby art glass equipment in the garage which will be fired by propane. Both my husband and I have for many years done art glass work through MIT and we are now sort of entering that stage in our life where it is a little bit more difficult for us to get down there and be part of that community. We have three young children and MIT has undergone recently a major glass art renovation and due to our involvement with that

community we were gifted some of the old equipment from that lab. So we have gone through the process of having that equipment approved by the State Gas Board and to the extent the board has any questions on the sort of the technical aspect of that Mr. Steve Younis is here and will be happy to address that process and what was done. But in effect that equipment was approved for our propane connection. It's not to the standard equipment that you would go purchase from a store somewhere. It's equipment that was constructed by the people who run the MIT glass shop. It's sort of unique equipment. But it has been approved for safety purposes and for fire purposes by the State Gas Board and by the Waltham Fire Department. And in order to fire this equipment, we need to have some propane more that it would be a little barbecue size tank. And we asked the building department for permission to have that connection in the garage structure and that permit was denied.

And the reason that the building inspector denied this request was that to determine that to the extent that we were going to engage in any kind of artistic purposes in our garage, the building would cease to be a garage and would be an accessory use structure.

Now, under the Table of Use Regulations, there is an allowed use in the A2 Zoning District; is a detached two car garage and there is also a separate use designation in the Table of Uses for an accessory uses structure.

Because the variance for the dimensional relief that was granted in 2010 specifies an attached two car garage, it was the determination of the building department that the relief was not for the accessory use structure which we are seeking to use our building for and, therefore, the dimensional relief that we received was not applicable to the garage as an accessory use structure and that we would need to come before the board for a variance for an accessory use structure in order to engage in the hobby purposes that we are seeking to undertake.

So, in terms of legal analysis, it's our initial argument before the board was that the determination of the building inspector was, in fact, in error. We contend that the building inspector erred in his narrow interpretation of what is an allowed activity within the garage as it relates to the 2010 variance decision.

When the board made its decision on the variance in 2010, the only limitation or condition that was imposed by the board at that time was for residential dwelling use and the board did that by imposing a condition that there be no residential heating in the garage and specified specifically a furnace, a wood stove or a boiler as being prohibited. And at that meeting, although it is not reflected in the minutes, there was a discussion of what we intended to use the garage for and we had a candid discussion with the board. We were planning on using it for a sort of your everyday garage purposes but when the discussion of the condition for residential heat was brought up, we specifically asked whether or not a kiln or a hobby type use would be prohibited and the board said, oh no, that would not be covered by this condition. We are simply looking to insure that nobody moves into this garage. We don't want anybody living there. And so, it was our understanding that the scope of the variance would have included those type of hobby uses had we decided to do that at the time. So, because of the scope of the decision, it is our contention that the building inspector's narrow reading of what constitutes a garage use, namely simply the storage of two vehicles, would be an incorrect interpretation of that decision and no further variance would be necessary to engage in these types of sort of subordinate accessory type activities in the garage. Furthermore, we are really not seeking to abandon the garage use which is I think is the more problematic aspect of the building's determination.

First and foremost, this is a garage. It's designed as a garage. It's used as a garage and to be honest with three children we are not going to do a lot of hobby use in there and it's clearly only for our personal hobby purposes.

So, the accessory use that the building inspector is focussed on is in fact subordinate to and really only accessory to the principal use as a garage and we would not be asking to have the garage use eliminated from the variance because that would affect the resale value of our property. You couldn't park your cars in there. It's sort of a slippery slope if you take that away as a garage and it ceases to become functional for us or any future owner beyond limited hobby purposes.

So, finally, to the extent that the board determined that the building inspector's decision was correct, and that the variance does not cover the use that we are seeking to engage in the garage, we would ask that the board consider modification to the 2010 variance and allow the use of the building to be for both garage and accessory use purposes and I think that would be another way to get at the same result.

So, if the board has any questions, I will be happy to answer those.

Mrs. Rando: Would you tell me how big the equipment is?

Ms. Laughman: There is actually a picture of it in Exhibit 3 to the memo. (Ms. Laughman went before the board to show a photo of the equipment.)

Mr. Hickernell: The tank itself is outside of the building?

Ms. Laughman: It's outside.

Mrs. Rando: You mentioned the size of the tank. You're allowed a certain size in residential. Yours is not. So in other words, you would have the size tank that any household would have if they could not have gas because of ledge or whatever.

Ms. Laughman: It would even be smaller.

**Mrs. Rando:** And this is only for personal use, artistic hobby only for you. No sales, no business, no classes.

**Mr. Hickernell:** That would be a separate permit.

**Mrs. Rando:** It meets the criteria for the accessory building.

**Ms. Laughman:** Right. That was one point that I mentioned in the memo to the board. If this were approved under the variance for an accessory use, it doesn't require any additional zoning relief. We meet the requirement for an accessory use structure. We are ten feet from the property line and all of those requirements are met. The only dimensional requirement that is not met is the front setback which we have the garage variance for in the first place and we are not looking to modify the footprint or anything of the structure itself, no further construction other than the tank.

**Mrs. Rando:** And of course after it is done it would have to meet all our laws having to do with the size of the tank.

**Ms. Laughman:** Sure.

**Mrs. Rando:** Mr. Sergi, do you have any questions?

**Mr. Sergi:** It's a hobby, so I am just curious. Do you work full time?

**Ms. Laughman:** I do.

**Mr. Sergi:** And does your husband work full time?

**Ms. Laughman:** He does.

**Mr. Sergi:** Forty hours a week.

**Ms. Laughman:** We don't have a lot of time to do this, like once a month, maybe. Its maybe optimistic on our part.

**Mr. Hickernell:** I was wondering the same thing. How many hours a week do you think you will be doing this and how many hours will you actually be parking the car in the garage?

**Ms. Laughman:** This is the sort of thing, we will remove the vehicles when we are doing this and so, I mean, I think it's going to vary.

**Mr. Hickernell:** Do you expect the car in the garage everyday?

**Ms. Laughman:** Yes, we expect the garage to be available for vehicle parking like ninety-nine percent of the time.

**Mr. Hickernell:** If you're lucky and the kids cooperate to do this.

**Ms. Loughman:** If we can find a babysitter.

**Mr. Hickernell:** I've got to say, Madam Chair, I don't find any support in the ordinance for the building inspector's decision on the first point. It's still going to be a garage. There's nothing that says you can't do a hobby there. If you get a ping pong table in the garage, that doesn't make it an accessory building. So, I don't have any more questions.



**Mrs. Rando: Ms. Gelineau?**

**Ms. Gelineau: I don't have any questions.**

**Mrs. Rando: Ms. Hankins?**

**Ms. Hankins: I don't have any questions.**

**Mrs. Rando: All right. Do you have anything to add?**

**Steve Younis, Private Consultant: Just for clarification, one of the things that triggered this off was certified safety. We added a roof to protect the tanks so that triggered him looking at that. It's on the record and it's on the drawings there should be a three foot roof sticking off the sides to protect the tank.**

**Mrs. Rando: Is the three foot roof on the plan?**

**Mr. Younis: Yes.**

**Mr. Sergi: It's not enclosed. So there's an opening.**

**Mr. Younis: It's open around for venting. But due to the ice conditions especially, it is required by code, but especially what happened this winter with ice dams. It's to protect the top of the tank from getting hit.**

**Mr. Sergi: It's a three by three roof, is that what it is?**

**Mr. Younis: It's a three by four.**

**Mrs. Rando:** Is there anyone in the audience that is in opposition to this petition? Seeing none, is there anyone in favor of this petition? Three people raised their hands in favor. Is there anyone seeking information? Seeing none you may continue with your proposed findings of fact.

