CITY OF WALTHAM

ZONING BOARD OF APPEALS

September 15, 2015

The Zoning Board of Appeals held a public hearing at 7 P.M., Tuesday, September 15, 2015, in the Auditorium of the Arthur Clark Government Center, 119 School Street, Waltham, MA.

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

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

Mrs. Rando: Tonight we have one continued case before us. Case No. 2015-09 Louis J. Antico and Anthony J. Antico, Prospect Hill Road, regarding the tower.

The first action this evening is for a motion to accept the minutes of the Executive Session that was held on September 8, 2015.

On motion of Mr. Sergi, seconded by Mr. Cotton, the board voted to approve the minutes of September 8, 2015.

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, Counsel for Louis and Anthony Antico came forward.

Mr. Grossman: Madam Chair, when we continued, one of the reasons for the continuance was the board was going to look into whether it could or would retain its own separate counsel and in this case it's the law department representing Mr. Forte, the Inspector of Buildings. So before we get going, I just didn't know where we've ended up on that, or if the board has had a chance to investigate that or if the board needs further time to investigate that which we are happy to do but I hadn't received any communication from Pam Doucette or anybody from the city on that.

Mrs. Rando: The board has not decided whether they will seek that at this time.

Mr. Grossman: Again, we agreed to continue last time to allow the board do that and if that's something the board wants to do we are still willing to allow and give the board time to do that so we can pick that discussion up later tonight if the board has a feeling that ultimately if it still wants to investigate that then we can set a date for another hearing.

Mrs. Rando: Are you saying that you want to continue the case tonight? Is that what you are saying?

Mr. Grossman: Ultimately, if the board feels it needs additional time to determine whether it can or will retain counsel, we are willing to give it. So we are happy to continue to allow the board to evaluate that option. I know from hearing from the board the last time there was some concern from board members, who I think felt strongly about in terms of retaining outside counsel if that option was available to you to help you to assist the legal claims that we've made and the arguments that Attorney Lerned has made and is making on behalf of the Building Inspector. We talked about it last time and from our perspective or mine this really does come down to a legal question and not so much a factual one. It comes down to what's the ultimate effect of a prior decision of this board as to whether or not granting the special permit to allow the modification of the pre-existing nonconforming use and the findings it made in granting that in 2013 are not only relevant but binding. We think they are. We've argued that in the court case that's pending. We've argued that here. This board is a quasi-judicial board. It is not the building inspector. I appreciate that Attorney Lerned, I think has made another filing today. I just received it. I will concede. She tried to email it to me and we were figuring out why I didn't get it. I know she did try and email it to me. We just talked about it. But I haven't even had a chance to read it yet. I got handed it when we convened. So, if anything, I certainly need a chance to review this and respond, so I think we are headed for a continuance one way or another tonight but from a legal perspective, the cases previously cited by Attorney Lerned on that issue in terms of effectively being able to pull a decision back relate to actions by town officials vs. some other cases and the cases admittedly there are some that go the other way would indicate that the court isn't deciding that issue yet because it doesn't need to for that particular case.

Where you are a quasi-board and you make a decision, I mean 40A is very clear. 40A wants finality. It demands finality. It is brutal in its finality at certain times and I think this board knows someone has twenty days to appeal your decision and not only do they have to file that opinion within twenty days, they need to then notify the City Clerk within that twenty day period and if they fail to do that even if they timely file that appeal

and they miss that deadline and they bring that appeal to the clerk on the twenty first day their appeal ultimately will be dismissed - - -

Mrs. Rando: I think that should be something that should be discussed in open meeting rather than for you to talk about it now. But in all due respect, there were other questions that were not answered.

Did we get the engineer's report saying that it was safe? I have not received that.

Can we go back and look at the situation in 1962 about the noncomplying, nonconforming cases. I think we asked you personally and maybe the building inspector also to come up with case law and to get it to us beforehand so that we could get it out to the public because they deserve to be able to see it. It's an open document.

Does the 2013 decision resolve the question as to the legality of the previous nonconforming use of the tower? I have no case law from either side on that.

The response to the city's opinion argument and get it to us beforehand. Use the PDF file, actual decisions, statutes or regulations we need ahead of time. Cases from both sides to support the findings. I didn't get any. Today I did not have chance to read these, I got it late.

