

**CITY OF WALTHAM
ZONING BOARD OF APPEALS**

October 18, 2016

The Zoning Board of Appeals held a public hearing at 7 P.M., Tuesday, October 18, 2016, in the Public Meeting Room of the Arthur Clark Government Center, 119 School Street, Waltham, MA.

In attendance were Chair Barbara Rando, and members, Sarah Hankins, Edward McCarthy, Marc Rudnick, and Michael Squillante.

Mrs. Rando: Tonight we have one continued case before us. It is Case 2016-25, Joseph R. Vanaria, Individually and Joseph R. Vanaria and Beverlee A. Vanaria, Trustees of Vanaria Nominee Trust, and and that is on 114 Felton Street and 44R Williams Street.

I am going to ask for a five minute recess right now so that we can look over information that we just received.

Ms. Hankins seconded the motion and the board voted to take a five minute recess at 7:05 P.M.

The board reconvened at 7:10 P.M.

Mrs. Rando: The first action this evening is for a motion to accept the minutes of October 4, 2016.

On motion of Mr. McCarthy, seconded by Mr. Squillante, the board voted to accept the minutes of October 4, 2016.

Will the clerk please read the petition in Case 2016-25, Vanaria on Felton Street?

Acting clerk, Edward McCarthy then read the petition in Case 2016-25. Petitioner/ Owner: Joseph R. Vanaria, Individually and Joseph R. Vanaria and Beverlee A. Vanaria, Trustees of Vanaria Nominee Trust, and Joseph R. Vanaria and Beverlee A. Vanaria, Trustees of Lee-Ang Realty Trust in an appeal of the decision of Inspector of Buildings. By letter dated May 31, 2016, the Inspector of Buildings served a Notice of Violation on the Owners of the properties at 114 Felton Street and 44R Williams Street alleging zoning and Building Code violation. Location and Zoning District: 114 Felton Street and 44 & 44 R. Williams Street; Commercial Zoning District.

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

Joseph M. Connors, Jr., 404 Main Street, Waltham came forward.

Mr. Connors: I represent the petitioner. The petitioner Joseph Vanaria is here with me tonight. But I want to introduce you to my co-counsel tonight, Robert Baum. Mr. Baum is an attorney from Boston. We've worked together. We drafted a supplemental brief and he is going to present that particular brief to you and the Affidavits.

Robert J. Baum, Esquire, Engel & Schultz, One Federal Street, Boston came forward.

Mr. Baum: I am co-counsel with Attorney Connors for the petitioner.

Yesterday I filed via email a supplemental brief that Attorney Connors and I worked on. I didn't know if it had been transmitted to all the board members, so I brought

copies with color photos if that would be helpful to the board members as well as an original for the secretary.

I also served a copy of that yesterday afternoon to the building inspector and via email he acknowledged that he had received it.

So as not to waste the time of the board members, I want you to know that I did view the last hearing and from that I was able to understand what was discussed and what the issues and concerns that were being expressed by the board members and what the response of the building inspector was as well my brother counsel.

In putting the supplemental materials together, what we attempted to do was to provide a detailed factual set of testimonies from people who had decades of personal knowledge about the site. And so we have three additional affidavits, the second affidavit for Mr. DiPronio, an affidavit from William Creonte, Sr., and an affidavit from Charles Malone, all people who were not just passingly familiar but very specifically familiar with the Arc Welding site over a period of decades. One of the witnesses going back to the 1930's, others from the 50's, others from the 40's.

And anytime you are trying to look back at historic uses, it's very difficult with the passage of time to find people or to find the kind of evidence that you might have with a more current event, so we try to identify these gentlemen, two of them are in their eighties , business owners within in the city of Waltham for decades and have very specific knowledge and we tried to direct it at the historic uses for the site, the noise and activity on site, the traffic that would come on and off the site as well as another element not presented before to such a large degree, and that is the fact that Arc Welding over the lifetime of its use of the site had a number of tenants and these were cohabiting the site and adding to whatever trucking or heavy equipment in there was as well as vehicles making access and egress from the site and any noise that might emanate from the site and what their hours of

operation were. And in doing that, what we hope to do is to give the board a fuller actual picture because if you haven't lived in Waltham all your life you may not necessarily have knowledge of these facts and what we are trying to get out is what's factually accurate and what we can rely upon.

So with that in mind and since the last hearing, my client has been active in addressing some of the concerns of the building inspector on the site and has done a lot of remedial work on the site which are evidenced in some of the photos that were attached to the supplemental brief. I would submit to you it's a much changed site from its physical appearance and the order on the site then what was the case in the photos that were previously submitted to the board.

In addition, I invited the building inspector to meet me on site and we met there last Thursday with a colleague of his and we spent a good deal of time on the site and from that discussion there was some useful information that was exchanged and some good ideas that were exchanged and I think a consensus that some of the issues may no longer be before this board to decide. So, all in all, in getting to this continued hearing, I think there's been a concerted effort both on the city's part and on my client's part to take seriously and address the concerns and also to provide additional factual information to the board to make its decision and make it in a fair and accurate way.

Now, there remain issues that would be issues of contention and one of the violations, the first violation is the Storage of Heavy Equipment openly stored on the subject property overnight and uncovered unenclosed areas. The affidavit assertions of fact are detailed on personal knowledge and cover decades. This personal knowledge thing is very important because you can't go on supposition, presumed, assumed or anything like that. It has to be people who are familiar enough that on their oath they can say, I have knowledge and I can tell you what was happening on the site. Mr. Creonte, Mr. DiPronio and Mr. Malone provide that evidence. Respectfully, but I give them much credit, the

building inspector said he doesn't have any personal knowledge about the historic use of the site. He's just taking it as he sees it now and making certain assumptions and that was clear in the last hearing because he would say I assume or I presume and I appreciate his candor in talking to me. But we have given some witnesses with actual personal knowledge.

The second affidavit of Mr. DiPronio, an eighty-one year old lifetime resident of Waltham, the owner and operator of Arc Welding for a very long period of time and the person who would have most knowledge about his uses and the uses of his tenants on the site who is here in the audience today and who can perhaps fill in any gaps that may develop or any concerns that the board may have. But he's pretty detailed. He's got thirty ton snow fighters from Logan Airport would come there for repair. These vehicles were so big that they could barely fit through the garage doors which are sixteen feet high and these are very large pieces of equipment. It's your snow blower on steroids. It's just a very huge runway clearing piece of equipment; steam shovels, cranes, excavating equipment. You've got large excavating companies that would bring their equipment in there for repair. There were snowplows on site. There were front end loaders, busses, tractor trailers, euclid trucks and I didn't know what a euclid truck was. But a euclid truck was what Mass Crushed Stone would use when excavating huge amounts of gravel and dump it into the truck. It's an oversized sixteen foot tall super wide vehicle and as Mr. DiPronio's affidavit says, just to get it moved down the street, you have to have a permit and an escort. That's how big that piece of equipment was and it would come to their site for repair.

Essentially, Arc Welding would do the repair for the hardest, biggest most difficult pieces of equipment on projects that we knew around the Boston area, the Big Dig, Deer Island Outfall Pipe, the Container Port in South Boston. These are baheemic pieces of equipment that would be transported there, transported on heavy equipment, removed on heavy equipment and repaired there with heavy equipment.

There's a photo of the crane on the site and there are other photos of heavy machinery. Heavy machinery is to underscore the noise element. When you have a three hundred ton press operating on steel, it's noisy. When you have the pneumatic hammers bursting rivets that are one and a half inches thick through shovels and buckets, it's noisy. When you are using all that heavy machinery constantly during the day, it's a noisy facility. It's what you would expect.

The photo that I want to point out was one of the buckets for one of the cranes or steam shovels is Exhibit C in his affidavit and that bucket is so big that it dwarfs a heavy duty pick up truck that's sitting next to it. It's several feet taller than a pickup truck and he testifies he could stand inside of it. That's the kind of equipment that they would repair. Then he goes on to talk about the tenants at the site. This is a large site. His business activity didn't fill the bill in terms of the use for the particular site, so he had tenants such as J.J. O'Brien, a heavy trucking contractor and snow plower. He had all this heavy equipment on site and the other witnesses testify about J.J. O'Brien, the kind of operation they had. They were a very large contractor and they also had a snow removal operation. So they would take trucks out with heavy equipment on them at all times, usually in the morning, come back into the early evening hours and, of course, with the snow removal business they would go whenever the snow was falling. They would have to go out with their plows. So, that's that kind of heavy intensive use and they kept their equipment on site. I noticed in the rebuttal document they refer to one of the characterized things as repair. Well, that belies the real issue. The real issue are heavy trucks and equipment moving in and on the site whether repair, storage or whatever, whether it's snowplowing equipment that's on and off the site, whether its heavy backhoes, bulldozers being moved to construction sites, all those things are the same set and quality of activities under the Powers Test.

Now, he also goes on, Mr. DiPronio goes on to talk about the landscaping businesses. We could not ask for a better parallel to my client's business than three large landscaping

businesses: Phil Mastroianni, Minuteman Landscaping and O'Toole's. The same kind of activity, the very same kind of activity that my client's involved in. They leave in the morning with their trailers and equipment and trucks. They come back in the afternoon. That is exactly the mainstay of my client's business and three large landscaping companies operated there as tenants while Arc Welding was in business.

There was also Boston Tours Company that stored busses on site and the Brewster Oil Company had oil trucks on the site. So this is a large site. It can accommodate a number of uses and there was always something of that nature going on. No one was complaining. We have allegations of complaints in the submissions by the city but we haven't seen any complaints not at this point. We may see them later on but there was no complaining.

We all understand that as time goes on everybody wants their area to improve in general usage but the activities that have been going on in this part of Waltham have been going on for decades and decades and we can't rezone it and change it today.

Mr. Creonte was planning on being here tonight, but unfortunately a death in his family has kept him from coming. He is familiar with the site since 1949 when he brought his first dump truck there to have sideboards put on. He's another witness to the heavy equipment that he saw habitually on the site, heavy trucks, steam shovels, school busses. He says the lot was filled with heavy equipment. He's another witness to the J.J. O'Brien activities. He can recall vividly the sixteen pound sledge hammers against steel creating noise that he could hear from a block away. And he knows the use in equipment of Mr. Vanaria and on his oath he says to us, it's no more intense and it's less noisy than what was going on when Arc Welding was there. Actually, each of the three witnesses in the supplemental affidavits say, I know the Vanaria business and what's going on there now is less intense, less noisy and no more involved with heavy equipment than what was there before. And this is on their oath and on personal knowledge.

Mr. Malone who ran C. Malone Trucking on Newton Street, also personally familiar with the site. He used their services of Arc Welding constantly to repair his trucks. He saw heavy trucks and bulldozers and he tells us something that is pretty interesting. He was familiar with the locations throughout the City of Waltham where heavy trucking and heavy equipment were as prior nonconforming uses. And he lists them in his affidavit and he was doing that because he was ever vigilant looking for an alternative site for his trucking business should they decide to redevelop the Newton Street location for a higher use and need to operate some place else.

He also says on his oath that the Vanaria operation is consistent with prior usage, no more intense no noisy.