**Ms. Laughman:** I have submitted a proposed findings of fact.

**Mrs. Rando:** Yes, you did.

**Mr. Sergi:** I've read them. I will make a motion that we waive the reading of the proposed Findings of Fact since they have been on file. Ms. Gelineau seconded the motion and the board voted to waive the reading of the Proposed Findings of Fact.

**Mrs. Rando:** You may continue with your Proposed Decision.

**Ms. Laughman:** And again, I have submitted two proposed decisions; one being to grant the petition appealing the building inspector's permit rejection and the other being to amend the variance. If the board is inclined to grant the appeal of the building inspector's decision. I would suggest that that decision be the one adopted by the board.

**Mrs. Rando:** How does the board feel?

**Mr. Hickernell:** I will make a motion that we waive the reading of the first proposed decision. Mr. Sergi seconded the motion and the board voted to waive the reading of the first proposed decision.

**Mrs. Rando:** You may continue.

**Mr. Hickernell: I will make a motion that the Proposed Findings of Fact be the board's Findings of Fact. Mr. Sergi seconded the motion.**

**Roll call: Mr. Sergi, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Ms. Hankins, yes and Mrs. Rando, yes.**

**Mrs. Rando: Do I have a motion on the Proposed Decision.**

**On motion of Mr. Hickernell seconded by Mr. Sergi, the board voted that the first Proposed Decision be adopted as the Board's Decision.**

**Roll call: Mr. Sergi, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Ms. Hankins, yes and Mrs. Rando, yes.**

**At 7:27 P.M., on motion of Mr. Hickernell seconded by Mr. Sergi, the board convened for a five minute recess.**

**At 7:40 P.M., the board reconvened.**

**The members sitting on the following case are Mr. Sergi, Mr. Hickernell, Ms. Gelineau, Mr. Cotton and Mrs. Rando.**

**Mrs. Rando: Will the clerk please read the petition in Case No. 2015-09?**

**The clerk then read the Petition of Anthony J. and Louis J. Antico in an Appeal of a Cease and Desist Order by the Inspector of Buildings. The Petitioner seeks to overturn a Cease and Desist Order by the Inspector of Buildings concerning the existing tower and wireless communications uses located on the property. The use, structures and equipment**

are pre-existing non-conforming or otherwise protected from enforcement. Location and Zoning District: Prospect Hill Road, Residence A-2 Zoning District.

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

Attorney Brian S. Grossman, Anderson & Kreiger LLP, One Canal Park, Suite 200, Cambridge, MA Attorney for Louis and Anthony Antico came forward.

Mr. Grossman: Madam Chair, as I mentioned before at the initial start, one matter of housekeeping is I want to submit a check for advertising and notice fee. Ms. Doucette asked if you could include that in your folder she would get it in the morning. She gave me very clear instructions.

Madam Chair and members of the board, the appeal concerns a property and a tower that I think some of the members of the board are very familiar with. The board in 2013 and 2015 heard two appeals to modify the pre-existing nonconforming structure at the property. The board voted to grant both appeals by the petitioners, the Antico's. In 2013, that decision went un-appealed and in 2015, prior counsel for the Antico's sought to amend that decision to allow the modification to the proposed plan. The existing facility is what we call a guyed tower, a tall thin structure and has those wires that you see that come off of it that anchored to the ground. There are a number of different types of towers out there and other styles all self-supported and those eliminate the guyed wires and that was what that 2015 application was all about was to change the design from the 2013 decision which still included guyed wires to go to the pure self-support tower. There is a 2013 decision that was un-appealed. I think the board is aware the 2015 decision has been appealed by the building inspector.

A little bit of brief history of the tower. It was constructed in 1962 pursuant to a building permit and the Antico's according to the Affidavit we've included in this application as well as the prior application - - -

Mrs. Rando: Are you going to start back in 1962?

Mr. Grossman: I'm going to move very, very quickly.

Mrs. Rando: Because I think 2013 and 2015 are more relevant.

Mr. Grossman: Yes, except there's a couple of points here to state for anyone who may not be familiar with or may not have already sat on this.

Mr. Grossman: It's very, very quick. In 1962 the original tower was constructed pursuant to a building permit. It was extended twice as discussed in the supporting statement, once in 1967 to 270 feet and once in 1982 to the current height of 293 feet. We have an Affidavit included again in this application as well as the prior two from the prior Building Inspector, Walter Ohnemus, that it was determined that it was a pre-existing nonconforming structure at the time and that no building permit was required for the two extensions.

In the 2013 application, again which was un-appealed and under some case law that sanctions the proposition and that would mean that it has occlusive effect. The board decided it once and need not go back and re-visit the issue of the pre-existing nonconformity repeatedly. You will hear from, I assume, counsel for the building inspector. There is absolutely some case law that doesn't score the other way but says that that issue is undecided other than there have been some subsequent Land Court decisions that lean towards the issue, the issue preclusion based the standing for position that once this board has decided it as a quasi judicial board, that that decision being un-appealed establishes the

issue and that to constantly go back and have a property owner and have to constantly go back and defend, regardless of the number of decisions that this board has made to preexisting nonconforming use. For someone years later to come back and say, no, we don't think it's a preexisting nonconforming use that that doesn't give the type of finality in decision that 40A looks for and really requires. If you had a decision and it goes unappealed, you've missed your jurisdictional prerequisite. They found that in terms of notification to the city clerk or the board it's very, very harsh. If you miss your twenty day appeal period, your rights to appeal have been extinguished. That 2013 decision, no appeal was taken, none was filed, late or otherwise. We recognize that the 2015 decision has been appealed but one of the issues that we have raised in that matter and we are raising here as part of our defense of the Cease and Desist order is the preclusive effect of the 2013 decision and this board's prior decision that the existing tower is a legally pre-existing nonconforming use and that the use is on that tower. We are legally pre-existing and nonconforming as well.

There were a number of findings that the board made in both decisions that were incumbent including that the tower was used for wireless radio and telecommunication services for various vital services including ambulance agencies, bus services for handicapped people, emergency vehicles as well as fire, police and other agencies at the City of Waltham. That the existing use of the tower which began in 1962 was not regulated as to the height at that time. It was classified as a nonconforming use. When the tower was extended to its present height to the 293 feet as it stands today, the petitioners were advised that building permits were not required since the tower's use thereof was a preexisting nonconforming structure. The tower was exempt from height restrictions pursuant to Section 21-10, Height Exception. The towers in 1960 and 1967 and 1982 was the relevant date when it was extended have continuously been used to broadcast wireless radio and telecommunications, so that the use of the existing tower has not been and has never been a mystery. It has been used for the broadcast of wireless and radio telecommunications. This board has had that evidence presented to it before and this board found as a necessary

part of its findings in granting on two separate occasions in a special permit to allow the modification of the tower as a preexisting nonconforming use and necessarily tended to that the structures on it would be relocated to the proposed tower that those were legally pre-existing nonconforming. That's exactly the issue now that the Cease and Desist Order seeks to put before you again for a third time as whether or not those uses are legally existing or not and this board had twice found that they are.

As to the existing tower itself, as the building inspector's Cease and Desist letter recognizes even if that the tower itself or some of the structures on are is not legally preexisting nonconforming, under Chapter 40A, Section 7 as far as structures go that affords an additional protection. There is a ten year statute of limitations within which an action to remove a structure that has not been constructed pursuant to a building permit needs to take place or under the ordinance or 40A can't compel that structure to be removed. The Cease and Desist Order kind of passes on that and says, well, its up to the petitioner to demonstrate that it gets the benefit of that except if you look at the timeline in the building commissioner's own Cease and Desist letter, he very clearly sets out the timeline for you in terms of when the tower was constructed, when it was extended and when it was extended again. I don't think there is any real dispute that the tower has been up and existing in its present form at 293 feet since 1982.