The building inspector asked for it at a reasonable time to be able to get it posted to the public and we did not get it. So there's many other issues than just whether we were going in to seek some legal counsel. And I haven't received anything. Why?

Mr. Grossman: In terms of some of the legal arguments we've already made those in our original brief minus then if we had a supplemental submittal on some of those issues that we have an opportunity to submit that. In terms of one of the issues in terms of the

pre-existing nonconforming vs. illegal but protected is not an issue that I thought we needed to brief. And that was really my understanding out of the one issue that was requested is actually one that Attorney Lerned was probably going to address because it was really more her argument than mine.

Mrs. Rando: I believe on Page 46 of the minutes of that meeting, I think it was Mr. Hickernell is the one that said: "So let me put it differently. What is 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?"

Then Mr. Hickernell went on to say: "Good. That's good. I thought it might be. Is there anything, again trying to keep this really focussed, anything additional you have in response to the city's argument. That would be welcomed and if you could get it to us ahead of time and to the extent, if possible, if you could put it into a PDF file of the actual decisions." So he wanted more. He wanted actual decisions, statutes or rates. And so I guess he wasn't satisfied with what was just in the brief.

Mr. Grossman: Then I misunderstood the exchange but when we had that exchange and I said that that's the narrowest question, I even had in my notes I thought that that issue, I thought Mr. Hickernell had said we had had enough, That we provided originally and he was looking at a different issue on the pre-existing nonconforming vs. illegal but protected. If I misunderstood, I apologize and I would be happy to provide certain additional information if that's now the question being asked.

Mrs. Rando: The building inspector: "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."

Does the board vote on a deadline for any new information? New information would be something short if you could just give us to review in a five minute recess or you could recite.

Mr. Grossman: I am not arguing. I'm not saying I'm trying to submit something now and want you to read it. It was because, as I looked through my notes, I didn't see an additional issue that I needed to submit a supplemental statement of. As I said, if I misunderstood and you were misunderstood by my own notes as to the question that Mr. Hickernell asked and the information that was being requested, that's on me and I am happy to now understanding that question you're saying whether the board can retain counsel and re-continuing, I will be happy to provide additional information and do it in the two weeks prior to the next meeting. As I say, I wasn't trying to submit new information, so that was all. I do have new information from Attorney Lerned that was submitted today that I haven't read and I think you haven't read. And so certainly any response for the next hearing, at least fourteen days before, we would incorporate a response to whatever you received today.

Mrs. Rando: Mr. Sergi, do you have any questions or any opinion at this time?

Mr. Sergi: I just want to reinforce what the chair had said. I have the same type of feelings. I think we asked for a number of items for us to have. We've been told that we have been misinformed in the past. We didn't have all the facts. So we are trying to gather all the facts this time apparently and make sure that we make the right ruling. There's questions personally that I have in my opinion that I may want seek legal counsel as well for the board's sake and we still haven't resolved that yet either. So we are still discussing that as well. So, I agree with you Madam Chair.

Mrs. Rando: Mr. Hickernell?

Mr. Hickernell: I have had a chance to read Attorney Lerned's memorandum, but certainly I think everybody else ought to have the same opportunity and you certainly should have an opportunity to read it and respond. I don't have any further questions or further information. I think last time I was just, not so much demanding the submission but inviting you to give us your best cases and its too bad that ships passed in the night on that one.

Mrs. Rando: Ms. Gelineau?

Ms. Gelineau: No, I have no questions.

Mrs. Rando: What is your opinion? Are you ready to go forward?

Ms. Gelineau: Personally, I am ready to go forward. Again, I always defer to the consensus of the board.

Mrs. Rando: Mr. Cotton?

Mr. Cotton: I don't think we have enough information to go forward.

Mrs Rando: All right, I will entertain a motion if anyone wants to make one to continue the case.

Mr. Hickernell: Before a motion is made, Madam Chair, if I may, the last time we did hold the public meeting open. If there's people in the public who have a new contribution to make, you might give them the opportunity to do so rather than making

them come back every time. Also I would like to hear from Attorney Lerned before we make such a motion.

Mrs. Rando: It is unfortunate that everyone came tonight and it may be continued. I am very sorry for that. I am willing to let everyone speak. The only thing is that we may have more information and we can't ignore questions, but if they would like to speak and haven't spoken before that's absolutely fine. But I will keep the public meeting open because you're going to have more information from both attorneys.