Now, these are, I think pretty important witnesses who cover a pretty large period of time. But let's assume for the moment that you can disregard their evidence, that you don't credit any of it even though it's uncontroverted. There's nothing offered by the city to rebut it. The petitioner's activity is not within the by laws definition of Heavy Truck and Storage since the equipment is not stored on the subject property overnight in uncovered and unenclosed areas. The entire lot is enclosed with fencing and I would suggest that if you take a look at the photographs it becomes pretty evident that the lot is totally enclosed with fencing. I've been there and it is completely enclosed. So, therefore, it doesn't even fit within the definition of Heavy Trucking Storage even if you disregard the prior nonconforming use.

If you take a look at those photographs, you'll see a number of interesting things.

The first photograph which is dated Wednesday the 12th of October shows how the vehicles look either at the end of the day or the beginning of the day. They are lined up in an orderly fashion, truck and trailer, truck and trailer, truck and trailer and the difference

in coloration if you see in that first photograph from the foreground to the earth in the background is the demarcation line between concrete pavement and what was recently installed as crushed asphalt over what had been a dirt surface.

If you go to the next photograph, you will see the opposite end of the lot and, again, that's Wednesday, October 12th, and again now in the sunlight you can see a little bit better where the concrete ends and where the crushed asphalt has been placed. Gone on that portion of the photograph is what had been a pile of what the building inspector was concerned about was open storage materials. Those were all removed. Everything that was on top of the tractor trailers is all removed. The site has been significantly cleaned up.

If you go to the next photo, you can see the bicycles that many of the employees use to ride into the facility. About twenty-five percent of the employees use bicycles; fifty percent public transportation and twenty-five percent use company vehicles that they take home at night and then they arrive at the site in the morning and drive out to customer locations.

The next photograph which is dated September 20th has the bulldozer on the crushed asphalt when they were applying and rolling over the crushed asphalt on that afternoon. And again you can see that the site is clean. The two photographs that follow were taken on a Saturday morning, early in the morning, and they show the traffic on that street, the parking rather on that street, on a Saturday at 6 a.m. So you can see there is difficulty in any parking is not because of any activity on the site, it's because that's the way it is even when the site is not being used. That's a Saturday.

And then the next issue of alleged violation that was discussed at the last hearing was whether or not my client's activity constitutes a truck or private bus terminal. And this one for me having been a former transportation official, is quite a stretch. When I was involved in transportation law issues, we knew what terminals were. And this defies

perdulity a little bit to say that my client's landscaping activity is the operation of a trucking terminal. If you look at the definition, it's so hard to see that this would at all apply. "An area of land, with or without structures where three or more busses, trucks, trailers and any combination are parked or otherwise used in connection with mass transportation of persons or with the receiving, shipping, transferring or handling of items, objects, and materials of any kind package or unpackaged,"

A landscaping business does not move people in mass transit. They are not involved in the movement, shipping, receiving or handling of goods. Bussing and trucking terminals are hubs of commerce. They are central points in which people arrive and are dispatched, goods arrive or are dispatched for distribution within commerce. There is no way that any stretch of imagination could equate the landscaping business of Anthony Vanaria and Sons as a hub for moving people or trucking goods, shipping and receiving. And trucking terminals, what happens, is goods either leave or come in or they're off loaded from one type of vehicle on to another type of vehicle for different distributions. I think it's helpful to take a look at what definitions in this industry say that a terminal is.

Now, the only thing that happens with my client is landscaping rigs leave in the morning carrying their tools of trade to go to a client's site and they come back in the afternoon with their tools of trades, rakes, leaf blowers, weed whackers, things of that nature. So if anyone wants to call that goods or the handling of materials, that's material in commerce not the tools of trade. That would mean anybody in a pickup with a box of tools, if there were three or more pickups on that property would be a truck terminal. It just doesn't make sense.

Now the Geography of Transport Systems, 2013 Publication, by Dr. Jean-Paul Rodrigue and Dr. Brian Slack defines terminal as: "Any location where freight and passengers either originates, terminates or is handled in the transportation process. Terminals are central and intermediate locations in the movement of passenger and freight.

They often require specific facilities and equipment to accommodate the traffic they handle.” If you look at the Bureau of Transportation statistics the BTS Dictionary, they define Terminal as “A dock or a hub where freight originates, terminates or is handled in the transportation process or located where motor carriers maintain operating facilities.”

If you look at the code of Federal Regulations for the Federal Highway Administration, Title 23, dealing with the requirements for trucks. it defines Terminal as “Any location where freight either originates, terminates or is handled in the transportation process; or where motor carriers maintaining operating facilities are.”

The common thread to all these definitions taken from different sources, from learned publications to Transportation Bureau definitions to the code of federal regulations is the movement of people or freight in commerce and that is what a terminal is. We have trucking terminals. We have other terminals in our area. Logan Airport is an air terminal. South Station is a bus and rail terminal. The truck terminals in the area are the, you see on the side of the trucks NEMF New England Motor Freight facilities in Boston and Springfield. You have Connolly Cargo Terminal in South Boston and you have a Logan Cargo Terminal which is in East Boston. So I think in any way that you look at it if we use common sense, look at the definition and look at my client’s true actual business activity, you cannot equate to a trucking terminal. And it doesn’t even pass the blush test for a bus terminal. So I think for that very important reason, that they have to fail on that particular argument by definition and by historic use. My client is not doing anything that is substantially more intense, substantially more noisy, substantially more involved than what has been done on that same site before.

The third violation was Open Storage. I don’t believe that I misspeak at all when I say that when Mr. Forte came to the site and reviewed the site and he reiterated what he said to me on the site in email that he’s finding that my client is not out of compliance, that the site has been put in a kind of quality position where that is no longer an issue as far as

the city is concerned. And I see he's nodding acknowledgement and I appreciate his candor for that.

The fourth violation was the parking on untreated earth. There's a partly unpaved portion of lot 44R historically which now has crushed asphalt on it. I showed you the picture of the steam roller going over it and it has catch basins and there's been grading towards the catch basins. Mr. Forte was on the site last Thursday and he saw that. It has been historically used for decades and decades for parking vehicles. The Google photos previously submitted in the first hearing show that. There has been just decades of parking on that site while its been unpaved. So you have the historic nonconforming use which is the first argument and I don't think there's anything to rebut that. I think the facts are uncontroverted and the affidavits buttress that and what Mr. Forte said to us on Thursday, is, well look, you shouldn't do anything more there but what you should do is get an engineering department approval of a plan before you go further to further paving in that area. That I thought was a constructive insight. Why go any further. We are moving in the right direction that will eventually make this not even an issue of compliance with the current by law, but in any case, historically we had that same use predating the by law.

So it was in the spirit of cooperation and looking towards the future that my client decided to undertake the expense and try to do the right thing. So we're going to work with Mr. Forte's office going forward to deal with that.

And the other violation of substance, the six and seven violations are kind of reach backs but the other violation substance had to do with the temporary structures. The office trailer that's beside the building that was being renovated and you may recall when Mr. Forte was here last time that he had a not on the plans that were part of the building permit application that said, "Joe pulled the application", and at that time it wasn't clear to him or anybody else whether he was talking about the owner of the property, Joe

Vanaria, or the contractor, Joe Penta. It turned out to be Joe Penta who could have pulled it because it was not my client's intention to stop that work.

So what we did when Mr. Forte was there last Thursday, he asked to see the building that was being renovated and I said, sure. And we walked through the building. It's substantially done on the second floor. The first floor has a bathroom issue that has to be made handicapped accessible. So that's where it was when the work stopped. And to his credit, Mr. Forte came up with what I think was a pretty creative idea and I told him that at the time. He said, well, what if you pull two permits. What if you pull a permit for the second floor, finish that up. You've got your electric and you've got plumbing in. It wasn't done under permit as far as I know. But apply for the permit, we can do the inspections and as soon as you have a permit, I will issue an occupancy certificate and that way you don't need the office trailer. Because he explained that the city's practices, although they allow office trailers on site for construction, they don't want you to have temporary business office operation in the office trailer. My client doesn't want the office trailer. It's an expense, it's a problem. It interferes with other use of the site.

So, I told him I thought it was a good idea. I discussed it with my client. Mr. Forte and I talked about it again yesterday and it is my belief, my understanding that Joe Penta was down at the building apartment today and submitted an application for a building permit to get that done.

So, has this time from the first hearing to this hearing had some benefit? Yes, it has and I'm glad that we've had a chance to further interact with Mr. Forte, and we've had the benefit of some creative things.

Now, there are a couple of storage containers that are on the site. They were shown in the photos. They were traditionally there. Mr. Forte had sent me an email that says get me evidence that they were there for ten years and then you're okay. I'm doing that. I

talked with the prior owner. I did notice, Mr. Forte, and I'm glad to go over these with you later, the Google earth historic photos show them. The CIS plan shows it. That's a more recent version but they've been there for a long time and Mr. DiPronio has told me that they have been there probably fifteen or twenty years. And so, that's something if we work with each other, I'm sure I can satisfy your concerns about that. So we have, I think, solutions for both the temporary trailer and for the storage containers and also I would say because I need to lay out all avenues that support my client's position, we're going to go on the route to demonstrate to Mr. Forte that the trailers were there for a long time but if you look at your plan vs. the Board of Appeals of Norwell, an SJC case in 2008, it had held that when you have auxiliary structures, storage sheds or other storage facilities that are added to a prior nonconforming use it does not make that nonconforming use illegal so long as they are proportionate in size to the prior use and, you know you don't have a baheemic storage shed and a little cottage and for the kinds of things that would normally take place in that particular use. In this case, the forty foot containers are proportionate in size with the large commercial business that is there and they are used to store stuff out of public view so that it is not open storage which is something that the building inspector objected to. So we are using the containers to store the stuff so, we're not out of compliance with open storage and I think that kind of makes sense and it's only two containers.

With Violation 6 and 7, I would rely on my fellow counsel's prior submission which adequately dealt with the issue which I think at the hearing the issue of statute of limitations and dimensional requirements of existing structures I think that Mr. Forte said that that's not really an issue. And then you have the occupancy certificates which all relate back to the main five categories of violation. So I'm not going to waste your time trying to get into those again. I'll rest on the brief.

In dealing with a couple or more of the rebuttal document that I received this evening, the second issue was, "Whether there is a difference in the quality and character, as well as the degree of use" and I think we've outlined pretty well that the prior lodge

landscapers, the snow removal activities directly consistent with my client's activity, Mr. Forte's submission makes reference to a hundred employees. Well, it's unfair to kind of say there are a hundred employees on the site. They're not. They are scattered to customer locations. So if you take the manual laborers, they may, full and part time, approach a hundred people, they may, but their activities are off site. It's not all those people on the site throughout the work day.

Whether there is a different kind of effect to the neighborhood. Well, I submit that the uncontroverted evidence is that there's less noise, less intensity. There is no in and out. It is a ghost town between the early morning hours and 3:30, 4 o'clock. There is no into the night activity that was there under Arc Welding and J.J. O'Brien. So, it is what it is. There's an allegation that there have been complaints. We haven't seen those complaints and ultimately if there are complaints they will be seen but without going down that road just yet just to say, we've been good neighbors. We employ. My client pays substantial taxes and he has no desire other than to operate in the City of Waltham. He is a good neighbor and I hope that the board and the building inspector feels that there has been a truly good faith effort to be compliant since the last hearing and we have made some great strides.