We have provided in the application materials to you the Affidavit of Mr. Antico that says that it was extended in 1967 and then in 1982. Of course since the building inspector at the time made the determination that no building permit was required, there isn't a building permit we can provide or an entry in the building jacket that we can provide because the city's own official cited that it was unnecessary. We did provide, since the towers both extensions required FAA approval there's evidence that those approvals were signed and the towers were ultimately extended and we did include the FAA approvals for those two tower heights for you in the application package.

**In addition, again, the idea that the city has been unaware of the use of the tower and the existence of the tower is just not credible. We have the Affidavit from Mr. Antico that when it was built the city agencies were permitted to locate on the tower. That is further supported by two letters that I now have and am able to provide, one from the City of Waltham itself in 1982, from the City of Waltham, Waltham Civil Defense, Anthony A. Mangini Acting Director. In the letter, it's dated September 9, 1982, the Director of the City of Waltham Civil Defense requests Mr. Antico's assistance and whether Mr. Antico would allow Civil Defense to locate wires facility on the existing tower on Prospect Hill Road for City of Waltham use. In the letter he references the fact that the City Rec. Department has equipment on the tower and that's how he came to know of it and come to the idea to ask Mr. Antico if the City of Waltham Civil Defense would be permitted to utilize the tower as well and then there is a November 1, 1982 letter from Anthony Antico expressing some condition in terms of the limitations of liability but saying, absolutely, yes, he would love to continue to assist the city and serve the City of Waltham to permit Civil Defense to be located on the tower and my understanding from Mr. Antico is that ultimately, yes, Civil Defense was allowed and did in fact locate on the tower itself. (Both letters were submitted to the Board.)**

**And, again, in terms of the knowledge of the existence and the extensions of the tower, you have the Affidavit from Mr. Walter Ohnemus himself who was the building inspector at the time of both extensions that he was not only aware of the tower and its uses but that his determination under the ordinance at the time was that those extensions were permitted and that the tower was a pre-existing nonconforming use. I would submit that the determination made thirty, forty years ago by the then building inspector who was in knowledge of both the ordinances in effect at the time, much closer in time to the construction of the original tower that he was better positioned to make that determination and not be guessed thirty, forty, fifty years later in that although in his opinion, Mr. Forte may disagree with that interpretation, it doesn't mean that that interpretation was wrong and incorrectly made. It just means he might come to a different conclusion but the**



inspector at the time looked at the facts and with that used his knowledge of both the situation as well as the ordinance and came to a different conclusion. And to be clear, it wasn't that the Antico's went out in the dark of night and constructed something and then extended it and extended it. But they, in fact, as both Mr. Ohnemus' Affidavit and the Affidavit of Mr. Antico established, they came to the City of Waltham. They tried to make sure they were doing the right thing. They consulted with the building official. The building official gave them an opinion that they didn't need further relief and they acted accordingly and then, of course, the city has at times taken advantage of the the use and existence of the existing tower to locate their equipment on. It is my understanding, I think all school busses, the City of Waltham school busses utilize the existing tower for their communications as well. There are other public safety uses that currently take advantage of the tower and are located on the tower, Boston Marathon Security and there are a number of emergency medical uses on it as well and medical companies, paramedics, EMT's, ambulance dispatch services as well. And so in terms of the information that this board had in 2013 and 2015, there really isn't anything new. Previously this board has decided the existing tower and the uses are preexisting nonconforming and we would ask the board to remain consistent in those determinations and overturn the building inspector's Cease and Desist Order.

**Mrs. Rando:** Are there any questions of the attorney at this time, Mr. Sergi?

**Mr. Sergi:** No.

**Mrs. Rando:** Mr. Hickernell?

**Mr. Hickernell:** We don't have jurisdiction over the Chapter 142 issue, correct?

**Mr. Grossman:** You don't.

**Mr. Hickernell:** That's all I have right now right now.

**Mrs. Rando:** Ms. Gelineau?

**Ms. Gelineau:** No questions.

**Mrs. Rando:** Mr. Cotton, any questions?

**Mr. Cotton:** No.

**Mrs. Rando:** All right, thank you. Mr. Forte, would you like to come forward?

**Mr. Forte:** Good evening Madam Chair and members of the board. My name is William Forte. For the record I am the Inspector of Buildings in the City of Waltham. I want to first start off by saying that our introduction was off to a little bit of a rough start where, you know, I had to actually question one of your decisions in court and this would be this particular case and I just want you to know that I have the greatest high regard for your authority to review and overturn my decisions and I will just tell you that the case right now that is pending has nothing to do with my personal feeling nor does it reflect anything on our relationship. I have a high regard for what you do here and it is my responsibility to make sure that you are well informed of all the information that I used to base my decisions on. And that's why I am here tonight.

So, if I may I refer you to the cover sheet here the package that was prepared for you, we can look at the first exhibit which would basically be the building permit application for the tower back in 1962, which I know, Madam Chair, you don't want to have to go back that far but I'm going to say that this is where the whole problem arises. This is where there's probably no problem with this property up until there was a change. There was a permit issued in 1962. It was for a 75 foot high radio antenna for personal use.

**It says right here under the remarks, "Permission to erect a short wave radio mast antenna connection for future dwelling to be erected for personal use for radio communications." Personal use would be basically a hand radio back in those days. The tower was legally constructed at that time and not until some time in the 70's was it extended to be illegal or noncompliant.**

**But if you look at Exhibit #2, actually Exhibit #1, still, this is the building permit card that we keep record of. This is every building permit that's issued for a particular property. We have records of every property in the City of Waltham and any time a permit has been issued or denied, we will have this on record in our files and this is the property record for this particular property.**

**You'll see your appeal there in 2013. You will also see another appeal granted in 2015 which is why we are here now and the only other exhibit that you will see on this, well actually you will see an appeal in 2009, there was an application for an appeal and it was withdrawn asking for leave without prejudice but other than that you will see one permit in here for September 26, 1962 for a short wave mast for personal use. It says it right there on the card.**

**Exhibit #2 is a relevant provision of the zoning ordinance in effect in 1962 which would be 1958 and if you look at Page 22, Article 7, according to Article 7, Section 3, it says, "Accessory Uses customarily incident to any permit herein provided such use shall not include any activity conducted for gain, which would be for profit, or commercial use or any private walk or way giving access to such activity or any activity prohibited under this ordinance." So back when this tower was constructed and up until the time it was erected there was no change in that ordinance and that you could not have a structure or a use allowed in a residential district for commercial use or for gain and gain would be within the same realm.**

**In addition to that, in Section 10A on Page 9 of the ordinance says, “No one shall perform any work in connection with, or materially change the use or occupancy of, any pre-code or post-code building or structure (and I will emphasize or structure) or cause or permit the same to be done, without first notifying the building inspector and obtaining the required permit or permits thereof as provided in this and the following sections; provided that repairs, as hereinafter defined, may be made without a permit.”**

**The extension of a tower is not a repair. I’ll just say that. That’s not a repair of the tower. So I just wanted to touch on that a little bit. Moving on, when I was first alerted of the notice of the appeal by Parks and Rec, I went out and I did my own investigation and I found that there was a pretty good amount of commercial activity.**

**Mr. Hickernell: Sorry to interrupt you but which notice of appeal?**

**Mr. Forte: The notice of the decision from the ZBA.**

**Mr. Hickernell: The 2015 one?**

**Mr. Forte: Yes, the 2015 one. This is when I kind of stepped into the arena. Prior to that I had no knowledge.**

**So the first thing I noticed is that there is a commercial gate, if you look at the first photo here, where it says Antico. This is placed on public land in a public park which is considered illegal but also this is a commercial gate basically to keep access out.**

**If you go to the second paragraph, you will see that the city basically is locked out from this. We don’t have a key to that lock box there on the gate which is, you know, basically it’s illegal.**

If you look at picture #2, this is the person walking up on the mountain of the fill. I estimate that to be between three or three and a half feet of basically commercial grade fill which would allow for commercial vehicles to traverse upon. Just on the opposite side of that picture you will see picture number 4, which is that little number at the bottom there. Again, this is a public park, a city park with a marked trail and if you look at picture number five, the width of the trail should be approximately the size of what you see behind that tree right there. That would be pretty much a walking trail.