All right, Attorney Lerned would you like to say something or Mr. Forte, the Building Inspector?

Michelle Lerned, Assistant City Solicitor: I am here today on behalf of our building inspector. I did answer all of your questions. I apologize for having the PDF files and cases and I maybe gave you more than you might have wanted but I specifically addressed each and every question that the Zoning Board asked of me on July 25th.

I can briefly recite that for you. And to address the concern about the need for counsel, this is not a difficult case. This is a simple factual determination. A factual determination that the board cannot avoid.

To answer our ZBA member Hickernell's question about what the narrowest issue could be, I addressed that on Page two of my submission. The narrowest issue is look at Exhibits One through Eight that were submitted to you on July 25th. Those are the exhibits that evidence that the tower use occurring on this locus is commercial use. Those exhibits evidence that at no time in the City of Waltham was commercial use permitted as of right in a residential zone.

Mrs. Rando: Even in 1962.

Ms. Lerned: Correct. And if you were to look at those submissions, Exhibit Two specifically gives you the language in the Zoning Ordinance that was in effect at that time, I referenced it on that title page when it was submitted to you, it's page 22, Article 27, Section 3, and the language that's important to note there says that any permitted accessory use and now I am quoting: "shall not include any activity conducted for gain." Now, this is interesting because we do have a residential tower in, Im sorry, a commercial tower in the City of Waltham in a residential zone. That's the Sachem tower. And what's interesting about that case is they did it the right way at a time when this zoning board was allowed to grant use variances, so that's prior to the 1970s, they came and sought a variance from that very quote I just read to you.

If you look back at one of your previous cases, Case 2011-21, one of your findings of fact specifically references that the lattice tower when originally permuted was not a prohibited use in the A-3 Zoning District and the original variance that was sought in 1964 same time frames was for the purpose of permitting an activity conducted for gain which was not permitted in the Residential A-3 Zone. That was the reason that they had come in 1964 to apply and seek and obtain that variance which was a use variance at a time when the board had the power to do that. Today, the board doesn't have the power to do that. And the only evidence that is before you, the ZBA, is a building permit that says a seventy-five foot tower was granted for personal use. That was given to you, that's Exhibit One.

Permit No. 567, the language on it is very clear. The landowners have conceded there is no other permit that was issued by the city. Now what they try to say is there was an agreement, a verbal agreement, that we haven't enforced in many, many years. What I gave to you on Page One are cases that seem on all corners to be entirely parallel to the fact pattern that's before you. There are cases where the previous building inspector had discussions. There's cases where lengthy periods of time lapsed and no enforcement actions occurred. But in these cases, and they are Mass Appellate Court Cases which bind the land

court if this matter gets appealed there too. They specifically say, conducting an illegal use for a very, very long time doesn't make it legal. It can't be simpler. It was never legal. It was never an existing nonconforming use. It never had legality attached to it that deserves grandfathering protection. It was alway illegal. From the second that they changed the use from the personal seventy-five foot tower at whatever time it occurred, it's an illegal commercial use. And that's the end of your inquiry. That's the reason you must affirm the cease and desist. It's that factual determination that has to be decided.

Now, the landowner tries to say that, well in 2013, there was a ZBA grant of a special permit. Putting aside the fact, we're not mentioning to you that that special permit lapsed. It's expired. They did not construct the tower to which you had granted the relief and he cites some cases and honestly admits well there's some case laws that says on both sides whether or not a ZBA decision has preclusive effect. So they admit that. And I have given you the two cases that show the Mass Appeals Case and also a Land Court Case that show why the ZBA decisions on non litigated matters should certainly not have preclusive effect.

The cases that the landowners' counsel cite are not really on point because there when the case, when the ZBA acted, was in their authority. So when the ZBA had the power to do a certain act and that decision is valid then the courts might be disagreeing and I don't necessarily think that's so but there might be a question about whether the ZBA decision has finality. He talks about 40A and how it's so important. That's when the ZBA's decision was correct, jurisdictionally. Here, back in 2013, because there is no way that the facts before you make out a nonconforming commercial use. The facts say one thing. That means in 2013, the statements of facts to the contrary that are in your findings of fact section, often the first draft is presented to you by the landowners, those facts were just stated. Again, you were provided with incorrect information and you relied upon that incorrect information to decide whether or not the nonconforming use as it was told to you to be could be expanded. It's the same situation that has occurred in the 2015 decision.

