

**CITY OF WALTHAM  
ZONING BOARD OF APPEALS**

**December 13, 2016**

**The Zoning Board of Appeals held a public hearing at 7 P.M., Tuesday, December 13, 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 Michael Cotton, Mark Hickernell, John Sergi and Michael Squillante.**

**Mrs. Rando: Tonight we have two new cases and one extension of time.**

**Case No. 2015-28. Alexandria Real Estate Equities, Inc, 205, 225, and 231 Second Avenue and that's for an extension of time.**

**Case 2016-42, Wendy's Old Fashioned Hamburgers of New York, LLC, 802 Main Street and Case 2016-43 Celco Partnership d/b/a Verizon Wireless, 415 South Street.**

**The first action this evening is for a motion to accept the minutes of December 6th.**

**On motion of Mr. Sergi, seconded by Mr. Cotton, the board voted to accept the minutes of December 6, 2016.**

**Would the Petitioner or the Petitioner's representative come forward in Case No. 2015-28?**

**Attorney Michael Connors, Connors & Connors, LLP, 6 Lexington Street, Waltham came forward.**

**Mr. Connors:** Earlier this year, on January 5th, the board unanimously approved the requested variances, special permit and modification to case 9721 in Board of Appeals Case 2015-28.

The zoning relief requested were for properties at 205, 225 and 231 Second Avenue. The building at 225 Second Avenue was formerly housed by ADP and last January at this time Forum Pharmaceuticals was the tenant at the time. Forum has unexpectedly had to vacate the premises due to a negative ruling by the FDA as to their once promising Alzheimer's Drug. But since that time our client has marketed the space and secured a new tenant by the name of Bioverativ which is a hemophilia focused spin off company of a biogen, and they hope to move in by early spring 2017.

Accordingly due to this change in circumstances, on December 5th, I filed a written application requesting that the rights granted under the variances and all the rights granted by case 2528 be extended to six months pursuant to MGL40A, Section 10, Paragraph #3 which further states:

...the permit granting authority in its discretion and upon written application by the grantee of such rights may extend the time for exercise of such rights for a period not to exceed six months...

So, Madam Chair, that's my presentation in chief and members of the board, if there's any question I can hopefully address those at this time.

**Mrs. Rando:** Do any board members have any questions?

**Mr. Sergi:** When is the tenant going to move in?

**Mr. Connors:** Hopefully in the Spring of 2017, two to three months.

**Mrs. Rando:** Have we ever extended time because of lack of tenants before?

**Mr. Connors:** Yes. There's a myriad of reasons. You're allowed just one six month's extension under General Laws and I had a case in front of this board where a house burned down that was part of it and time was extended for that reason, so similar here. Any reason that they are unable to exercise the rights under the variances, the first issue that comes up and that's the issuance of a building permit is how they would go about that. They had ADP used to have an area that they would come in and it was a payroll company and drop things off. So part of the variance requested the last time was an infill of that space so that part didn't move along. They weren't pulling building permits acting under this decision. So things happen all the time lesser than this. They were pretty far along in the building actually. Some people don't even get a shovel in the ground type of thing, so this is promising that they do have a tenant and they are hoping to move forward under the rights granted in that case.

**Mrs. Rando:** And you're looking for July 5, 2017?

**Mr. Connors:** We would like to request six months from the date of the grant.

**Mrs. Rando:** And the date of the grant was what?

**Mr. Connors:** January 5th. I have to come in prior to it and file an application prior to them lapsing, so...

**Mrs. Rando:** Do I have a motion to allow the extension of time for Alexandria Real Estate?

**On motion of Mr. Sergi, seconded by Mr. Cotton, the board voted to allow the extension of time to grant the Petitioner time to make the improvements to the property.**

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

**Mrs. Rando: Will the clerk please read the petition in Case No. 2016-42, Wendy's Old Fashioned Hamburgers of New York, LLC.**