And in fact, in picture number six, you will see depicted there that the walking trail is narrow, its probably four to five feet. That's what these trails probably look like and I am only estimating that these are the kinds of trails.

Mrs. Rando: May I ask you one question? On number two, you were talking about the three feet of fill for this road. Was it just a walkway at that time?

Mr. Forte: I can't tell you what was there before but I would just say that that did not get there from natural processes. And I would say that I don't know if it was built up over a period of months, weeks or years but I would estimate that this looked pretty fresh. There was no weed growth on the side of the bank basically indicating that there had not been long term placement of the fill there. So I'm guessing in my expert construction experience that this has probably been there for probably a period of less than two years.

Picture number 5 here, again, the width of the trail behind that and picture number six gives you a little better picture of what a walking trail should look like and then if you look at picture number 7, picture number 7 is actually the walking trail now. It's approximately twenty-five feet wide. It's fairly level and it's a compacted drivable base whereas when it rains out this doesn't get muddy. Any kind of heavy construction vehicle can traverse this walking path or this hiking trail now. So there was a substantial alteration to this land here which indicates that the property is being used for commercial

uses. So this part of the property that we are standing in right now in this picture is Park and Rec's which is basically zoned for recreational use only, not for commercial use and when you get up to the property line, we're crossing the line from Parks and Recreation Zone to Residential Zone.

In the next picture, I'm standing at the very edge of the fill to show where the natural contours meet the graded contours that were basically done, again without any kind of permits. It looks to me like here that this is a tree that was freshly cut, again to widen the path to allow for construction vehicles and I think that during the transcript in 2015, it did mention that commercial vehicles would be traversing down there and that they had expanded this particular portion of the Parks and Rec land to allow for the commercial activity for the trucks.

This is where we come down inside near the property marker. You will see that there's probably a hundred foot turnaround in this particular area which would allow for a pretty good size crane to be able to turn and maneuver a very large appurtenance which could be made for accommodations for a tower.

Picture number twelve, as you get a little bit closer there, I'm standing approximately ten feet off the property line. The property line going basically horizontally across the page at a little bit of an angle, probably a little higher on the right side and a little bit lower on the left side, but this is basically standing at the line where recreational use and residential use pretty much that's where the zone line is and you will see that on the map.

Picture number 13 will show an overall scope of the work that was done. There were two turn-arounds one on the left side. As you go down further, there's one on the right side and then there's a little bit more cleared down on the left side, again beyond the tree that's on the left side.

Picture #14 depicts the amount of equipment that's on this particular tower. Now again, I must reiterate that the use of the tower at the time it was lawfully permitted was for residential use and basically it's for personal use. It would only be for a hand radio tower or the like. If by today's standard you can even have a home satellite dish on that and that would still be considered a legal use. These appear to be several different commercial uses including a cell phone. It looks like cell phone transmitting equipment, a different short wave radio, antennas. I couldn't speculate on all the types of equipment that were on there but there's a various number of pieces.

If you go to the next page, you will see that there is some kind of satellite dish there. I'm not sure what that is in picture #15.

Picture #16, depicts the footing at which the base of the tower sits on. This is the area where all the pressure of the tower sits on that one footing which to my estimate would only support a 75 foot tower. I don't know why there's a 300 foot tower on there but I know this footing was designed and built for a 75 foot tower at the time unless it was replaced again without our knowledge.

If you look at picture #17, some of the power lines and different things that got up on there without knowledge of the building department or the wires department. I'll get into that a little bit later. But there are several pieces of equipment on this building and inside this building that we have no knowledge of. I would say that these lines in the sky are basically the guyed wires that not only strut near the property line but they also strut over the property line into city park land which I am sure you are aware of as you have heard this a number of times.

Picture #20 shows basically a support wire being held on by a tree which I believe supports the electrical equipment and the poles going up.

These are kind of one and the same. I am going to go through 22. Here's an interesting thing I want to show you. If you go to picture #24 you will see that I took a picture of this particular footing and I just wanted to show you my concern for safety. Although this board is not considering the safety of the tower and I realize that you had had a question regarding the fact that you are not going to consider the unsafe structure, it appears to me that these particular footings are only a foot deep. In my experience, usually tower footings that hold guyed wires are much deeper than this and they are way more heavy duty. In their own structural report they actually admit that there are some things that are inadequate about this tower and they are of grave concern.

So those pretty much are the pictures. I don't know if you have seen those or not. I don't know if anybody has been out to the site but there's been quite a bit of alteration to the land in anticipation of commercial use. I will tell you that commercial use has never been allowed in this zone and the building department has never said that that particular use is legal. Now I know there was some kind of Affidavits from a prior inspector and going over the fact that he felt as though what was going on there was a legal nonconforming use and that the extension of the tower being required building permits, I will tell you this that never in the building code or the zoning code did it not require a building permit to extend that tower. It's always been the law. You need a building permit to extend that. So I don't know where he got his information but I will just tell you its inaccurate.

If you look at the next exhibit, these are basically the zone lines here. We are talking about Conservation/Recreation and Residence A-2 Zone. You will see that dash line that kind of runs into the corner there. This is that 11/17 map if you want to look at that. That will tell you basically where the zone lines are. This will show you the proximity of the tower and, again, as soon as this tower was extended beyond 75 feet, it was no longer legal nonconforming. It was noncompliant. In order for it to be nonconforming, it would have



to be done legally at the time. And it was never done legally at the time. It was conforming until such time it was extended without our knowledge or our permission and at that point on it became illegal. And there is no statute of limitations on use. I'd like to have my attorney may be able to elaborate on that, Michelle Lerner. If she could just step up and just talk a little bit about the statute of limitations on use. Thank you.

**Michelle Lerner:** I am City of Waltham Attorney and I am representing the building inspector and the action with respect to the 2015 appeal of the ZBA's decision. I am also representing him here with respect to the Cease and Desist Order they issued. And he asked quite eloquently for me to just kind of remind you that although it is true that there is a statute of limitations for enforcement actions against structures that may have been in existence for ten years, there is no statute of limitations bar to enforcement actions for violation of use. And so what has happened and he has eloquently gone through the exhibits thus far, is that the last time around, and it appears as if you were misled. You weren't given all the facts. You weren't given all the information. You were told it was a nonconforming use, and then under the provisions which you are usually able to expand that nonconforming use after the ten percent, you acted. But what wasn't given to you was what was in effect in 1962 when this tower went up is the zoning ordinance in 1962 which said absolutely no, you can't have anything for personal gain. There's no commercial activity that can be permitted in a residential zone. That's the story. That's the first card that everything else builds upon and you weren't given that information the last time. So the building inspector has an obligation to the citizens to enforce the zoning ordinance and to enforce the building code. The public is entitled to have the zoning enforced. It's his responsibility. If somebody previously within the administration made an arrangement or agreement that they weren't allowed to do according to law, that doesn't bind him. They made a mistake. If Ohnemus, our prior building inspector, made a mistake because clearly he did and the building inspector has provided you the relevant pages of the Waltham Building Code in existence at the time that the tower goes up required a building permit. And that's because the building code, this one in 62, and the current one is designed to

make sure that what ever is erected by vote is safe. That's his role. He has to make sure that the structures that are erected are safe for all those properties when you look at that map that are within a fall zone. He, nor his predecessor has had the ability to review that, the groundings, the moorings, how deep they are. They are in a concrete thing that could go away with a very strong wind. No city entity has been able to go in and look at the that electrical room to see, is it up to code?