Apart from the 2015, there's some movement of the tower now occurring but it's the same ultra viral act in effect the use that what effectively happened Is the ZBA granted a use variance when it didn't have the power to do so. So, logically, how can a decision that you didn't have the power to rule upon bind the building inspector from enforcing the zoning laws? That defies logic. It also defies case law. There are ample cases that I provided to you on Page Two of my submission that show exactly that. Circumstances where the building inspector, even in a tower case I've outlined for you, made a mistake in their earlier ruling that was allowed to be revisited and corrected because there's a strong body of law that says you cannot have municipal estoppel against a city. And the quote that I would like to give you from the bottom of page two: "The right of the public to have the zoning by law properly enforced cannot be forfeited by the action of a municipality's officers." So, that applies in two instances. It applies to any verbal arrangement, any proported arrangement because we really have no evidence to that that has come before you. So any sort of non public, because it certainly didn't follow what the proper channels were back in 1962 or any time through today's date because there's no record of them coming to the ZBA for a use variance at the time when that could be granted. There's no record of them going to the city council for every single piece of equipment that is on the tower as you can see in Exhibit Three that was submitted on July 25th. Many of those photographs depict lots of various pieces of equipment and under our current zoning requirements those pieces of equipment have to be authorized by the city council and never in a residential zone. So if they were in a zone where they were permitted to have a tower they would have to go to the city council each and every time. There's certainly no evidence of that. They just did it.

So, I've given you a vast body of law and as Exhibit A, all of the cases that I relied upon are there so you can read them for yourself and see that what those cases do is say, hey, if a municipal officer does something they are not supposed to do. make the mistake, the building inspector is not bound by that because the public has a right to have zoning enforced. Now, your decision that has that mistake in it, in 2013, well, it's not six years past

the issuance of that decision. So even looking at the law as when something is permitted, when the building inspector issues a permit, they could even build a structure and the building inspector has six years to fix an error and courts will say, no, the structure has to come down. Here the error is in a 2013 lapsed decision that is void. Null and void because unfortunately you acted beyond the scope of your authority based on information that was given to you incorrectly. So you are not bound by that 2013 decision and you cannot escape the factual determination of whether or not Exhibits One through Eight establish that it's a noncomplying use and noncomplying structure.

Now, the only other issue before you is, all right you have a structure that is standing. The law clearly says that the use cannot occur, What happens to that existing structure? It appears its been erected for over ten years but the law says it's their burden to establish that and all the building inspector asks in his cease and desist order which is the document that you are charged with reviewing to see if it's correct or not or should it be overturned or should it be affirmed. All it asks for is tell us why you think or even what you think can remain legally and the dates that they were erected because the building inspector hasn't had the opportunity nor have you to examine whether all those pieces of equipment have been erected within that time frame, you know that ten year time frame. In addition, the use that is associated with that will never be protected and our zoning board member,

Mr. Hickernell asked specifically for the cases that will support the language in Chapter 40A, Section 7 for the fact that Chapter 40, Section 7, does not afford protection to use violations unsanctioned by a permit. I provided you with three really good on point cases that specifically reinforce that principle. So, I'll just end with returning to the fact that in my opinion as Counsel for the Building Inspector, again this is not a difficult case. The question of whether or not the evidence that he presented is Exhibits One through Eight factually presents an issue where the use occurs on the locus in noncompliant is something you do, you know, many, many times in a year. That's not something that necessarily requires the advice of outside counsel.

The second issue, which is a legal issue, certainly whether something has an preclusive effect, I have certainly given you enough information for you to make that decision and if you chose not to reach that, that's a defense that the landowners have presented. That issue will be resolved by the land court. So, again, I just end with this has been going on on the property some point after 1962 when they were permitted, it was authorized. It's not nonconforming at its inception. It complied for personal use, seventy-five foot tower for personal use. Some point thereafter, and you don't need the exact date, we just know today what is standing and you know from the records before you that every single zoning ordinance from the pre-tower construction to today's date did not and does not allow a commercial tower, commercial activity in a residential zone. And to me, that ends the case.

Do any of the board members have any questions?

Mr. Sergi: Thank you for your summation.