And I appreciate, whenever I have the opportunity to deal with a municipal official, who aside from taking the position it had to take, also do things in a matter that reflects candor, I really appreciate that because that's how you work through solutions and I think that we have two issues, Heavy Trucking Storage and Trucking Terminal that the board has to decide based upon the evidence before you. The other sets of issues have gone away, Open Storage, or in the process of going away. And so that may suggest to you how maybe you may want to handle it. What I have in mind, it's just a suggestion, is you may want to bifurcate the two issues of heavy trucking storage and trucking terminal from the rest; dismiss as to open storage, and continue the rest for a reasonable period of time as we work through drawing the permit, completing the construction of the second floor, getting rid of

the temporary trailer and doing the other kind of things, and the engineering plans on parking because we can't do that overnight and why force the board into decision making on issues that have a substantial likelihood of going away.

So, unless my brother has anything more to add, I do have Mr. DiPronio here who can offer some live testimony as to the length of time that the tractor trailers were there; the kind of trucking activity that was going on; heavy equipment. If the board would care to hear from him, I am happy to present him.

Mrs. Rando: Does the board wish to hear from Mr. DiPronio?

Mr. McCarthy: Could we ask him some questions first?

Mrs. Rando: Sure, go right ahead.

Mr. McCarthy: One of the things that was complained about was early morning activity, not during snowstorms. The owner told me that they don't start till seven o'clock in the morning. But they have leaf blowers, they have weed whackers, they have lawnmowers, or whatever the case may be, on site that might need to be adjusted early in the morning, might need to be checked out, wasn't working yesterday, it doesn't work today. The complaints have been coming in earlier than seven o'clock in the morning that there's noise there in that regard. What is going to be done about that?

Mr. Baum: All the repairs, the last minute kind of things could be done inside the premises. The garage door is closed. And I suspect that's very rare because the trucks need to be ready to go out. So when they come in at 3:30, 4 o'clock any of that emergency repair could be done then, Also there's redundancy of equipment. You have a whole bunch of weed whackers, you have a whole bunch of these leaf blowers, so you're not dependent on any one for every day, So you say, let's have Joe repair this one, take this one out on the

field today. And this is the same kind of activity that O'Toole, Minuteman and Mastroianni did every time. Moreover, the affidavit of Mr. DiPronio says that his Arc Welding operation and Mr. Creonte also said started earlier and went later. And the J.J. O'Brien trucks would come in in the evening and so I have been on site and I've seen in the afternoon inside the shop, they are working on small pieces of landscaping equipment. As you said, tune them up, get them ready and so I believe that it would be my client's desire in good faith would be shown to minimize any within ear reach activation of machinery or repairs. Essentially, in order to keep their schedule with their clients, they've got to get off the site early to get out to client locations. That's what the work requires. There's a redundancy of equipment and repairs are done during the afternoon hours and we haven't seen those complaints, but certainly as a good neighbor we would do that.

Mr. McCarthy: Okay, right now there's no restriction other than the complaints that we get and we know about, so that's the thing. If there was like, if you had a special permit issued by the city council restricting you to this that and the other thing, you'd be covered and then any complaints we could do this or do that and it's over and done with.

Mr. Baum: Well you know I understand Mr. McCarthy what you are saying and I would say to you there's a general ordinance that deals with noise and if we're not complying with that there's another avenue for enforcement. It's not a zoning matter. But there's a general ordinance that requires certain noise limitations.

But let me address head on, a notion that although understandable, I can't support. The notion is, oh come on, if you get a special permit, you know, they'll impose conditions, and it shouldn't be difficult and then you're off to the races. Well, it's part of our culture as Americans that when we can do something as a matter of right and we've done it for a long time, we don't like the idea of somebody telling us now we have to ask for permission and not only do we have to ask for permission, you could impose whatever restrictions you reasonably think are right. We've lost some of our freedom. We've lost something that

we've had for decades in submitting to that but also there's no guarantee that a special permit would be issued. I know, if I am doing something on my property that I've been able to do for decades, I wouldn't want somebody to say, well, from now on, Robert, you're going to have to go and get a special permit from this department and they have the right to impose conditions. I'm offended by that. I understand the convenience of it because you say, oh, everyone is going to be reasonable, the licensing authority will give you what you want, they'll just impose some conditions but there's no guarantee that you're going to get the special permit. No guarantee that the conditions that are imposed are going to work for you. And why should you give up what you already have as a matter of right? So I'm trying to candidly address that concern because I heard that raised at the last hearing and to me what I have as a matter of right, I am extremely reluctant to give up because I know I'd never get that back. So, I hope the board understands that.

Mr. McCarthy: I know what you are pointing at, I get that, but to me it seems that there are things that are happening down there that are causing, we never heard about that site before. We never had complaints about that site. Now we're having complaints. So something's been going on down there that's irritating the neighbors. And, and those aren't things that were done by right. If you're irritating the neighbors now and they weren't irritated before then you're doing something different that wasn't done before.

Mr. Baum: I understand that, but you know something, I didn't grow up in Waltham, I didn't grow up in Massachusetts. I grew up in Brooklyn and where I lived in Brooklyn and what we did and everyone got along, didn't mind, you couldn't do in a heartbeat now in that community because it overlooks the river into Manhattan. Everything is very expensive and people have different tolerances. And what happens in our society as time goes on, we get more either truly gentrified or want to be gentrified and we're demanding things that we didn't have before. If people put in condominiums right next to the site of Arc Welding, know Arc Welding is an operation, and then they expect, okay, once Arc Welding is gone, everything is going to be quiet. The whole thing is going to

change. That's not a realistic expectation. And I understand the human nature involved. They bought where they could, where they could afford, where they thought was a good opportunity and would like to see the whole community change to make it a more idealic residential community and that wasn't the expectation in 1940, 50, 60, 70, 80 or 90 when Arc Welding was in its hay day and so I haven't seen these complaints but I suspect that it's born of a lot of that feeling and we do what we do because it's no more intense than what was done before and I had a case on the Cape in Barnstable County where people built a subdivision next to a commercial landscaping operation that had manure compost and everything like that and the new owners made a complaint to the then building commissioner who issued a cease and desist order and we went to the Board of Appeals and we went to the Land Court.

In that particular instance, the land court judge ruled in favor of my client who had done, everything he did with the full knowledge of the building department with building permits, etc., but the new neighbors had sensitivities that prior abutting property owners didn't have. And the fact that they were making complaints should not turn the day. And that case was upheld in the appeals court.

So, as our society moves on we have higher sensitivities and lower tolerance to what's going on on our neighbor's properties. I don't think its right to take this particular business that moved there at large costs, is a good neighbor, good employer who's trying to do the right thing. I don't think they should be told, why don't you just go and get a special permit. I think that's just not appropriate. It was a very large investment and we can do what we do without offending appropriate sensibilities. Again, I haven't seen any of the complaints. I don't know the nature or who it was. I've just got to say, I see it in my own community, people in one area of town that now no longer tolerate what was tolerable five years ago. And that just happens.

Mr. McCarthy: I know what you are saying there, but there are no new condos next to this place, okay. Those are old homes that have been there for a long, long time. Look at the pictures. The houses that are on Williams Street they are a hundred years old.

Mr. Baum: There are a row of condos right there.

Mr. McCarthy: Well, that might be but on Williams Street there are houses as old as this building if not older. I just want the complaints to go away, that's all. Understand? Whatever it takes to make them go away, let's do it.

Mr. Squillante: Did you say you are going to pave the lot where the crushed asphalt is now?

Mr. Baum: That is the intention.

Mr. Squillante: That just clarified it. I appreciate the historical perspective but grandfathering expires after two years, so the real question is what was the active use for the last two years? It's not what you've done in the fifties.

Mr. Baum: I was trying to point through the affidavits that the uses originate in the fifties. Arc Welding didn't go out of business until 2015. J. J. O'Brien was on the site until a year ago.

Mr. Squillante: The landscapers, O'Toole?

Mr. Baum: Mr. DiPronio would know.

Mr. DiPronio: They were there all that time.

Mr. Squillante: So it;s coming down to intensity of use, I guess. When it comes to intensity of use, it's not our job to prove that your intensity has gone up. It's your job to prove that it hasn't.

Mr. Baum: Yes and that's why each of the clients said they were familiar the Vanaria operation and had personal knowledge of the prior use on that site and it's no more intense, no more heavy equipment, less noisy as a matter of fact than what was going on there before.

Mr. Squillante: Since we are talking about only the last years, there should be some documentation that I remember it being intense, affidavits.

Mr. Baum: Well, J. J. O'Brien was on the site until 2015 so that's within the two years. They were in the heavy trucking contracting business and the snow removal business. That's a real parallel right there.

The landscapers were there throughout that time, Mr. DiPronio said. So the cut off point has to be with the transfer of the property to my client when Arc Welding went out of business. And Mr. DiPronio has indicated that those activities continued up until that date.

Mr. McCarthy: I know that O'Brien, he does subcontracting for all the utilities and he goes 24 hours. He went twenty-four hours a day. He'd do the gas company. He'd do the Edison as well. When you have call outs, a pole goes down or dig ups they have to go out twenty-four hours a day. So, they'd be down there with the big trucks going all day long. I understand that.

Ms. Hankins: My understanding is that in the fifties it was the welding company, correct?

Mr. Baum: Welding and tenants.

Ms. Hankins: So do you know what percent was the welding company and what percent was other tenants?

Mr. Baum: No, but I'm sure Mr. DiPronio could tell you that in terms of how much of the activity was directed to Arc Welding and how much to the tenants?

Mr. DiPronio: 50 - 50. Before I was born, I was born in 1935 in that same house at 44 Williams Street. My dad started the business about 1933 in the back of the house in a little garage and that's how we started and we kept buying more property and making it bigger and bigger. We used to work there, I'm going to tell you, a lot of Sundays. If something broke and had to be fixed we fixed it. We did a lot of work for the Port Authority in Boston. We even worked on Thanksgiving Day sometime. If a big ship broke and they were unloading the ship and we had to go in and bring it back to the shop and fix it. We had a lot of big equipment there. It was like a junkyard, I'll tell you right now. Joe has fixed it up so nice. It's clean and all of the years we were there, we never had one neighbor complain about anything. And we made noise like you wouldn't believe. If you get two jackhammers, two riveting hammers going driving one inch, one and a quarter inch hot rivets, one man inside the bucket and one man outside the bucket, you've got a lot of noise.

Mr. McCarthy: Did you go twenty-four hours?

Mr. DiPronio: We didn't go twenty-four hours but a lot of times we had to work late into the evening, early mornings, Saturdays. We worked six days a week and sometimes Sundays. We never had a problem. We did some of the biggest work in the area.