There is an Affidavit that is the last exhibit in this pile for you that is from the current wires inspector, and there were in my building inspector's investigation. He had to consult with the wires inspector because the land owners made assertions that we, police and fire were on this. He checked his records, there was nothing. This is the first time that the letters with respect to the Civil Defense were presented. So whatever that is we haven't had a chance to review it. It was not provided. All the building inspector had asked, if you look at the Cease and Desist Order was, tell me what you think should stay. Provide me documents to show me why it should stay, and tell me it's safe so that I can make sure that I am doing what I need to do under the building code. So we would have loved to have a document. Now, what do those documents say? They don't say that what was required in 1962 to be done occurred. They don't say it was permitted. Having somebody make an agreement, if indeed it happened. Maybe an agreement happened but that doesn't mean that the building inspector is not supposed to enforce. If they agreed to something and they didn't have the power to agree to it, they acted beyond the scope of their authority, whatever administration. I know he made assertions that there were verbal agreements. Verbal agreements are not honored in the law. You need to have it in writing for this very reason. All these years later, a written agreement that is done correctly is a public record. The public is part of that process. Any agreement that may have happened to use a tower in city park land occurred outside the process of the public's ability to weigh in on that. And you have a city park that has been used for commercial purposes. City park land in order to use city park land for a use that is different than recreation or conservation requires an application to our State Legislature. It's a very big complicated process and a

vote of the general legislature and then as part of this under Article 97, if it even was granted, you have to find an equal amount of land somewhere else in the city to make up for what you are using and taking away that isn't the park land. It's a difficult process. It's probably why the 2008 application before you was withdrawn. It's probably why the 2013 application was lapsed. And it is true as the opposing counsel mentioned that the city didn't appeal the 2013 decision that the ZBA board had rendered. Well, they didn't commence within the year. There's a specific requirement in that ZBA decision, that requires, I think the condition was: "All necessary permits shall be issued and work commenced within one year of the date of the filing of the decision and work be completed within two years of the filing and in accordance with a certain plan." And that wasn't done. So it lapsed.

Now, why didn't the city appeal at that time? There was no possible way that they were going to be able to get the State Legislature to agree to let that tower have its footings in city park land. There was no reason for us to sue the ZBA. There was no reason for the building inspector to take any action because it's an impossibility.

Mr. Hickernell: So is that something the city was actually considering at the time and just didn't share with us? Or is this some argument that you came up with later because the board spent a lot of time on this and it would have been very helpful information at the time to say, you know what ZBA, you're wasting your time. This can never happen anyway!

I have to say I appreciate both of you very much because I find this quite helpful, but I'm sorry, I don't mean you particularly, but if that's the case why didn't somebody say no problem!

Ms. Gelineau: Are you speculating that's what they thought or do you know what they thought?

**Ms. Lerner: No I am speculating. It is to me a logical assumption that the board authorized relief based on information that was incorrect. You were never told that the first card that everything is built upon, the first legal premise, that fact was not relayed to you. That's not a fact that can be disputed. Take the zoning code that exists and we provided you a copy. The actual words of the Zoning Code say you cannot have commercial activity in the residential zone, nothing for personal gain and that language follows every single revision from 1962 to today's zoning ordinances. So there has never been a time where you could conduct commercial activity in a residential zone and that's the dispositive issue and that information wasn't given to you last time. They told you it was nonconforming and then that you had the ability to expand that nonconforming use. And that information is incorrect and it's incorrect by tangible evidence. The same way that Mr. Ohnemus's Affidavit, the assertions in his Affidavit which were non attested to under the pains of penalty of perjury. But putting that aside even, you can pick up the building code and the provisions that were cited to you. You can see that, yes, a building permit was required in 1962 for a structure that was erected and towers, radio antennas, is included in that definition of structure. So what has happened is you weren't given the information you needed to decide that, the applications that were before you to move the pre-existing tower. That's what the 2015 application is doing. It's also moving the existing tower by at least fifty feet which has a whole host of other issues. But that is the other appeal that is pending and what's here is the building inspector's responsibility to the citizens to make sure that the tower is safe and the appellate review process is not before you for the safety aspect and they have pending appeal of those decisions now. But it's his obligation to the citizens to enforce that the illegal commercial use activity that's occurring at this property and that's what he did. And so, the statute 40A, Section 6, and even directly in the Cease and Desist Order, he advised pretty clearly about 40A, Section 7, I'm sorry, on Page 4 of his Cease and Desist Order explained very clearly how 40A, Section 7 does not bar enforcement actions with respect to use violations that are not sanctioned by permits. And so, here because this illegal commercial activity at whatever point it began, it was noncompliant. It has always been noncompliant.**

Now, with respect to the straddling of the lot lines with the guyed wires that are in city park land that also makes out dimensional violations with respect to the fall zones, the setbacks and in that area it is where the building inspector merely asked for what do you think is protected by the statute of limitations? And if so, prove to me that those structures that you think are still able to be standing are safe. Give me a professional engineer report, because the review that is required under the building code making sure that these are safe has been skipped and that's all that the building inspector was requesting with respect to the remaining structural dimensional violations. And that's outlined in #3 also on page 4.

Mrs. Rando: May I ask you a question? When you mentioned the statute of limitations, it's not relevant because it was not sanctioned by a permit to date, you're saying?

Ms. Lerner: So there's some language in 40A, Section 7, if a building permit issues and somebody builds according to the building permit, but that building permit was a mistake, then the city, even when you have a building permit in your hand, if the building inspector figures out he made a mistake, he has six years to say, oh, wait I made a mistake and to fix it. That's how important the statutory scheme thinks it is to make sure that the zoning rules and building code are followed. However, if ten years passes regardless of whether a building permit issued or not, the only thing he can do is make sure that the structures are safe. He can't tell you to remove that illegally built structure. However, that's only about structures and the dimensions and physically where they are on the lot. A use that is illegal is never protected because time had lapsed. If a building permit had issued and they built and the use was logical to that building permit then that six year limitation would happen. But we have evidence here before you in the record that shows and they even said no building permit was issued. So the 75 foot personal use tower is protected by the building permit but nothing else. So the second it turned into commercial

use, illegal commercial activity, the building inspector is not barred and in fact is obligated under the statutory scheme to enforce. Does that explain it better?

Mrs. Rando: Yes.

Mr. Hickernell: Counsellor, so I think I understand what you are saying about the statute. Surely there have been some case law that's come down addressing this. So I would request, assuming that we may not actually render a decision tonight that if you have maybe some case law for us to review this specific issue, please provide them.

Also I certainly understand why Mr. Forte issued the Cease and Desist Order over Chapter 143. I can perceive the safety issue. It's absolutely what you should do under those circumstances and they can figure out who's right in some other forum. But where the 2015 decision of this board is already under appeal, what does the Cease and Desist Order under 40A add? I mean, why are you trying to win in two places at once and what would you get from here that you're not already getting by having appealed the decision.

Ms. Lerner: So, I will be happy to answer that. We have already consulted with the land court judge who is hearing the current appeal and no matter what happens here today either one of us will appeal that decision to the land court to have the two cases consolidated.

Now, why the Cease and Desist has to occur is for enforcement. All that the other case does is argue that the application which they were advocating for which is to build a new free style, free standing structure and move it and whether you had the authority to issue that decision or not. It doesn't assist the building inspector with any enforcement effort. So in order to ask, for example, the land court to say we need an injunction to stop that commercial use he needs to fulfill his statutory obligation of issuing a Cease and Desist Order. He is required by that statutory scheme when there's a violation, he must

investigate and issue a Cease and Desist if he finds a violation. Now it may be, if they decide in favor of the ZBA's decision that that new free standing will resolve these issues. However, they are separate because one's an application for the permission to do something and the other is related to the existing structure as it stands on the site.