Mrs. Rando: I think people also are not aware that the only thing that is before us right now is the Building Inspector's cease and desist. It has nothing to do with the land court case that is pending.

Ms. Lerned: Correct.

Mrs. Rando: Thank you. Did I cut you (Mr. Grossman) short? I mean she did go on. Do you want to say anything?

Mr. Grossman: I do. In part, she went rather strong when I was talking about 40A. As I say we view a couple of things very, very differently. One, I viewed the cases that she cites with regard to a municipal officer. It's different than a municipal board. A municipal

officer taking an action and not being able to waive enforcement because I read the same cases she had in terms of the building inspector who has made a mistake and issued a building permit and shouldn't have issued that building permit but there was no other relief granted. Just as a general example, I want to build a house. I want to put it fifteen feet from the property line and that particular zoning district requires twenty and issues a building permit. And they start building and somebody realizes that it's too close to the property line. The building inspector looks at the plan and says, you know what, I think you're right. I thought it was a different subject. We had information it was in a different zoning district, it's not. It's in A2 not A3, it's too close to the property line, you've got to stop building. The major difference here is that there was a board action. Board action has an appeal period attached to it and if someone disagrees with that action they are required to file an appeal within twenty days and they are required to notify the city clerk within that same twenty days. If you don't do either, you are precluded from appealing that decision. You can disagree with it. You can think it was wrong. You can think it was based on incorrect facts that you would have brought to light had you been present at the hearing but that decision is final. And Mr. Forte said this at the last hearing: "If I had been here for the last time, I would have done this. I would have brought this to your attention. I would have submitted this information. And maybe he might have. However, just as the 40A gives him aggrieved person status as it does an abutter, it gives his office, not Mr. Forte individually, his office, the office of the building inspector that standing. There was the building inspector in the City of Waltham who held that office. And he steps into those shoes. And that building inspector did not appeal the 2013 decision. No one appealed the 2013 decision. And Attorney Lerned can disagree with the decision and she can say it was based on bad information and she can say it was improperly done on facts that were misunderstood. All of those arguments can and should have been made within twenty days after that decision was filed and they weren't. And there's a major difference between the actions of the building inspector and the actions of the board because 40A wants finality.

And if you go down the path that Attorney Lerned asks you to, effectively every decision you make that goes unappealed isn't unappealable. And it's not unappealable and it's not enforceable. If you make specific findings of fact which this board did and does because of the way you do your decisions, you made very specific findings of fact about the tower being legally pre-existing nonconforming, about the use as being pre-existing nonconforming. Every time someone seeks to modify their existing pre-existing nonconforming use and that decision as to whether or not it was legally pre-existing nonconforming was absolutely within your authority. Every time someone goes to modify a legally pre-existing nonconforming use that they have received a permit for before, under Attorney Lerned's theory, you re-open that door. So, if twenty years ago I had a special permit that says I am a legally pre-existing noneonforming use and I am operating that use and I am operating that use in accordance with a permit. Twenty years go by, I want to expand it again and under the ordinance, I can and I come back and I say, look the issue of it being legally pre-existing nonconforming has already been decided. We have been operating it that way and we would like to expand it and we meet those criteria. Attorney Lerned's theory is that you could open that door again, and again, and again and every time you seek to do something on the property that requires a special permit to modify the pre-existing nonconforming use you will be reopening that door and that's not what 40A wants.

And so again, we can talk about the fact the permit lapsed and we request an extension and additionally there are cases that say that the special permit can be told regardless of whether or not an extension has been granted that effectively the court can ultimately decide that, yes, there is good cause and that is told so when she says its lapsed, it's not definitely lapsed, it may in fact be told - - -

Mr. Hickernell: Who gets to decide that? When are we going to find out because I think that's, if it is expired, I'd like to address the implications of that. What you've got is

the right to do something within a couple of years and if it wasn't exercised what do you want for?