Ms. Hankins: Sir, again, my question is not more not to the intensity of the use but to the actual nature and purpose of the use. So you're saying at the time that about half of the property was used for Arc Welding and the other half was used for tenants. What type of tenants?

Mr. DiPronio: A lot of things because we didn't need all the property.

Ms. Hankins: So all different types. It wasn't just the landscaping tenant. It wasn't just excavating.

Mr. DiPronio: Construction companies, landscapers, the bus company was there.

Ms. Hankins: So I guess back to the counsellor, I'm having a hard time putting together how the use hasn't changed. A welding company to me is far different than a landscaping company, so I don't see how you've established at all that it's grandfathered in the sense that, um - - -

Mr. Baum: Excuse me, Mr. DiPronio how long have those storage bins been on the site?

Mr. DiPronio: I'm going to say about twenty years, roughly, and maybe longer, I'm not even sure. But they have been there a long, long time.

Mr. Baum: How long was J.J.O'Brien on the site before you sold it to Mr. Vanaria.

Mr. DiPronio: O'Brien? He was there a good maybe fifteen years.

Mr. Baum: And Minuteman Landscaping?

Mr. DiPronio: He was there a good ten years or so. We had another landscaper there also, Phil Mastroianni. Phil was there way back.

Mr. Baum: Was O'Toole there up until the time you sold the property?

Mr. DiPronio: Yes. And O'Brien was there. And Minuteman was in there.

Mr. Baum: And Minuteman was in there before you sold the property. And you sold the property in 2015?

Mr. DiPronio: Actually we passed in 2016.

Mr. Baum: And that's when your business stopped as Arc Welding?

Mr. DiPronio: Right.

Mr. Baum: And those tenants remained there up until that time?

Mr. DiPronio: Up until that time. As a matter of fact they didn't want to leave.

Mr. Baum: And O'Brien had the heavy trucking operation and the snow removal operation.

Mr. DiPronio: They did. Heavy excavating equipment was there.

Mr. Baum: Do the board members have any other questions of Mr. DiPronio?

Mrs. Rando: I don't think she's finished.

Ms. Hankins: I don't have any more questions for him. I don't have any questions for you.

Mr. Baum: The nexus of the complaint is not whether you are welding or removing tires, it's the presence of heavy trucks and equipment. There's some activity of whether you are using a torch or doing hot wheeling pneumatic hammering. It's not material. The issue is that you have heavy trucks on the premises continuously and the trucks are the focal point, the vehicle for the business that is being undertaken. If you bring steam rollers, steam shovels, bulldozers to the site you have to do that through heavy equipment. If they're on the site and you replace a part, or you weld a part, the activity that is the subject, the gravamen of the city's complaint, is the storage of heavy equipment. Heavy equipment is there for whether it's for repair, for welding, for delivering other heavy equipment to other locations or for snow blowing. So, respectfully I disagree that the evidence does show the same kind of activity. How you made the profit may be different. But it is the same kind of factual activity occurring on the site.

Ms. Hankins: Well, respectfully, doing welding repairs and doing landscaping actually have nothing to do with each other. So I think to claim that it's the same nature and purpose of use is just not clear. They're all trucks. That means under that umbrella, anything that in a business that allows a truck, you want to include in there. That's a wide variety of things; welding, landscaping, bus stores, I mean you could go on an on.

Mr. Baum: I thought it was clear from the record that landscaping had gone on for a very long time up until the sale of the property and with that snow removal had gone on for a very long time up until the sale of the property. So, I think Mr. DiPronio's testimony that these were ongoing tenant activities and the tenants occupied fifty percent of the site. That's what I believe the evidence is. So, I hope I've answered your question. I don't know if I have satisfied you.

Ms. Hankins: Thank you.

Mrs. Rando: I have a question for Mr. DiPronio: Mr. DiPronio you stated that you had some very large pieces that you had to work on.

Mr. DiPronio: Yes.

Mrs. Rando: So, were those pieces brought in individually?

Mr. DiPronio: Sometimes they were brought in three or four at a time.

Mrs. Rando: Huge, like pieces of ships or —

Mr. DiPronio: Yes, big trucks, large buckets.

Mrs. Rando: And do you have any statements that you kept? Did you keep any of the statements from any of the landscapers that - - -

Mr. DiPronio: I don't believe so.

Mrs. Rando: And when you had that building, the business, how many employees were on it?

Mr. DiPronio: How many employees, we had at one time, about ten or twelve. Then as business wasn't as busy we went down lower and lower. But in the hay day we were really doing a lot of business. A lot of noise.

Mrs. Rando: So, the business that is there now employs a lot more people than you had.

Mr. DiPronio: I don't know. But when we were there I have to tell you it looked like a junkyard.

Mrs. Rando: So you don't have any certification of - - -

Mr. DiPronio: Well you have the old pictures.

Mrs. Rando: It seems to me that when I looked at the pictures that a lot of them are inside a garage. Did you have a high enough garage to be able to fix things?

Mr. DiPronio: We had a large garage.

Mrs. Rando: So a lot of them were inside. Every picture here there was something inside.

Mr. DiPronio: We did a little bit of everything, a lot of construction equipment, big construction equipment. The Big Dig and Mass Port Authority, Logan Airport. We did a lot of cities and towns in this area, all the colleges. We had a lot of equipment coming in and out. Some days you couldn't get a truck in the yard.

Mrs. Rando: Thank you.

Mr. McCarthy: Just one question. When your business was winding down, that's when you had O'Brien there; that's when you had the other landscapers they were all in the same property at the same time, right?

Mr. DiPronio: Right.

Mr. McCarthy: So you had more than six people working on that site. You had your six but then O'Brien had his whatever and then the landscaping company had their number of people working there as well, correct?

Mr. DiPronio: Yes.

Mrs. Rando: Were they working there or were they just driving in and out?

Mr. DiPronio: They'd go out in the morning and come back in the afternoon, it depends. A certain part of the day they would be back in the yard otherwise they'd be out working. All the years we were there we never had one complaint. Not one person complained about anything.

Mrs. Rando: But you don't have any certificates of um —

Mr. DiPronio: What certificates would I have. You've got me, that's it. I'm still here.

Mrs. Rando: It's your job to prove to us.

Mrs. Rando: Do you have anything Mr. Rudnick?

Mr. Rudnick: Im hoping that we are going to hear from Mr. Forte. I'd like to save my questions.

Mr. Squillante: I don't care about the last two years. How many landscaping trucks were there beginning in 2015?

Mr. DiPronio: Mastroianni was there. I think Phil had about five or six. Minuteman had about four or five. O'Brien had trucks, loaders, backhoes, maybe had twelve to fourteen pieces of equipment there.

Mrs. Rando: Thank you Mr. DiPronio. I appreciate it.

William Forte, Inspector of Building for the city came forward.

Mr. Forte: I concur with a lot of Attorney Baum's summations in that most of these violations can be cured by permit. It was substantially neater when I went to the site last week. It looked a lot better than it did to the prior months and certainly I applaud their efforts to try to comply with certain portions of the notice of violation and I would also say that I would agree again with Attorney Baum that there are only two issues really before you tonight that may be of substantive decisions and that would be the pre-existing legal nonconforming use.

Now I've said in a number of hearings before, I have been before you and that I don't argue the law because I'm not an attorney but I did happen to dig a little bit into case law regarding pre-existing uses and nonconforming use rights and I did supply you with some case law regarding some of the criterion which in order for a petitioner or a land owner to establish a pre-existing nonconforming use right, they first of all have to prove that it was legal at the time. Now I've looked through all this testimony and I have no reason to believe that this isn't true and this is what people saw and this is the activity that went on. I have no doubt about it. In fact, I would say a hundred percent, that I believe everything that I hear in these Affidavits. However, I believe that what these Affidavits reflect not only is the inconsistency of the nonconforming uses that existed but it's the burden of the petitioner to prove that the use at the time was legal; that it continued all the way through, and that it hasn't changed in character and size or detriment to the

neighborhood. These are the three criterion in which all these uses have to exist in order to be afforded the protection that Attorney Baum seeks for his client.

I would say that they haven't met that burden of proof. They haven't shown me in the ordinance where it was legal to have heavy trucking in the commercial zone. That's been a commercial zone since way back. I think its 1935, I checked the maps and it goes way back. It's always been a commercial zone over there. It's never been an industrial zone . So the heavy trucking aspect, they've offered no substantive evidence showing that that at the time, if there were trucks that existed on that lot and if there was a beehive of activity that they claim was going that they've supported it with any kind of research or evidence.

Just to kind of briefly go down the list and I don't want to take up too much of your time, because I did submit everything here in writing that I needed to say and I think that this pretty much outlines my argument that the use can't be abandoned for more than two years in accordance with Section 3.77213 which is in our Ordinance. Our Ordinance is very specific to pre-existing nonconforming uses. The Affidavits don't give any statements. They give statements of different businesses that occurred on different parts of the locus. Each time a different company moved in or out, they lost their nonconforming use right. So if Mastroianni was there in 2007 or 2009 and they took their trucks and they left for two years then they lost that nonconforming use.

Just because these types of activities went on on this parcel at different times, in different eras, doesn't give them the nonconforming protected use rights that are afforded in Mass General Law. I know that when they talk about the three prong test is that, "it must be proven legal at the time". They haven't offered that and then in accordance 3.7222, if there's been an alteration to that, if it's been altered or enlarged in that use to an extent not exceeding ten percent then that requires a variance from this board. So even if there's a substantial change, to a nonconforming use, it still needs a special permit by the

Board of Appeals. So even if they fit in all this criterion, they still would need to go for a special permit. But, again, in order to even get that special permit, they would have to prove to you that that use existed and it stayed in continuation up until today.

Now, I believe the testimony of Mr. DiPronio and I believe that these other Affidavits here are truthful, but, again, they did not offer anything to substantiate who was over there at what times? How many trucks were there? How many employees were there? If there was an impact to the amount of people that were there? I used that number a hundred, because I did hear that although Mr. Vanaria employs probably a hundred people. Maybe they are not all on site at the same time. Maybe they don't move in and of the masses but they are a large employer and that's great.

But here again, there is nothing in document that shows me how many trucks were there, for how long and what the number was. So in looking at this and I did give it an objective look and I do believe it but it's just not substantiating the nonconforming use. I think that the petitioner needs to provide us with a more solid claim with documentation whether it be registrations of vehicles, whether it be a lease agreement, whether it be manifests or whatever it might be but the Google Earth Images didn't show me anything. It showed me a few trucks that were parked on there but they weren't really clear enough for me to make a depiction as to what is actually allowed to be there on site?

And I will say this is that all the businesses that existed, Arc Welding was the only business that was legally sanctioned by permit. Okay. That's in the record. Arc Welding was a business. General repair was allowed in that zone the entire time. It rarely made reference to how big those repairs might be but it does say that repairs were allowed in that zone along that whole time. So Arc Welding was okay. And even if the storage of trucks and even if the movement of trucks was incidental to the business, large portions of that business were conducted inside the building. Whatever was going on outside the building was really a non accessory use. It was not allowed by permit. Therefore, there's no

documentation. It was not incidental to the primary use of the business which was welding and repair. Again, that was allowed. But, you know, the storage of heavy trucks was never sanctioned with a building permit and it was never allowed. And I would contend that the repair of a vehicle is substantially different from the movement of a vehicle in and out for daily, routine service whatever that service might be.