**Mrs. Rando:** But it's used as a business.

**Ms. Lerner:** But it's used as a commercial activity and as referenced earlier to the school busses, that's a private entity. The school bus contract, they put it out to bid. People decide and the contract is made. We're not involved in the contract of where those busses are housed or what their communication equipment is and so I hear in their arguments that they are trying to say somehow the city benefits from its existence or from either use of it and they are benefiting, they are deriving funds, the rental and later on, in fact, I think it's the next exhibit in your packet, there's a handout that comes from an on line advertisement from the land owners. There's also some leases that were in existence and discoverable just by an on line search of the property at the Registry of Deeds showing the profit that is gained with this leasing of the tower space and that's what makes it for commercial activity. The photographs that were shown were also evidence of commercial activity. If it was the personal 75 foot tower for personal use, there was no need to build up the earth, you know, I don't know at five feet or some point to destroy the park. There are photographs in here that show you the walking paths are named. They are walking paths and they have turned into these giant areas to turn around commercial vehicles and there's a gate that bars the public access to the city park which is how it all came to this building inspector's attention.

**Mr. Hickernell:** So I don't want to ask you all the questions and not save any for Mr. Forte, but I do want to try to establish, is it disputed or is not disputed that at some point since 1962 the city or some other of its agencies have paid for the use of communications from this tower.

**Ms. Lerner:** It is disputed and the contrary Affidavit is submitted. It's the last exhibit here.

**Mr. Hickernell:** And the Cease and Desist Order, I mean it's a very long letter but it seems to be addressed very generally at commercial use in addition with the safety issues. Is there any separate action taken because of all these new structures on city land or is it all sort of subsumed within this one.

**Ms. Lerner:** No, the building inspector is only able to act within his statutory scheme so the building code and the zoning code, that's what he enforces. So the trespass issue with respect to what has happened to the city park land actually will fall and I believe is being addressed by the Park and Rec Board and they are investigating whether or not to bring trespass actions. It is the building inspector's hope that this will encourage the land owner to put the earth back in its original state and perhaps seek another avenue of relief. And that it's not before you, the ZBA, because in essence they are asking you to grant a use variance. And after 1974 or 5, you no longer have the power to grant a use variance. The entity that has the power would be the city council, if they went, not now because they don't have the power to grant a tower in a residential zone either under our current code. But if they went to the city council and pursued a zone change there is the possibility for relief to be granted by the city council, the correct entity that is in charge of towers in the City of Waltham.

**Mr. Hickernell:** So all those, I think, probably disturbing pictures there's evidence of commercial activity. You're not going to get an order from us saying make that better. That's going to be pursued by the trespass action, if at all.

**Ms. Lerner:** Correct.

**Mrs. Rando:** Mr. Sergi do you have any questions at this time?



**Mr. Sergi:** No, but I'm just sitting here listening to all this, I have been sitting on the ZBA. I don't know if it's been ten years, Barbara?

**Mrs. Rando:** At least.

**Mr. Sergi:** I mean probably longer than that. I've sat on this case a number of times and I have to say, shame on the city. I mean to sit there and tell us that we weren't presented all the facts. It was a public hearing, a public hearing. The legal department knew about the public hearing and in all due respect to Mr. Forte, he wasn't here, but there were different building inspectors that were well aware with what was going on with that hill. I just feel like, boy, it doesn't seem like we are working together. These are all good facts and I wish I had them but I did not and I feel a little betrayed and misled in a number of ways but by all parties including the city. The city has an obligation, I believe, to stand up not after thirty years to say something but maybe say something a little bit sooner. And I'm not, I salute you sir, you know, I think that maybe we should have had some inclination of this a little sooner is my point.

**Ms. Lerner:** There is a very strong body of law that exists to insulate the building inspector to help him because clearly if there were other actors that looked the other way or made some arrangement that was outside the public's, without them being able to have the opportunity to weigh in. If those entity didn't have the power to do that, there's a nice body of law that supports that any mistakes that a city entity or city actor has made do not equitably bar the building inspector from enforcing his building code and the zoning ordinances for that very reason because the citizens are entitled to enforcement. So, there's a strong body of law that says, you know what, when a city entity makes mistakes, don't do what they are supposed to do, that that inaction does not prevent a bar to his action today.

**Mr. Sergi:** I understand what you are saying but we sat through a number of hearings. We sat with the residents that were directly impacted by this and we sat here and the petitioners had agreed to do a number of things that was bettering the situation from what I understood, in my opinion, and not to have anyone else stand up and say there was a violation of the city zoning at the time, just a clear lack of - - -

**Ms. Lerner:** As soon as the building inspector, as soon as myself were made aware of the situation, legal representation was given to this building inspector, to pursue the action, and unfortunately it - - -

**Mr. Sergi:** But where was the Park and Rec at that time? The Park and Rec was mentioned a number of times at those public hearings. They did not show up. My understanding is that they did not show up. They were in agreement to what was being said.

**Ms. Lerner:** I'm not sure, and I'm not speaking for them but I understand that many department heads or boards are not able to show up at hearings unless they have been specifically invited to attend. And I don't know if that was the case or not but perhaps that might have been one of the reasons.

**Mr. Ssrgi:** Okay. It's a public hearing.

**Ms. Lerner:** In their private capacity but to attend as a representative of the board, that they sit and to speak in any regard on a matter that is pending before you, the invitation you know - - -

**Mr. Sergi:** I find it hard to believe that there is no other department, no other person in the city knew what was going on for over thirty years, I'm just sitting here in amazement.

**Ms. Lerner:** But we are doing it right now.

**Mr. Sergi:** I understand. That's enough said.

**Mrs. Rando:** I can understand Mr. Sergi's frustration because up until 1972 it was legal. From 1972, no ward councillor, no councillor at large, the Park and Rec. It just happened to be thrown on our lap many years later.

**Ms. Lerner:** I know you can see it but it is deep within the city park. It's not as if residents are interacting with the tower. I mean the fall zone concerns residents. but - - -

**Mr. Sergi:** At the public hearing I remember the residents specifically, the DeCola's and they had agreed because this tower was being moved further away from the residents, that they felt better about it. They felt that the new structure would be better. I mean it would be stronger.

**Ms. Lerner:** When the people that enjoy the park saw what was happening and that's really how the Park and Rec board contacted our building inspector and how they all got involved because the people that travel those trail ways were impacted.

**Mr. Sergi:** People voiced their opinions at the hearing and we thought we had addressed those concerns at this point.

**Ms. Lerner:** And I think you thought so and were sort of misled to thinking you had a framework where you could make that work.

**Mrs. Rando:** The frustration also was because we don't have any representation. We are trying to do the right thing here that goes back to 1962 and 1972 as legal and after

that for what 40 years nothings been done. Now we are trying to do the right thing too by evidence.

**Mr. Forte:** First of all when this hearing was going on I was still trying to get to work without a GPS. So I'll just tell you that I was still fresh on the job. I think it was March 10th. I was still putting fires out and just trying to dust off my desk and so I didn't have a chance to attend that hearing.

What I did notice right away upon discovery of the decision that was made here by the board on March 10th was that it was a unilateral argument. That there was no way that I could have possibly represented the opposite side of that what may or may not have happened. What I did notice is that the procedure for an appeal is that an application comes to us and we put a stamp on a plan and say it needs relief from these two things. I find it to be quite ambiguous. I don't know if you received any letters from me. I think I wrote one letter on an appeal, I wanted to make sure that you understood. So I think in the future to avoid this kind of thing, I think that my involvement with helping the board to understand the zoning ordinance would be certainly my responsibility. You know my job is to not only enforce the code but to educate people on it and I think that I would like to make myself widely available as much as the administration would allow me to be available to answer specific questions. I mean, I am specifically supposed to be the expert on the zoning ordinance. I've got a long way to go before I understand it completely and know all its workings but I do have a law department to confer with and what I will try to do in the future is try to elaborate on these particular types of things especially, where, as Attorney Lerner said, you know there were several different things that you were misled down the path and if you could just go to the transcript of the meeting, the first six or seven pages, and I don't want to bore you with details. I know we all have got places we want to get to tonight but I just want to touch on a couple of things.