Mr. Grossman: The determination as it stands and that's where we clearly disagree. The determination still stands because effectively, you made specific findings of fact. Those findings of fact could have been challenged. They weren't. Now if I decide, you know what, that project doesn't make sense and I am going to modify that project, I'm going to let that go, but I know I have effectively in the bag, I know I've got my previously nonconforming use. I don't need to prove that again. But now I need to show is, okay, it's legally pre-existing. The judge has already decided it's legally pre-existing, so now under the ordinance, I need to show you that I meet criteria to expand the legally nonconforming use. One of the reasons I respectfully disagree with Attorney Lerned on this is, and I had this in another case, if you have to keep going back every time you want to modify that previously nonconforming use you have to go back and show from the inception that it's legally pre-existing nonconforming, you could have to go back thirty years, forty years. fifty years, sixty years, seventy years - - -

Mr. Hickernell: But don't they actually to do that when they come to us? I mean we have to make the findings of fact every single time and if it turns out somebody did a bad survey, we are going to look at that when we do findings of fact. I mean, it's not directly on point, the survey example, but don't we have to make the findings over and over again every time a landowner wants to come to us and say, hey, that pool was great for a while but now we want to put a porch back there and even though you gave me a variance before for a pool they still need to come back to us and we make new findings even if they are the same findings of fact we have to remake those findings of fact based on evidence presented to us. So I'm not sure I agree and I am open to their defense but I'm not trying to agree that the findings of fact we made is immune from reviewing a subsequent petition if we have different evidence.

Mr. Grossman: And the reason I think it's different is when you're changing the question. The question being asked in the first instance is, is it legally pre-existing non confirming. That answer in theory should not change. Once its decided, that answer shouldn't change again. The next question of, okay, I have a legally pre-existing nonconforming use. We've established in a prior case that use is legally pre-existing nonconforming and this is what that use is. Now, members of the Board of Appeals, the project that we have before you is to modify that legally pre-existing nonconforming use that you've already decided and here's why it meets the criteria as to either percentage or not substantially more detrimental. But you're not re-deciding over and over again that same issue of, well, was the original use legally existing nonconforming? And I understand when you come to the board for the first time, that's what you have to demonstrate. And you may have to go back ten, twenty or a hundred years. But that's the defense. But once it's decided and someone, again, they have that decision that this board's already decided then they should be entitled to rely on that and they may to their detriment rely on that by saying I already have this decision. I applied for and received a special permit for this use that's pre-existing legally nonconforming and I have been operating that way for the last X number of years. Now I want to modify that use and they come back and suddenly not only the project that they are promoting or advocating for may not have been approved and it may substantially be more of a substantial detriment and maybe the facts are on the ground. But they effectively could lose everything.

Mr. Hickernell: But has the petitioner in this case relied to his detriment on our 2013 decision?

Mr. Grossman: Well, I would say, yes, because they had that and instead of acting and constructing that tower, they tried to do something that was actually even better for the area and community and build the self-support and now that's been appealed to the land court. And so effectively that's exactly what the building inspector wants to reopen. And if you were an abutter, you would not necessarily have that opportunity and in this case the

building official is more in the shoes of an abutter than as an aggrieved party than as the enforcement officer when he issues a building permit and then realizes he may have made a mistake. The cases are different. The cases that she's citing about a zoning officer issuing a permit and then being able to pull it back are different than the cases that deal with when a board made a decision whether it has a preclusive effect. As I said, in terms of finality, that's what 40A is looking for. And just because a landowner or aggrieved party may disagree with a prior decision doesn't mean that they get to re-litigate the entire thing or cause the board to re-decide everything.

I also want to address one thing and I don't need to defend anyone's honor. The filings that were made in the prior cases had the original building permit. There were Affidavits from Mr. Ohnemus and everything was up front in terms of there wasn't a building permit obtained for either extension and we've made that clear here as well in the findings that I've made. So no one has been trying to hide the ball, so to speak. The applications approved the building permit. The applications included the information from Mr. Ohnemus and the admission from the prior counsel and from the property owner that extensions were done after consultation with the building official and no building permit was obtained so they didn't go out in the dark of night and go do this.

Mr. Hickernell: But we don't have to decide that and if we don't have to we are not required to.

Mr. Grossman: Right. You may not have to but of course, over and over and over Attorney Lerned and Mr. Forte have pounded the table on those issues that you have been lied to and misled. And there was information in the file and there was information submitted and the board made its decision. And to say otherwise, and to say that anyone was intentionally misled as the board may have misunderstood, they may now look at that information and have decided differently but the information was there. It's not that

someone held something back and didn't show you something or affirmatively gave you misinformation.