I would also refer to Attorney Baum's argument about private bus terminals. Our Ordinance is very specific in it is exactly what he described. It's an area of land with or without structure where three or more busses, trucks, trailers or tractor trailers or any combination thereof are parked or otherwise used in connection with mass transportation of persons or with receiving, shipping transferring or other handling of items. That does not specifically mean those items are stored on site. Mr. Vanaria owns several tractor trailer trucks that basically hold material. It says right in there. Vehicles used to move materials and mass transportation of persons, you know, they are talking about a bus there but not specifically. Specifically, what they are talking about is three or more vehicles that are used to move something around. That's what the ordinance says. It does not say anything about commerce. It does not say anything about Logan Airport or any other kind of terminals. They are talking about specifically, this is a local ordinance and it is described pretty clear right here. It does say that.

No area of land, and this is a terminal, land use for a terminal or any combination thereof unless an area has been graded, paved and drained with on premises catch basins or appropriate dry wells or connection to the street drainage system.

So what they are talking about is the number of vehicles and the activity associated with moving those vehicles in and out. It has terminal aspects. I don't believe that you have to take a crate full of boxes and put them on a truck and move them in and out to be a terminal. I think it has terminal aspects in the fact that there are several truck and trailer combinations that move in and out. It doesn't give a weight, size. It doesn't say that they

have to be filled with product or if they are for commerce or not. It's specific to the number of vehicles and the fact that the surfaces need to be graded and paved with proper drainage to be able to handle the kind of pollution and the kind of trucking activity that goes on. So I would disagree with Attorney Baum's summation on that.

I would say also too, the activity of repair is substantially different from the activity of a service based business whereas equipment may have come in for days and sat there for days and although there might have been some noise going on and there might have been some loud stuff and maybe there's some truck activity going down there and there's some big stuff being moved around, I believe all that. But I believe that the aspect of the number of vehicles that are here, the number of people that come in and out and the activity that goes on on site on a daily basis is substantially different and I don't see anything that counsel presented in this evidence, in these Affidavits that is going to substantiate that they have a pre-existing nonconforming use to what was there before.

I would just say that we have agreed that we could probably get rid of four out of these seven violations. Certificates of occupancy are pretty easy once we have everything that needs to be in compliance. The nonconforming structures under Section 6, they are afforded protection after ten years. I wouldn't really contend that the use of those is going to any more impacting and so that even though the use may not be protected of those trailers, the fact that they exist and they're fairly benign in use they wouldn't pose a problem. Counsel would have to provide me with a site plan showing where those are located on the property and that probably will take care of that.

You heard that we had some discussion about a temporary office being used on the second floor after it's had a safety check and that it is reasonably safe for habitability, we can allow them to have a temporary office use there until such time that they can finish off the building and they are fully compliant with ADA compliance etc. So we see that that problem will probably get resolved.

So I think the only two things that really that the board needs to consider tonight, respectfully, is, has the petitioner provided you, have they met the burden of proof under the Powers Test? Have they proven that they have a pre-existing use and to what extent that use is going to be continued and has the quality and character of that use been in any impact to the neighborhood?

And I would just say the complaints don't come in on a regular basis. I don't have people knocking on my door saying, you know, this is crazy, it can't go on anymore. There's not a lot of outrage. But there has been complaints. I do have record of them and they do exist.

So that would be my rebuttal on what I saw and what I think.

Mrs. Rando: Are there any questions of the Building Inspector?

Mr. Rudnick: By my count, Mr. Forte, there are five violations that you have cited that seem to be at least in the process of being resolved like the gravel, the open storage and the three building related or certificate of occupancy related complaints. Is that your testimony that those five issues are at least a work in progress about resolving?

Mr. Forte: So - - -

Mr. Rudnick: The gravel on the ground - - -

Mr. Forte: Yes. So like in that case, right, we could provide a building permit to them to pave the rest of the site. That still would not give them rights as a truck terminal. It would cure a portion of that violation but it would not cure the entire thing because truck terminals require a special permit in the commercial zone to operate. So by allowing

that pavement now, they would have to have, the engineering department would have to look at the storm water calculations to make sure that they comply and they may end up installing a subsurface drainage system on site to handle the amount of impervious surface that they are going to increase or create.

So, I would tell you that, again, that's something that can be solved as of right but it still would not sanction the use.

Mr. Rudnick: Don't get me wrong but you can throw these away.

Mr. Forte: Yes, sure.

Mr. Rudnick: But you made statements of seven violations. It sounds to me like and so this board's mandate here to uphold your statements of violations one by one or reject them.

Right now I see that five of them can be treated and neither of those two because we are in the process of trying to resolve them that you seem to be willing to allow to go on. Until they show you that they are no longer making progress in resolving those violations, it doesn't seem appropriate for the board to either say they did or they didn't because we are depending on you to say I'm working it out with them. So let's wait on those five and I do understand that those don't affect numbers one and two, the truck terminal issue and the equipment storage issue. So those are active issues that it seems that the board has to act on those two potentially now and continue this until you give us testimony that the other five have either been resolved or not resolved to your satisfaction before we can dismiss or accept the entire letter of complaint.

Mr. Forte: Respectfully, so my position on the violations that were cited at the time will not change. It would be up to the petitioner to withdraw those notices of appeal on

that particular section. So let's just say that they, give an example, okay. I would agree in writing that the open storage is substantially compliant and they would withdraw their appeal on that notice of violation.

Now, systematically, if we were to get resolved on all five of these, again it would be up to them. What I am asking the board or basically what the petitioner is asking you is to overturn each one of these. My stand will never change. My stand would always be, did I cite the violations correctly and are you going to uphold them? So systematically we could reduce the number of violations on this by being compliant. You know, by working with the petitioner to resolve the issues. Which, again, we've agreed that we can probably resolve five of the seven.

Mr. Rudnick: Thank you for clarification. So we would be depending on, again, for those five points it sounds like we continue this until the appeals are withdrawn on the basis of having satisfied this and that your testimony is that those were satisfied although the violations were in fact real at the point when you cited them and some reasonable amount of time I guess should be given for those. So I'd like to dismiss those five for now because it sounds like we're going to wait until these guys address those and come back to us and say we addressed them and Mr. Forte doesn't object. Just those five, not the other two.

There were several mentions tonight and you mentioned it just now that there were multiple complaints. Your violation refers to a single complaint. So could we get more elucidation on that point because the violation notice says the Waltham Building Department received a complaint from a citizen claiming that you're illegally using that lot. So tell us about the additional complaints.

Mr. Forte: Well, the complaint came from the ward councillor and I think it's pretty evident that the ward councillor has continuously asked me to enforce this notice of violation and to be more forthcoming, I believe there were two violations after that notice

was issued. So I would say that there are three and I don't know that there's been any more since.

Mr. Rudnick: So you're concluding reasonably that Mr. Logan's testimony at the first duration of this hearing was implied.

Mr. Forte: And I would just again, respectfully reiterate that a complaint from a citizen does not really authenticate a zoning violation. A zoning violation exists because I have cited it and these are some of the times that things are brought to my attention through a complaint, but again, once the complaint has been issued, it is up to me, the enforcing officer for the city, to diligently pursue that and to uphold the ordinance.

Mr. Rudnick: I wanted to clarify whether there was just one complaint. That's all the questions I have for you, Mr. Forte, thank you.

Mr. Squillante: Documentation aside, there's apparently a landscaping business at this site. So I guess the question becomes, if at some point and time that landscaping activity, the trucks, I guess there could be trucks they don't have to be landscaping but trucking activity is actually allowed legally, and there had to be some way to show that. And then if we assume that is the case then the question becomes, are there more trucks there now than there have been in the past? And that's also a question of documentation. The question then is if they could provide documentation that something other than welding is allowed on that site which involve trucking the current number of trucks does not dramatically exceed the previous level of trucking and what they're are doing would be okay.

Mr. Forte: So again, I'll go back to the beginning of the Powers Test, okay the three prong test. The first burden of proof is that they have to prove that the use was always there; that it was always legal, and that when zoning changed, if it changed, to what extent

are they continuing that same use and again I have a lot of testimony here but I have no supporting documentation. And I would say that heavy trucking and truck terminals were never allowed in a commercial zone. So it was largely unsanctioned. The activity of a trucking terminal or heavy truck storage equipment was not an allowed use as far back as I can see it, at least the existence of this building. The petitioner needs to provide you with evidence, in my opinion, that they were able to do this from the beginning, that heavy trucking and truck storage and truck terminals were from the beginning okay that they continued that use all the way up and through and that what they are doing now is no more detrimental to the neighborhood.

Mr. Squillante: So did it always require a special permit?

Mr. Forte: I don't know that, but again, that's their burden to prove. There's been no zoning study on this. They are just saying that it existed, it's okay and that's that. I think to have an afforded protected use right you have to provide solid evidence that it was right from the beginning, that it has been continuous all the way through and that it's okay now and not any more detrimental.

Mr. Squillante: So during that whole period of time it could never have lapsed for more than two years.

Mr. Forte: Well, no, more than two years. So if the use was discontinued for two years, it first it has to be legal.

Mr. Squillante: That seems to be the key question.

Mr. Forte: That's what I'm saying. I don't see that there's any evidence supporting that in this documentation. It first has to be legal to be a pre-existing protected use right and I contend that it was never legal, not a heavy trucking truck terminal.

Mr. Squillante: Do you know how many trucks are on the site?

Mr. Forte: I estimate that there's fifteen truck and trailer combinations that are probably light duty. There are probably at any given time, I would say maybe ten to twelve pieces of heavy trucking and maybe two or three pieces of construction equipment. Looking at their pictures, looking at my pictures, I don't know how the site changes dynamically during the day and I don't go there at night to see what's stored outside.

Mr. Squillante: So assuming there were documentations that indicated prior uses, it doesn't sound like the number of trucks are a lot more than it has been in the recent past.

Mr. Forte: I don't have any evidence.

Mrs. Rando: So, Mr. Forte, are you saying that since 1935 it was not allowed. So in other words as his attorney said that he felt he didn't want to give something away that he's always had.

Mr. Forte: True.

Mrs. Rando: Instead you're saying that they should be happy that they had it for as long as they did? Is that what you are saying?

Mr. Forte: What I'm saying is if they haven't shown any evidence that it was legal back then. I haven't done the research because my thing is to cite the violation and it's up to them to refute with evidence showing that, hey listen, back in 56 this is what the zoning ordinance said, this is what changed. I haven't seen that documentation. Again it's not mine to prove it's their to prove.

Mr. McCarthy: So in the final analysis if they cannot prove what you're saying, or they do have something indicating that they can use the terminal then their alternative is to get a special permit from the city council.

Mr. Forte: I would say that the activity that's going on there right now, as I said in the beginning, I believe requires a special permit from the city council to operate. And that's the today zoning. I'm specifically citing today's zoning and my mandate says and I am basically statutorily obligated to look at the evidence and make a finding that it either complies with zoning or that it is a protected legal pre-existing use. I determined that there was no protected pre-existing legal use. And that's what I was mandated to do. So it's their burden of proof that if you will, to provide you with documentation to refute that.