If you start right off in the beginning where Attorney Ed Bigham starts off, he says, "The Antico's entered into an agreement with the City of Waltham to erect a tower on the property. I have never seen any such written agreement that they were allowed to erect anything except a seventy-five foot radio antenna and that at the time would not have been an agreement. It would have been a building permit. So, that's the first thing that I noticed. Seventy-Five feet that's allowed as of right. That's not something that a city would make an agreement to. It's something that a person is entitled to.

If you go to line #9, it says that the Antico's were required under the agreement to provide space for transmitters. They may have provided space. I don't know that they were ever used but here again, the City of Waltham, Police, Fire and Public Works, again as Attorney Lerner had alluded to, there is no written contract. Therefore there is no contract. So in many, many different instances, the applicant's representative made his own assumptions and I'll tell you the biggest one where he says that the tower is not noncompliant, it's nonconforming.

If you go to page #6, its on the top, but its 3-1015/39. On that particular page Chairman Rando said did you say it was noncompliant and Attorney Edward Bigham replied, no not compliant. If it were noncompliant it would have meant that we didn't have a permit to build it initially. Now, the only thing he had a permit for initially was to build a seventy-five foot tower. You know there was a lot of smoke and mirrors back here and had I been here to be able to argue that I would have buried this argument. There would have been no doubt at the end of that meeting in your mind that this is a noncompliant tower. And I say that because whenever I have to make a ruling or a finding, it's only based on facts. I'll give you an example. Somebody buys a three family. They are allowed a two family. They're in a two family zone. I check the property file. The property file is evidence. It's public record of the property. There's no evidence in there saying that at anytime was there ever a third apartment created lawfully. Well, guess what? They are not entitled to it. It is a legal two family. They get an order to cease and desist and to vacate

the premises or apply for a special permit and go the right route. It's the same thing with this. The only thing I deal with are facts and records and if there is no fact and no record then its illegal. And that's kind of how I found this whole thing.

So to sum up my violation notice, everything that I cited in there is based on fact. The applicant never proved to the department that indeed it was a nonconforming structure because it would have had to be legal at the time and I think there were several inquiries but there was never any factual evidence. In our records, we never found that to be nonconforming. It's always been noncompliant. And I can't answer to what happened prior to when I got here, but unfortunately I think everybody's luck changed in January 28, 1965, when I was born. So that's everybody else's unfortunate circumstance. But the fact that it's here and it's here now I am asking you to uphold this enforcement order so that it can go to the proper legislative body to be agreed to the way it should be. I really don't think this is something for the local board to handle. I know that you are limited as to the amount of knowledge that you have and certainly this is by no fault of your own. You know, you only based your decision on the information that you had, but I would say that you were grossly misinformed. So I have the unfortunate news of telling you that but I also have the advantage of being able to correct it. And so, that's what we are here tonight to do. We are here to correct an action that has been incorrect for several years, and probably several decades. So I ask you to uphold my decision. I don't know if there are any other questions.

Mrs. Rando: Ms. Gelineau?

Ms. Gelineau: Do you know is there any jurisdiction of the FAA?

Mr. Forte: I can elaborate on that actually. The FAA only regulates the height of towers as it relates to aircraft flying by. The FAA does not get involved in local permitting nor do they have any purview over the use of a tower only the fact of its height and whether

it requires beacons. I don't know if Attorney Lerner wants to elaborate a little bit more on that, but that's the basic - - -

Mrs. Rando: Mr. Cotton?

Mr. Cotton: No questions.

Mr. Hickernell: I just want to be a little bit careful I mean you've already in land court and you're probably making some of these same arguments there but I want to make sure that our focus on the cease and desist order is not taking on the stuff that's already before the land court. I think that there's going to be some overlap. I want to make sure that we are as narrowly focussed as we can be as a board on this. To what extent do we really have to decide or agree with you that we were given bad information as a board previously. I'm not sure we do. I think we look at the statute and we look at what the current information for us is. I don't think we have to really reopen or or re-litigate either the 2013 or 2015 decision.

Mr. Forte: If I may elaborate a little bit on that. As Attorney Lerner had let you all know that regardless of what you decide this is going to end up back into the land court anyway. By either upholding or denying my order, either way I don't believe it's going to change the fact that you granted a variance on this. The action if we have our way will get reversed but it all will be kind of grouped in. So in recognition of the facts, that's something you probably have to confer with the law department about regarding if you decide to uphold my decision —

Ms. Lerner: Again, in my capacity as representing the building inspector, to answer your question you're deciding factually based on the evidence that's been put before you by the building inspector whether the use was noncompliant or nonconforming. So that's the narrow issue you can decide so that very first fact if you look to the zoning code that was in

effect at the time and that's the provision that says you can't have commercial activity, nothing for personal gain and you look at the building permit and the street card and you will see that all that was authorized was the personal use then the factual determination that the building inspector is asking you to uphold that he made is that it is a noncompliant structure and therefore you would be affirming his factual determination that it was a noncompliant structure so that it is illegally being used for commercial purposes and so you're affirming his cease and desist to stop all that illegal commercial use at that site. So it is that narrow.

Mr. Hickernell: Okay, that's what I was thinking. Since you are all going to be going up back to the land court anyhow, why don't you guys just stipulate your decision for us to sign and take it up and it will go away. It was mostly a joke.

Mr. Sergi: I totally agree with that but anyway Attorney Lerner, I feel that we are on an island here. We don't have legal representation from the city's law department and obviously there is a petitioner here that is represented. We are not represented. I'm not sure I feel comfortably in making a decision tonight without consulting with an attorney. So my question to you is what is the proper procedure for us to pursue counsel?

Mrs. Rando: I've done that before. If I remember correctly, we went before the Mayor and asked for her permission and we then had to go to the council for their approval of whatever from there.

Ms. Lerner: And I do point out, you're making a determination that you would make on any other case. It just so happens that there's an aspect of it that is in court and really you're trying to decide, forget whatever action is in the Appeal Court. Right before you, you're just trying to decide, is the tower noncompliant in 1962 when it was erected but it changed its use from the hand radio personal use to something else. Is that noncomplying



or do you think that it somehow was nonconforming. He's made very intelligent arguments.

Mr. Sergi: Well that's what I would like some help with, with a legal representative that has my interest at heart as a board member.

Ms. Lerner: So there is a process and procedure so that when the legal department is representing the building inspector in a matter there is a process that you as a board can vote to request that the chair make a request to see and pursue whether or not funding for an individual counsel for you.

Mr. Sergi: I would like to test that. That's my opinion, I don't think there is a better case that I can think of that would warrant a request of that nature.

Mrs. Rando: And what are you asking the attorney that we hire?

Mr. Sergi: I want them to give me their opinion.

Mrs. Rando: Of the entire case or just the cease and desist.

Mr. Sergi: No, this argument of nonconforming and noncompliant. I would like to know because we have been presented with a number of facts along with this case and I thought that the nonconforming argument that we ruled on before was pretty convincing. And now I'm hearing that it's not, that we were led down the wrong path, that we weren't told all the facts. So, that's my concern.

Mrs. Rando: I agree with you up until Attorney Lerner brought into focus the 1962 agreement that it was just a hand radio just for personal use. So from that point, like she

said that's the foundation so it's only for personal use. They don't have the right to use it for business, and he is.