Mr. Hickernell: I didn't hear her call anybody a liar and I think we should not go there and I think we should stick to the legal and factual determination as again on a narrow basis as possible. And again, I haven't read all of the cases. I've read the memo but I haven't read all the cases provided by Attorney Lerned here and I want to and I am sure that the others do too and again I would be interested in reading what if any cases you may put up against them.

Mrs. Rando: Attorney Grossman, I have one question and you probably have answered it. If we have based our opinion on and been misled and did not get the correct information and made our decision, there's no statute of limitation that you can have if you have done something that is a violation of the use. It's not like you were protected by the ten year statute of limitations because you did something that was wrong, if we believe that.

Mr. Grossman: I'm not sure I understand the question.

Mrs. Rando: It says in, there's a statute of limitations for enforcement against structures that have been in existence for ten years, correct?

Mr. Grossman: Correct.

Mrs. Rando: But there's no limit of statute of limitations enforcing actions for violations of use that's involved. Correct?

Mr. Grossman: Under the ten year statute that is correct.

Mrs. Rando: So, if we made a decision with information that we did not receive, then why can't they go back now and say you're wrong. It would be like someone buying a three family house and finding out that it's only legally a two family and they have been using it as three families. It's a two family on the building card. Exactly. They have to go back to a two family. Correct. And that could be after ten years when its been used illegally. Am I wrong?

Mr. Grossman: It depends on what scenario you are talking about. So if you are talking about a scenario where no special permit or variance or a decision pro-porting to authorize that use was granted and it was just walking into Mr. Forte's office and say this is what we want to do and he gets a building permit. Then after ten years, that structure would be protected but the use would not. But, and this is where we disagree. The difference is the issuance of a special permit making specific findings that the existing tower and uses were legally pre-existing nonconforming uses. And that ten year statute of limitations and the six year statute of limitations with regard to use and structure under the issuance of a building permit are different. That particular version of 40A applies to, if you pulled a building permit, it doesn't apply in the scenario of the special permit.

Mrs. Rando: Why?

Mr. Grossman: There's nothing really statutory.

Mrs. Rando: Well, maybe its just as well that we do continue the case so that we have both sides and we can really digest it. And I think that was the consensus of the majority of the board.

All right, I'm ready to entertain a motion to continue Case 2015-09 to another date. Do I have a motion to continue the case?

Mr. Sergi: So moved, Madam Chair.

Mr. Cotton seconded the motion.

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

Mrs. Rando: All right, let's see if we can find a date that's compatible for all. How is November 24th?

(Mrs. Rando polled the board that that date was convenient for all the members. Both attorneys agreed.)

Mr. Hickernell: As a matter of courtesy, Attorney Grossman, if you are able to submit your argument before the two weeks, I think that will be appreciated by everybody and that will also give the city a chance to be able to review the submission. Looks like you've got two months, so if you can do it a little faster than six weeks, that would be great.

Mrs. Rando: It will be a chance to get it out to the public also.

So, I have a motion to continue the case to November 24th at 7 p.m. I will allow anyone who would like to speak in the public because I really feel it's hard for you people to come out and then not be able to give your opinion. And you will have a chance at the next meeting, I will keep the public meeting open for that also.

Mrs. Rando: Mr. Sergi, how do you vote on November 24th. Do I have a motion only November 24th.

Mr. Sergi, I'm okay with November 24th.

Mrs. Rando: Mr. Hickernell, you're okay?

Mr. Hickernell: Yes.

Mrs. Rando: Ms. Gelineau?

Ms. Gelineau: Yes.

Mrs. Rando: Mr. Cotton?

Mr. Cotton: Yes.

Mrs. Rando: All right, Case 2015-09 will be continued to November 24th at 7 P.M., hopefully in the same room. Now, for the public, is there anyone seeking information on this case that would like information?

Anyone in favor of us not overturning the building inspector's decision.

Mrs. Rando: Is there anyone in favor of the petitioner?

(Two people raised their hand in favor.)

Mrs. Rando: Is there anyone in opposition to the petition?

(Thirty people raised their hand in opposition.)

Mrs. Rando: Is there anyone that would like to come before the camera and to the microphone and give their name and address and give their opinion at this time? I just ask that you don't repeat something that is said.

Sonja Wadman, Waltham Land Trust Program Director submitted a letter dated September 15, 2015, to the board and read the letter into the record.