Robert Logan, Councilor of Ward 9, 109 Taylor Street, Waltham came forward.

Mr. Logan: As far as the complaints, I issued a complaint. I submitted the complaint on behalf of residents in the neighborhood who complained to me and they're not somebody that's living in a new condo. So, I just wanted to make sure that that impression is not from the tapes because these are people who have lived in that neighborhood for decades. And I think it's very telling, the fact that they lived there for decades and decades, and never had a complaint and they knew who I was. They knew how to get in touch with me and never called me to complain until this operation went in there. So there's definitely something in the nature that's changed.

Mr. Rudnick: Mr. Logan are you saying that the complaint that was reported on the first two in his violation notice is your complaints?

Mr. Logan: That's what he seems to be what he's saying. None of them complained directly to you (looking at Mr. Forte).

Mr. Rudnick: So you were bringing the neighbor's complaints.

Mr. Logan: Yes. So I had more than one complaint and I brought those to the building department.

As the building inspector said, in order to prove and maintain grandfathering, it has to have existed continuously since before the zoning ordinance was adopted. And Mr. DiPronio said the storage shed was there for twenty years. J. J. O'Brien was there for fifteen years. Minuteman was there for ten years. That doesn't establish grandfathering because these ordinances run long before that. So somebody that was there for ten or fifteen years, that doesn't establish grandfathering. It has to have existed before the zoning and continued unabated, never interrupted and you have to document that. The building inspector is absolutely right. We've seen some anecdotal evidence here, that this or that use existed at some sporadic points and time for some periods of time, but nothing that absolutely locks down that it's been in continuous use for that purpose from there all the way.

We did hear, specifically on the heavy truck and equipment storage. It's always been interpreted by the building department by Mr. Gaudet before Mr. Forte that it means when they said not unenclosed but that meant enclosed to the building because it requires a special permit. The idea that just because you put a fence around the property, now it doesn't require a special permit is ludicrous because why would you create a use, say it needs a special permit only to create a situation where it doesn't need a special permit if you put a fence around it. Well, who would ever go for a special permit for it? You just put up a fence. If you have a box and you open it, is the box enclosed? You put something into that box and the box is open. Is it enclosed? No, it's not enclosed until you close up the box. If you have the box open it's got four sides and maybe a bottom. So the bottom is the ground, the four sides is the fence but it's not enclosed until you put a roof on it. Now it's

enclosed. That's what they mean, inside of a building, inside of the garage, inside of a shed, that's what it means.

So we've heard testimony that the Arc Welding brought equipment and we've seen pictures of them inside the building. That doesn't establish grandfathering for the open truck storage. So the burden of proof just hasn't been met. As I said, the neighborhood residents complained to me. They never complained before. I've been representing the area for twenty- seven years and never had a complaint. Now all of a sudden I'm getting complaints. What's changed?

I think obviously something has changed and they haven't proved at least to my reading of the ordinance and the reading of case law and looking at the evidence presented here tonight, they haven't proved that its continuously existed and that what existed at Arc Welding, and I think there's an important point to make there too and that's this. At Arc Welding any presence of trucks on the property were really incidental to, what they were really were doing there was repairing things. The main use of the property wasn't storing trucks and heavy equipment. They might come, get repaired and leave. What you have now is storing the trucks and they don't do their business on the property. They leave to do their landscaping and come back. So the property isn't being used for landscaping, it's being used to store the trucks for the landscaping. It's truck storage. That's new and we've seen again when asked, how long ago have those other landscapers been there? J. J. O'Brien, fifteen years; Minuteman, ten years. That doesn't even come close to establishing grandfathering.

So I would certainly hope that you would, especially on the count of the Heavy Trucking and Equipment Storage that you would uphold the building inspector on that. And again, as it has been pointed out by a number of the members of the board there's an easy available remedy for that and the appropriate remedy is to go to the city council and get the appropriate special permit. It's not like if you turn them down that you've closed

all avenues to them of being able to address the situation. They have something that they can do. Maybe they just don't want to do it but that's the proper way to do it.

Mrs. Rando: Any questions of Mr. Logan.

Mr. McCarthy: What is the general nature of the complaints?

Mr. Logan: Mostly noise.

Mr. McCarthy: At certain hours or all day long? I mean I've been down there in the afternoon, it's like a ghost town down there.

Mr. Logan: It's more like in the morning and when they come back at night.

Mr. McCarthy: Do you agree with the representation of the folks that work there are coming to work on bikes and walking and very few vehicles.

Mr. Logan: I don't think that the problem is the vehicles that they are arriving in. I think its once they get going in the morning and doing whatever, adjusting some equipment in the back of the trailers and whatever they are doing, is creating the noise complaint. As I said, I haven't been down there personally to see it. I'm taking the word of my constituents who have lived there for decades and never complained before and now all of a sudden We've got complaints.

Mr. Squillante: Do you think that the noise complaint can be resolved with the noise ordinance?

Mr. Logan: It may or it may not, I suppose. But then you have to get the police down there all the time. I think the zoning ordinance has more teeth but the bottom line is,

once it was brought to our attention, you can't undo it. It's been brought to our attention that the violation exists there and now the appropriate way to address that violation is for them to come and get the special permit that they should have gotten, I don't know, ten or fifteen years ago when J. J. O'Brien or Minuteman first moved out of that site.

Mrs. Rando: Thank you.

Mrs. Rando: Is there anyone in the audience that is in favor of this petition that would like to come to the podium or raise their hands?

(Two people raised their hands in favor.)

Mrs. Rando: Do you want to say something?

Joe Vanaria, 55 Ivy Lane, Waltham: You know, we're all hearing about these complaints that are coming in but, but if we're not told, we could be doing the same problem wrong over and over again. If we don't have the opportunity to know what the problem is then how do we correct it? You know and as far as being noisy down there in the morning, please come down. It's not noisy in the morning. And during the day, it's empty. And if we can't make some noise at 4:30 - 5 o'clock in the afternoon when the trucks are coming in, it is commercial land. Trains go by every twenty minutes blowing horns. Thank you.

Ms. Hankins: Is there noise going on before seven o'clock?

If they're leaving the grounds at seven o'clock to go to work at seven o'clock then they must be in there making noise before seven o'clock. Would that be a fair - - -

Mr. Vanaria: The trucks are started but the majority of the trucks are gasoline trucks. They are no louder than a car is. Is there twenty of them running at the same

time? Okay, but there's twenty cars running down there. Where's the noise? You know, we're not banging. We're not adjusting engines at six o'clock in the morning. That's total false. The only way to prove it is to come down.

Mrs. Rando: Do you plow for the city in the Winter?

Mr. Vanaria: We do.

Mrs Rando: And those trucks have to run all night?

Mr. Vanaria: No. We have to start them up and warm them up.

Mrs. Rando: How early?

Mr. Vanaria: It depends on what time it snows.

Mrs. Rando: Is there anyone else? Is there anyone in opposition? Seeing none, anyone seeking information? Seeing none again.

Mr. Baum: Regardless of how you decide to weigh the evidence that we put before you on historic uses the bylaw calls for the storage of trucks and heavy equipment, unenclosed. It doesn't say it must be stored inside or indoors which many bylaws use those terms and when they intend that you must keep it indoors, unenclosed. This facility is completely enclosed. So if you step away from the track of prior nonconforming, and look at the bylaws as written today, my client's activity does not violate that prohibition. In addition if you look at the photographs on the supplemental brief, you'll see you've got small trucks and trailers which are the predominant vehicle used on site, not heavy construction equipment, excavators, backhoes, front end loaders, other heavy equipment.

So I don't think they qualify by definition of vehicle, nor do they qualify by the prohibited activity, unenclosed, overnight storage. It is enclosed. Albeit admittedly it is overnight. But by definition of the current bylaw, it's neither the right type of equipment nor is it unenclosed.

Second violation, private bus terminal or trucking terminal. It says mass transport of people or shipping, receiving, handling of materials of any kind. Now, while the city says that we have to bear the burden on prior nonconforming use, the city bears the burden on proving noncompliance with the current zoning bylaw. And there is no evidence of shipping, receiving or handling of materials. The tools of the trade are on the trailer. They leave in the morning, they come back. There is no off loading, unloading of materials, boxes, crates, or anything else. There's no shipping or receiving.

So the bylaw was designed to separate the movement of people to the trucking activity. And the trucking activity is the lead word, shipping receiving or. So it tells you right away the kind of activity they are trying to prohibit. So the burden is on the city to establish that and I believe that they failed to. Otherwise every single business that involves a vehicle that you can call a truck that moves on or off the premises and at some point somebody puts something in it, some tools or whatever, or take something out of it would be arguably the city's version of a bylaw a violation of that trucking terminal term so long as there were three trucks involved.

Ms. Hankins: It's not just one, it's three.

Mr. Baum: Okay. I'm trying to be fair to the bylaw. The point being they are trying to avoid a shipping and receiving terminal activity with multiple vehicles That's the thrust or the mass transit of people. It's both the volume and equality issue.

I think under any view of the positions of parties open storage has now come off the table and there's a procedural aspect that I want to be careful about and it came up in Mr. Rudnick's question. A claim of violation was made by the building inspector. We said we disagree, so we appealed to the board. And by appealing within a timely fashion, we preserve our subsequent rights to proceed to a judicial determination and we need to protect those rights. If at any time we withdraw anything, we've collapsed those rights. It's like we never did make an appeal at all. So we can't sign onto this notion of withdrawing. If the commissioner is satisfied that a condition is no longer an issue then with respect to that violation without a determination by the board it should be withdrawn with that respect. It's not withdrawn with prejudice. It's withdrawn without prejudice. If we somehow in future violate, he could always bring another notice of violation. But in order to keep our appellate rights that the statutory provided under 40A current and not lose those we are not in a position to withdraw anything. If the commissioner says for the purpose of this hearing we will withdraw the complaint on open storage without prejudice. That's fine. Then we have not lost any judicial position. There's nothing to take to the court because the zoning board would not act on that. It's only if the zoning board acts on something and we feel its adverse and we have a legal right that we would then take a judicial appeal.

So I want to be clear on that and I think in substance, the building inspector and I are pretty much on point on a number of issues in working in that direction. But for the storage of trucks and heavy equipment, I believe that we have shown a prior nonconforming use but should you disagree with that, I believe the violation does not meet the statute because what is there is enclosed and if you look at those vehicles I don't believe heavy equipment and trucks are being referred to.

On the trucking terminal again, if you read the bylaw, I don't think it's in. I also want to point out that's in Attorney Connors initial brief to the board and I will refer you to Page 9. He goes through the onset of the activity. There are fifty-two and fifty-five

amendments to the zoning ordinance and what was allowed at that time. I ask you to look at it because essentially there was a very broad area of activity permitted in Business B districts including wholesale storage warehouse facilities, etc., that he argued in his initial brief would capture the activity of our client here. So, I direct your attention to that.