Mr. Sergi: But, it's been in existence since 62. Okay, I mean, if your convinced, I'm not.

Mrs. Rando: I'm not convinced on the entire case and I'm confused.

Mr. Sergi: I would just feel comfortable if I had legal representation that is representing us in giving us the correct interpretation of one that would not conflict with either of the two viewpoints here. A separate opinion if you will, Madam Chair.

Mrs. Rando: How do all the board members feel?

Mr. Cotton: I don't think we have enough information to vote on anything, there's such confusion and we don't have representation. I think the whole case should be continued until we get this clarified. As he said, no matter what happens, its in front of the land court. What are we doing here?

Mr. Hickernell: When do you go next to land court?

Ms. Lerner: I think we have a court date in September. We were anticipating the twenty day appeal period from when you issue the decision and then consolidating that case with the land court action.

Mr. Hickernell: So, I mean I think I suggested early on that we probably want to continue this anyway and at least chew it over if not go to the Mayor and I would definitely if you have some cases for us, I would like to see them and obviously counsel for the petitioner has his cases also. We will be happy to review those. I think I would make a

**motion that we continue it. I guess we've got more to do before the hearing is closed anyway. But I did want to address the Petitioner's counsel again at some point.**

**I'll make a motion that we continue this case, not close the hearing tonight, but continue the case until such time as we've had a chance to evaluate the arguments a little more closely and hopefully we can do it in a way that works well with the parties' land court schedule.**

**Mr. Cotton: I'll second that motion.**

**Mrs. Rando: First of all, I'm going to see if there's anyone in the audience that is in favor of this petition so I can close the public hearing.**

**Is there anyone in the audience in favor of overturning the cease and desist order?**

**Seeing none, is anyone seeking information? Seeing none, is anyone in opposition?**

**(Eight people raised their hand in opposition.)**

**Is there anyone that would like to come to the podium and speak?**

**David Kehs, 76 Midland Drive, Waltham: So I'm not an abutter to the locus but I am a frequent visitor of Prospect Hill Park in as my interest. You may recall, I had spoken at the previous two hearings about this issue and I actually brought up many of the issues that Attorney Lerner brought up today but I never set foot in law school. So I felt very outdone when it was me against Ed Bigham. I even brought up the issue that this cease and desist order is based on, the commercial use of this residential property but when Attorney Bigham answered he addressed some of the things that I talked about and then sort of ignored the others and then that was sort of the end of the hearing. It wasn't really an**

adversarial situation like you have in a court room where you have both sides presenting their arguments. It was just them and me. But I have done a little bit of research. I just wanted to show you a land court case that I found. (Mr. Kehs submitted the court case to the board.)

Anyway, the case has to do with a residential zone and a resident who was renting out their house to hold weddings and the neighbors complained there were all these noisy events and weddings all the time. And eventually they took it to the zoning board which ruled that it was an illegal use of the property and they appealed it to land court and the land court agreed with the zoning board that it was an illegal use of the property and the main point was the structure was completely legal because it was a house. The activity was legal because it was people having a party, preparing food and enjoying themselves and the only part that was illegal was the commercial use and it was being marketed through the internet as here's a place where you could come and have a party and have weddings because that was a commercial activity in a residential zone, it was disallowed. So, I'm just pointing this out that the land court has taken the same position as the building inspector in this case. I ask you to affirm the cease and desist order.

Mrs. Rando: Is there anyone else that would like to speak?

Sonja Wadman, Program Director, Waltham Land Trust Inc, 240 Beaver Street,  
Waltham: The Board at the Waltham Land Trust urges you all to vote against this appeal. We have several concerns about the tower which are summarized in a letter that we have provided. (Ms. Wadman submitted a letter dated April 6, 2015, from the board and then she read it into the record.)

Mrs. Rando: Is there anyone else? Seeing none, the public hearing is closed.

**Mr. Hickernell, do you want to make your motion again. Do you want to wait until after the land court's decision?**

**Mr. Hickernell: No, I will make a motion to give us enough time to at least consider the arguments and evidence that's presented here and if you decide to go to the Mayor and ask for funds for counsel then we could then address that at our next public meeting.**

**Mr. Grossman questioned if the hearing should be closed and the Chair stated she would withdraw her statement that the public hearing would be closed.**

**Mr. Hickernell: So you will already have been to court.**

**Mr. Grossman: We will be in court that afternoon, but that's okay. We had advised the court, what we had done was set that date as a check in date understanding that the hearing was July 21st and there may be a continuance or two and we're very early on, I don't think that Judge Long is going to be concerned. He will at some point but he certainly understands that this case is coming.**

**The board set the date of September 15, 2015, for the continuance of this case.**

**On motion of Mr. Hickernell, seconded by Mr. Sergi, the board voted to continue Case No. 2015-09 until September 15, 2015.**

**Roll call: Mr. Sergi, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. Cotton, yes and Mrs. Rando, yes.**

**Mr. Hickernell: Can I ask the petitioner a few more questions? We have made a motion to continue this and we haven't closed this hearing. So, first of all I want also to thank you for your presentation and invite you to submit any case law that you may have**

on the issue of the noncompliant vs. nonconforming and whether there's any statute of limitations on one of those on the use, if it is a proper use but I think we got your brief on your argument as to why the 2013 decision should be observed and should apply here. So you don't need to write anything additional on that unless you have something new on that particular point.

Again, I'm not interested in and I don't think that the board is interested in trying to resolve facts presented by both sides here and I think we want to look at it as narrowly as possible. Do you agree that the real issue that we have to decide is can we go back and look at what the situation was in 1962 noncomplying vs. nonconforming or is there more to it than that? Again, and I understand you've got a question of the 2013 zoning decision that you've kind of relied on - - -

Mr. Grossman: Could you ask that again. I'm not sure I understand.

Mr. Hickernell: So let me put it differently. What's the narrowest question we can answer from your point of view to resolve your petition?

Mr. Grossman: From my point of view, the narrowest question is does the 2013 decision conclusively resolve the question as to the legality of the previous nonconforming use of the tower?

Mr. Hickernell: Good, that's good. I thought it might be. Is there anything, so, again, trying to keep this really focussed, anything additional you have in response to the city's arguments would be welcome and if you could get it to us ahead of time. And to the extent, if possible, if you could send us a PDF of the actual decisions or statutes or regs that you are relying on ahead of time.

**Mr. Forte:** Madam Chair, just a question. If both sides confer with each other on the evidence that they present, would that be available for both sides? In other words he's going to present cases that support his findings and we are going to submit cases.

**Mr. Hickernell:** You can feel free to show them with each other if you think it will make for more efficient hearing when we get back together but I don't think we ever required people to do that.

**Mrs. Rando:** No we never have.

**Mr. Forte:** Shouldn't it be available for display?

**Mrs. Rando:** Yes, its supposed to be.

**Mr. Forte:** It should be available for public view I believe a certain amount of time before the meeting. So we've got to find a way to get that out so that the public not only can look at it but we can to.

**Mr. Hickernell:** It's submitted to the Law Department and it will go in the case file for the public to review and we'll get copies of it sent to us.

**Mr. Forte:** Is there a timeline as to when we can submit evidence for the next meeting?

**Mrs. Rando:** We ask for it at least two weeks.

**Mr. Forte:** Does the board vote on a deadline for any new information?

**Mr. Hickernell:** No.

**Mr. Forte:** So that day I can find new stuff and I can bring it in that night?

**Mrs. Rando:** Sure. Are there any other questions by board members? (There were none.) All right we will see you on September 15th at 7 o'clock with all the information.

**One more motion is in order.**

**On motion of Mr. Sergi, seconded by Mr. Cotton, the board voted to adjourn at 9:15 P.M.**

*Barbara Rando, Chair*