Delores Kricker, 24 Hillcrest Street, Waltham: I am a member of the Waltham Land Trust and I am just speaking as a resident who has been assaulted by the view of the tower on that beautiful hill, that public park for years. I can see it out on my balcony every day. You can see it almost 360 degrees around the city. I just don't understand how one person can star our landscape and so I would appeal to you to fix that mistake which I'm understanding more about the legal implications from the counsellor for the city, Ms. Lerned. I was very impressed by her argument and I guess I'm even more urging you to fix the mistake. Move the tower. Put in on Bear Hill with the rest of the towers. Have a sunset clause. There's got to be some resolution. I would think that you could find in a creative way that we dissolve this dilemma and I am speaking on behalf of probably a lot of people who aren't even here who look at the tower and wonder, why is it that one person stick up a tower, and I won't say what it resembles, but say, hey city, I can do this to your public land. So, as a nature lover and that's how I feel. Thanks.

Mrs. Rando: Thank you. Anyone else?

Allison Mooney, 81 Irving Street, Waltham: I am a Waltham resident, still a breezer. We chose our home in Waltham in large measure because of Prospect Hill Park. I am fond of nature but the legal aspects intrigued me and I'd like to remind everyone that alcohol was one time illegal and the premise of legality is something which is in some way influenced by the times. The stakes for this particular tower have only increased given the fact that when erected I would say that none of us would have carried a cell phone and

times have changed. So I believe in the living law and that that law is based in park system for public. Our national forests are set aside for cultivation of commerce for the public good and then rented or leased for private good and none of that is happening in our public park. I would like that to be so. I have never comprehended other than the fact that money speaks and power is useful. And now, I would like to say, not as an abutter, not as a board member, not as anyone other than public, that I am aggrieved and I believe I have a right to be aggrieved as a citizen of the country as well as a citizen of Waltham.

Mrs. Rando: Thank you. Anyone else?

Nesters Cruse (?): I am also a hand radio operator KC7IKX. I have the very lowest rating that I could possibly have and I am in favor of private towers for hand ratio operators. However if we were to say that the proponent of a larger tower had the right to have a hand radio tower, there are also FAA Regulations as to how high they can be, the maximum height. And that is controlled by the FAA Code of Federal Regulations, Title 14, Part 77.9 (B). And that says that if a radio station is within 20,000 feet, you need 3.7 miles. There is a formula for high that tower can be. The maximum tower can be 200 feet. However, I think, if someone does the calculations you might find that that tower if it's a hand radio tower, is taller than it needs to be. Thank you.

Mrs. Rando: Thank you. Anyone else?

Susan Reardon: I live at 316 Dale Street in the shadow of the tower and I would just like to put on the record that we use the park on a regular basis and I think it is a blight to have THE tower within a city park. I've had to explain to my daughter many times not to cross the line into The private property while we are in the park as well as well as had to be concerned for safety. I don't know about the fall zone. I've never seen any information on the electro magnetic field and as a parent and a Waltham city resident, I am just concerned about the future of the use of that land. Thank you.

Mrs. Rando: Thank you.

Jennifer Cogswell, 6 Overlook Road, Waltham: I've been a long time resident and before your November 24th meeting I think it would be wise if any of you could or all of you could research Google Cell-phone Tower and incidences of cancer. It may be a stretch, it may have no effect or it might. And two cases in point, my niece lives in Lakewood Colorado and wanted to buy in Golden Colorado, had a lot of friends that were up in that area in the hillside and there was a huge tower. Five or six families that were in proximity of that tower developed cancer, the children. You can say, yes, the tower causes it. And a second case in point was along in Route 2 there was a Massachusetts Department of Transportation building with a tower. It's a hand building that you see when you are heading out to Waltham. It's on the right hand side and two men that have worked there for thirty-four years developed brain cancer. Some of the people in the building were scared that was a sick building because this tower had an impact.

So, I would advise before you make a final decision that this may have an impact as a health concern from the tower or the neighbors, or all of us. Thank you.

Mrs. Rando: Thank you. Is there anyone else? Seeing none, we will close the meeting and we will see you on the 24th. Do I have a motion to adjourn?

On motion of Mr. Sergi, seconded by Mr. Cotton, the board voted to adjourn at 8:15 P.M.

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

Barbara Rando, chair
9/29/15