And now I feel that at least what Mr. DiPronio said has been vindicated. He never had a complaint in the years that he operated and what we now understand the building inspector didn't get a complaint but it was basically the ward councilor who raised the complaint on behalf of his constituents so I misunderstood that. I thought that Mr. Forte had received direct complaints from an area resident or residents. But now I understand what's happened.

Again, I suggest that the procedural way in handling this going forward with a bifurcating of the matter. So I appreciate very much the time that you have afforded me and my client and I hope that we have given you some additional information that you will find useful in your determination.

Mrs. Rando: Any other questions?

Mr. Squillante: In my opinion it doesn't appear to be a truck terminal. So I don't have to worry about that. And I think I believe that the intense of use is not for heavy trucks. But where nothing is shown, even the affidavits have shown the uses predate the ordinance at least in effect, until this came in effect in 1935 so I think that's become a question, Finding some sort of documentation that shows that this use has been there. That seems to be the problem.

Mr. Baum: Finding a paper trail is very difficult given the passage of time in what would be typical business record keeping practices of a small family owned business in 1939, 1945 and with the passing of the business from one generation to the next. Having

that paper trail unfortunately is pretty difficult. The best that we could ever find is a couple of gentlemen in their eighties who have clear memories and have tried to give that memory, their personal knowledge to the board. I wish there was a vault or residuary for documents that I could go to. We've tried tracing as far back as we can.

Mr. McCarthy: It just seems to me though that the problem is that although the fifteen years that O'Brien was there and the ten years that the other landscaping companies were there, they were there not under the building department permission to be there with some type of a permit. That's the type of documentation I guess we are all looking for at this point and time. You've got a slip of paper about the Arc Welding business saying that they got permission to do that but as far as saying, okay you can use this as a landscaping company and you can use this as a construction company in addition to the Arc Welding Company, that's the piece of paper that's missing. If that is the case and there is no pre-existing nonconforming use for that type of situation, which under what we talked about is we're getting back to that special permit again. You need a special permit in order to get that right.

Mr. Baum: Well, unfortunately I must disagree with you Mr. McCarthy because that assumes that the only argument for the petitioner is prior nonconforming use. The petitioner makes two separate and distinct arguments: one, it's in compliance with the current by law because if you are talking about heavy equipment and trucking storage, it's not overnight in an unenclosed space. So it doesn't meet that definition. So they fail on the current by law. If you're talking about a private bus or trucking terminal, we are not, obviously moving people. So that doesn't apply and we are not shipping, receiving or handling materials. We're parking and leaving with the equipment needed to do our job on the trailers. So it fails at that definition and that's why I went through the discussion in my main presentation about what a terminal is because it really doesn't have to say commerce. They're dealing with the notion without using the word, mass transport of people, okay, they didn't use the word commerce. Shipping and receiving and handling of

materials, they didn't use the word commerce but shipping and receiving is what truck terminals do and we don't ship, receive, move boxes or crates from one vehicle to another. We handle material. We take our tools, put them on the truck and leave in the morning and come back at night. So even putting the nonconforming use argument aside they have the burden on the violation of the present bylaw and they haven't met that because of these two critical deficiencies. We are enclosed for the storage of our equipment, most of which is not heavy equipment and we're not into shipping, receiving or handling of goods. So I think we have to keep those two tracks separate and I'll concede to the difficulty in finding documentary evidence on the prior nonconforming use. I think the quality of the testimonial evidence is good, but I also think that the current words used in the bylaw mean something and the city has not shown that we have violated those current bylaws because of the reason I just described.

Mr. McCarthy: But the question in my mind is still there. You have a permit for an Arc Welding Company that's been issued that was issued back in nineteen, whenever it was issued. But in any event, if you can't prove that you have a pre-existing nonconforming use, you have a problem.

Mr. Baum: Only if the bylaw prohibits what we are doing and the bylaw does not today prohibit what we are doing. It says you can't store certain kinds of vehicles overnight in an unenclosed space. We are not doing that in an unenclosed space. We have the fencing.

Ms. Hankins: It would be hard pressed to find a business especially of this nature or property of this nature that doesn't have a fence around it. It's your contention that having a fence around the property counts as enclosed in which case there seems no point in having to go get a special permit as Councilor Logan said. Because that's par for the course to have for safety reasons, for financial reasons, all those, insurance reasons, almost

all these businesses have a fence around their property. To me that does not pass any test as far as an enclosure.

Mr. Baum: I submit that the bylaw says what it says and it means what it says.

Ms. Hankins: Well we can go by what they say too about the terminal letter by letter. I mean you can't pick and choose if you're sticking to the letter of it or not. Because on the terminal you brought up all these different things of Logan Airport and all this and now you want to go straight to the letter of it. But the reality is there's nobody that can reasonably say an enclosure is a fence around the whole property because everybody, I have a fence around my property. Everybody has a fence around their property.

Mr. Baum: Well why wouldn't the bylaw say stored indoors?

Ms. Hankins: Well because it doesn't necessarily mean indoors. It means an enclosure but there's certainly some judgement around that but I cannot see how you can make an argument that an enclosure is a fence going around the entire property. Everybody has that.

Mr. Baum: So you would suggest that a sub enclosure for certain heavy equipment would be what the bylaws suggested?

Ms. Hankins: I'm suggesting an enclosure would be, not a sub enclosure or anything. A fence around the property is not an enclosure. So, yes, I would suggest if there was an enclosure, if it was what it isn't now then we wouldn't have a discussion. But clearly just having a fence around the property could not count as an enclosure. There would be no point in the special permit process.

Mr. Rudnick: I don't actually see where the ordinance requires enclosure of heavy trucking and equipment storage. Enclosure is subsumed in 3.248 which is about open storage. There we start to talk about enclosures.

The definition, 3.247 of heavy trucking and equipment storage in part says storage shall mean the keeping of such vehicles or equipment or portions or parts thereof remaining un-utilized or stationary in open lots or in uncovered or unenclosed areas between the hours of 10 P.M. and 6 A.M. or any portion thereof. So my reading of this is you can store heavy equipment unenclosed. That's what it seems to say to me. Storage is allowed. It doesn't have to be enclosed. It doesn't have to be covered. It can be in an open lot. It doesn't even need a fence.

Open storage, a separate issue, that's what requires the fence. My understanding is Mr. Forte has examined the efforts of the petitioners to address the open storage issues and have found them to be addressed at least at the moment.

So the issue here about the trucking is not about whether it is enclosed or not. It's just about whether it's permitted in the zone or not and it clearly is only permitted in the zone with a special permit, and, therefore, as Mr. McCarthy said. The essential question is does any grandfathering exist here for the storage of trucks on this site because it was done prior to of zoning that requires special permits for six years.

Looking at Mr. Connors initial brief, he asserts that in 1955 zoning came in that made these restrictions. And the question really is was this use, because we are talking about number one now, heavy trucks. Was this use in use on this site before zoning said you've got to get a special permit for that in a commercial district and I would like to see some hard evidence. I mean, frankly as a zoning board member, when evidence doesn't exist it usually pushes us to make the unfortunate choice of going to the law department and asking for them to opine about this. So I would much rather have the petitioners give

me something that convinces me that this is addressed. Frankly, I agree with Mr. Squillante that the terminal issue seems a stretch to me. I'm not a lawyer. I'm not a zoning professional. I'm just a citizen on this zoning board. But I read this fifteen times already. I really don't see this as a terminal and it sounds like Mr. Forte at least at the moment is feeling that the petitioner is addressing all of the other issues except for the heavy trucking issue which my view here is, I'm likely to say, you need a special permit for this heavy trucking unless you can show me more substantially, and I mean, I get it that this is an issue about use. But there's nothing stated here that says there's a violation because there's a landscaping contracting company here. In fact, what I'm hearing is the complaints are about the noise that propelled Mr. Forte to make an inspection. He cited seven violations and the one that's sticking at the moment is about the heavy trucks not about whether landscaping is a different use than Arc Welding and therefore doesn't enjoy the grandfathered status that Arc Welding had. I don't know a lot about this but common sense says to me that this is the only issue left unless Mr. Forte says, no you misunderstand, open storage is not resolved. That's the issue about the fences and the and the openness.

Mr. Baum: I fully appreciate your observation and analysis and I credit it a lot. But I do want to point out that two very credible witnesses have talked about heavy equipment being stored on the site since the 1930's - 1949.

Mr. Creonte since 1949 when he brought his truck there and Mr. DiPronio from 1933 when his father started the business. It is impossible to repair heavy equipment without it being stored and logic tells us you can't drive in, do a quick repair and drive out. It has to be stored overnight. So it was stored overnight in the thirties, it was stored overnight in the forties whether it was a bull dozer or steam shovel, parts of a crane. That's all heavy equipment. Arc Welding did heavy equipment for the Big Dig, every major project. So his testimony goes back to 1933, Mr. Creonte goes back to 1949 and they are the people who are saying I was there, I saw it, forgetting right now what was being done, am I repairing, am I doing this, the heavy equipment was on the site. Sometimes the lot

was full. That's what the testimony is and they describe the kind of equipment, steam rollers, backhoes, plows, all these huge construction excavating apparatus and that was the mainstay of the Arc Welding business. So it was impossible for them to do the welding without them storing the equipment overnight. And I think that addresses the concern that you are raising and Mr. DiPronio's testimony buttressed by Mr. Creonte, who had no role in the deal of the transfer of the property. He was a separate tire and auto company who worked on vehicles, changed tires at the Arc Welding site. So I think if that's how you're viewing where we stand now, and I understand it, that is the continuous thread since before the advent of the zoning through until the sale of the property which closed in 2016.

Mr Connors: Mr. Vanaria wanted me to point out. We have pictures of heavy trucks that he does have here so. It's not thirty heavy trucks, its eight to ten trucks which is a continuity between Vanaria and the tenants.

Mr. Rudnick: I'm pretty satisfied with the quality and quantity of the trucks as Mr. Squillante testified. My issue is, is this grandfathered? The current use doesn't seem unreasonable considering what kind of business it is. Once again, my concern here is that noise is actually the complaint.

Mr. Connors: And I would say that's why we have the general ordinances that regulate noise. So every business is regulated by the general ordinances and the city has the right to enforce it. That is a condition and sometimes they don't and I think they should. When they have a violation, enforce it.

Mr. DiPronio: Can I interject something. A lot of the equipment we worked on was so large we couldn't get it in the shop. We worked on it out in the yard. So if that answers your question. It wasn't all done inside. Some of the cranes were so large we had to work on them outside. If it was a large machine we had to repair, we had to shorten the frame on it, we had to do it outside. We did a lot of work outside. And we worked Saturdays and

sometimes Sundays. We never had one complaint. And I would like to know those people that complained. You said they lived there thirty years, Mr. Logan. Could you give me the names later. Because there aren't too many people that live there thirty years. It's all industrialized around there now. There are very few families and most of them are transients. Their there and they leave. I've lived there all my life.

Mr. Rudnick: Your testimony, Mr. DiPronio, is that the various heavy equipment that you described tonight was stored on the site prior to 1955.

Mr. DiPronio: Bet your boots.

Mrs. Rando: Mr. Forte, one of the members has a question for you.

Mr. Squillante: So its sort of two questions. One is it a truly a legal grandfathered use and I was reading like all of our ordinance you can read more than one way and my question is, it says heavy trucking equipment storage is something that is done in an open lot in uncovered or unenclosed area. How do you define unenclosed area?

Mr. Forte: So to kind of circle back on what Attorney Baum had testified to, he's given you two options here. You can say it was either pre-existing legal nonconforming or it's not a violation today. I would contend that it is a definite zoning violation today because it meets the definition of heavy trucking. In saying that buildings or land used for the storage of heavy trucks, heavy contracting equipment, that's what it is. There's no question about it. It meets that first part of the definition. Earth moving equipment, he has that. Shall mean the keeping of such vehicles or equipment or portions or parts thereof. That could be plows, that could be buckets. It could be just about anything that might be associated with it - remaining un-utilized or stationary which it does, unless there's a snow emergency there's no operation of that. And here's the key: In open lots or in uncovered, uncovered or unenclosed areas between the hours of 10 P.M. and 6 A.M.

I agree with Councillor Logan's interpretation. You don't cover something with a fence. You may enclose it but you may not cover. The ordinance covers all three. It says in open lots, uncovered or unenclosed.

Mr. Squillante: Mr. Forte, it says that those are all allowed currently allowed by special permit.

Mr. Forte: Respectfully, may I correct you. In the commercial zone, go to Table of Uses. It says heavy trucking, that's one. So it's not allowed. It's not allowed.

Mr. Rudnick: Allowed by special permit only.

Mr. Forte: Right. That's my point. My point is that it's in violation right now because it's in a commercial zone without a special permit.

Mr. Rudnick: Unless we can establish that it was a grandfathered use before zoning.

Mr. Forte: Exactly. So getting back to Attorney Baum's argument it's either nonconforming or it's completely compliant. I would say that it's not completely compliant not without a special permit. So that's the heavy trucking storage, okay.

Mr. Rudnick: So, again, it just reiterates my point that we're down to one very fine point there. Was it in existence before zoning required a special permit for this activity in a Commercial Zone?

Mr. Forte: Respectfully, if the use of heavy truck storage was continuous from the time it was legal until this time and it was not abandoned then it would remain legal. But

again, you would have to have the number of trucks counted. You can't just say, well it was out there and that was it.

And Mr. Squillante, I didn't mean to get off track. But did I answer your first question?

Mr. Squillante: No, not really. Truck Storage sounds exactly like what they are doing except that it refers back to Section 3.247. So you clearly can't do it on an open lot. You can't do it uncovered and or you can't do it unenclosed.

Mr. Forte: This is only a definition to define what it is. It's not saying whether you can or can't.

Mr. Squillante: If it doesn't meet the requirements then it's not by definition of Open Storage.

Mr. Forte: So I contend that it meets this definition.

Mr. Squillante: I'm asking what the definition of enclosed is or unenclosed.

Mr. Forte: Well it says uncovered or unenclosed areas. So would enclosed mean you would put a fence around it?

Mr. Squillante: That's what my question is.

Mr. Forte: I can't make that determination. All I can tell you is they covered it in all three ways. They said, its either an open lot that's either enclosed which Attorney Baum says that a fence is an enclosure or uncovered. How can something be uncovered. They've covered it all three ways. They defined it as heavy truck storage whether it's an

open lot, whether its uncovered or enclosed. So if it meets one of those three then it's open truck storage. Unless its in a building otherwise it meets this definition.

Mr. Rudnick: That's the key

Mr. Forte: Unless its in a building it can't be anything else.

Mr. Rudnick: It's not heavy truck storage. If its outside or partially covered or enclosed by something it does meet the definition.

Mr. Forte: Exactly. So that's why I cited the violation in the way that I did and I believe it violates the current zoning requirement for the commercial zone.

Then if I may to the private truck and bus terminals it says for the mass transportation of persons, receiving, shipping, transferring or handling of other items. I don't know what you saw in those pictures, but I saw dump trucks that hold material. They transport material. That's what they do. They certainly meet the definition of a truck that transfers materials. It doesn't say specifically whether it is stored on site. It says uses of building or land and these trucks carry material. I can't be any clearer than that so I would completely disagree with Attorney Baum's interpretation that this is not a truck terminal. This is a truck terminal by all definitions.

One more thing I would like to touch upon. Attorney Baum has mention that he may lose his appellate rights by withdrawing an appeal on a particular violation which I think that that is probably true. But I would not withdraw my notice of violation because what I'm asking the board to do is did I cite it correctly at the time. Now, if you were to decide that I did in fact cite that violation correctly at the time and that they have abated it, then you can make it as part of your decision that it was cited correctly, the petitioner cleaned it up, it's all gone. I can't withdraw my notice of violation because I believe I cited

it correctly. He can't withdraw his appellant rights and I would agree with him as well. So, that would probably be the decision that you may have to make.

Mr. Rudnick: It sounds like what you are saying, let's say on number six, certificate of occupancy. These guys can't withdraw. You can't withdraw. We can certainly say the appropriately cited violation has been cured and, therefore, we are overriding the violation notice.

Mr. Forte: You can decide to uphold it. You can decide to overturn it and that certainly whichever you think is more appropriate but to say that they didn't need a certificate of occupancy, I don't know what implication that would have. That would mean they don't have to get an occupancy permit which means it violates the zoning ordinance.

Mr. Rudnick: When we hear corroborating evidence from the inspector of buildings, that they have been fully dealt with at that point I would be comfortable in making moot the violation. But I don't see that we're there. I see progress is being made but I haven't heard your testimony that it resolved.

I don't see any way to rule on this other than to continue it unless perhaps the board is - -

Ms. Hankins: Well, I don't know if there's a sense on the two. I'm certainly ready to rule on the first two and then is there five other ones so the two that we are discussing, I don't know if everybody is prepared to rule on that.

Mr. Rudnick: Well, I'm not because Mr. Forte hasn't testified that those have been resolved. He's only testified that they are working on it.

Ms. Hankins: No what I meant is to rule on the two that we are sort of discussing - -

Mr. Rudnick: Oh, and leave the five.

Ms. Hankins: With the understanding that we are continuing it just so you can clear it out.

Mrs. Rando: I don't think that we can do that.

Mr. Rudnick: The separation.

Mrs. Rando: We did it on a previous case and it threw everything off because of the certain time limit that we have to decide certain things on.

Mr. McCarthy: We either uphold each one of the seven or you're not. That's what we are here for, uphold it or not. End of story. And then it will work its way out. And if they fix everything they will be satisfied. If they don't then there will be more problems, that's all.

Mr. Forte: In the aftermath of any decision, respectfully that that the board might make, I would just tell you whether you decide to uphold the notice of violation or to overturn it. Either way the petitioners will be working with my department to getting in compliance with whatever they need to. So, if you decide you are going to overturn the entire thing there are still permits that they are going to have to get and I'm sure that they will work with me on.

If the vote is to the positive to uphold my notice of violation, again I can delay enforcement action provided that they are working diligently towards compliance. So I do have that ability provided we have some kind of written agreement.

Mr. Connors: I just want to mention that we did in the past bifurcate a case

Mrs. Rando: We did and it was very complicated because we voted on things and there's a certain date that those two matters like today's date, she only has so many days to file it. And then we have other things that the same date being heard that we are not deciding by the time limit.

Mr. Connors: The case that we did bifurcate. You voted on two and the other matters were continued. So, we have a definitive vote subject to appeal and then the other matters were continued. I didn't think it was a problem.

Mrs. Rando: It was a problem.

Mr. Connors: That's the first that I've heard of it. Thank you.

Mrs. Rando: All right, do you want to continue with your proposed findings of fact?

Mr. McCarthy: I think that we are at a point right now, I think it's just a question of upholding the appeal or not. And I make a motion that we uphold the building inspector's ah ———

Mrs. Rando: Well we usually do in the affirmative.

Mr. McCarthy: Okay, then I ought to make a motion that we deny the appeal of the petitioner to eliminate the decision of the Inspector of Buildings in this case.

Mrs. Rando: We could do it that way or we could vote to allow the petitioner to continue working at that address - - -

Mr. McCarthy: Well that's a - - -

Mrs. Rando: I know, it's just the wording. And that's going to be your motion?

Mr. McCarthy: Yes.

Mrs. Rando: Does everyone understand Mr. McCarthy's motion?

Mr. Rudnick: I need to ask Mr. Forte another question.

Bill, I understand what you just said is that you will override your violation notice and you still have the ability to enforce all of the options that you are currently engaged in with the petitioners to address the issues of occupancy, building location, gravel.

Mr. Forte: If you overturn my notice of violation any one of the items that you are overturning, I do not have the ability to enforce unless I go to court. Unless I appeal your decision in court.

Mr. Rudnick: Our statement that your violation is overridden could potentially stops the petitioners in their tracks in order to address any of those concerns.

Mr. Forte: I would just say that the building code violations that exist and I think there are a couple of them that there was no appeal on the building code violations. So that those will still stand and you would have no authority to overturn those decisions.

Mr. Rudnick: The uses of the buildings, the issue of the occupancy permit, those are code issues that you would still be imposing those regardless of whether we overturn your violations.

Mr. Forte: Right.

Mr. Rudnick: Parking on gravel, not a building code issue.

Mr. Forte: No, it's a local ordinance.

Mr. Rudnick: The three last ones that were all about the building code issues.

Mr. Forte: Anything that's cited in the zoning ordinance I would not have authority to enforce if you were to overturn my notice.

Mrs. Rando: I believe we have a motion to allow the petitioner to continue his business at Felton and Williams = == =

Secretary, Ms. Oliveri: No the motion was to deny the appeal of the petitioner to eliminate the decision of the inspector of buildings.

Ms. Hankins seconded the motion.

Roll call: Mr. Squillante, no; Mr. McCarthy, yes; Ms. Hankins, yes; Mr. Rudnick, no; Mrs. Rando, yes.

The secretary repeated the vote once again to the board.

Mr. Baum: The motion was to deny the petitioner's appeal?

Mrs. Rando: Right, I was confused.

Mr. Baum: Just to be clear, the motion was to deny the petitioner's appeal?

Ms. Hankins: Yes.

Mr. Baum: And because there was some uncertainty as the votes were being taken exactly what that motion was, we request that for the record would just do the vote over again. Madam Chair, I just raised the issue because it was clear that there was a misunderstanding on the chair's part as to what the motion was.

Mrs. Rando: I think it was the same motion except that he was a little fancier in his.

Mr. Baum: Okay, the discussion made it unclear to me whether the chair was voting in favor to deny the appeal or for something else. That's why I asked for a recount of the vote just so that it would be clear on record because I thought there was some misunderstanding as to exactly what the motion was.

Mrs. Rando: I know what the motion was. Are you talking about my vote?

Mr. Baum: Yes.

Mrs. Rando: I'm upholding the building inspector.

Mrs Rando: One more motion is in order.

**On motion of Ms. Hankins, seconded by Mr. McCarthy, the board voted to adjourn
at 9:45.**

Barbara Rando
10/25/16