**The clerk then read the petition in Case No. 2016-42, Wendy's Old Fashioned Hamburgers of New York, LLC. Owner: Waltham Legacy Holdings LLC., in an application for Special Permit - alter a nonconforming use and Appeal of Decision of the Inspector of Buildings. The Inspector of Buildings has denied a Building Permit for Petitioners to renovate and remodel the existing building at 802 Main Street. Petitioner appeals this denial. Alternatively, the Petitioner seeks a special permit pursuant to Section 3.7222 of the Ordinance. Location and Zoning District: 802 Main Street, Business B Zoning District.**

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

**Joseph M. Connors, Jr., Esquire, 404 Main Street, Waltham, the Petitioner's representative, came forward. (He submitted a copy of his brief and exhibits to the board. He introduced Anthony DiNato, of Bohler Engineering and also Bob Manning, the representative and General Manager of Wendy's. Mr. Connors then read his brief into the record along with going over the plan of the locus, facade and the proposed handicapped spaces and interior renovations.)**

**Mr. Sergi:** The building inspector sent you here because he felt the use was changing?

**Mr. Connors:** Well, MGL states that if you're changing the use or you are substantially changing or extending it, you need get the special permit. So it's our position that the use is not changing. So I don't think he was saying the use was changing but he was saying that the changes we are making to the property were substantial and therefore they were so substantial that they require a special permit.

So we have done two things. We have appealed his decision but then alternatively if the board was to deem him correct, we would have to ask for a special permit to allow us to alter the nonconforming uses on the property.

**Mr. Connors:** I'm just going to have Mr. DiNato kind of just walk you through the specifics. I just generalized what the changes would be but I am going to ask him to kind of just walk through the real specifics of it from an engineering point and then I will go back to my brief.

**Mr. Anthony DiNato, Bohler Engineering:** As Mr. Connors had stated that the exterior improvements are going to meet accessibility and regulations to code and they involve regrading a portion of the parking in the front. Currently the ADA parking doesn't have the required width for a van space. It's not signed correctly, signage is on the building. The way cars can park they can block the sidewalk entrance to the building.

What we are proposing is to put signs with bollard protection to prevent cars from parking over the sidewalk and the signs will be of a height that will meet the requirements which is at least six feet tall. And again, there will be a new sidewalk that will connect to the sidewalk in the public way.

In addition to, as Mr. Connors stated, the canopies are for the customers, just for the convenience, so that when they are ordering and pull down the windows, if it's raining out they don't get the interior of the car wet. And there are two windows as Mr. Connors had stated, one is a cash pickup window and the other window would be to pick up the product.

Other than that, the layout of the parking lot still is the same. There might be some striping, new landscaping on the site just to kind of clean it up and give it a new look to match the building which is typical of their new corporate identity. I don't know if you have seen any new stores lately but they are a lot brighter and cleaner and on the inside they're also clean and they have TVs inside, work stations and Wi-Fi and the idea is to get people in there and stay there for a while and do some work. It will be a more pleasant place to visit.

Mrs. Rando: Any questions?

Mr. Hickernell: Would you go through the interior?

Mr. DiNato: Sure. As Mr. Connors had stated, there would be new brick, and the footprint stays the same but it would be refreshed in the front and the new signage would be in the corporate image of the company. The vestibules, the current vestibules doesn't meet the current regulations, so the vestibules will be redone on the inside. As Mr. Connors stated, there will be new lighting on the outside of the building and new counters and tables and new seating and new flooring.

Mrs. Rando: The signage, is it going to be lighted?

Mr. DiNato: Yes.

Mrs. Rando: Is it the signage that is there now?

**Mr. DiNato:** Yes.

**Mr. Hickernell:** Are you extending the seating capacity?

**Mr. Connors:** No, we are reducing the seating capacity. We are going from sixty-seven seats to sixty-two seats. What was initially occurring in 2001, I couldn't find the seating plan but on the site plan that was submitted and approved by the city said that it was going to have eighty-five seats. So they continually try to bring down the number of seats.

(Mr. DiNato went over the plan of the interior with the board.)

**Mrs. Rando:** How many handicapped seats do you have?

**Mr. Connors:** Looks like there's two, where they have none today. So we are in fact reducing the number of seats from sixty-seven to sixty-two.

**Mr. DiNato:** It looks like there's four.

**Mr. Squillante:** Two quick questions. I assume it had a special permit from the City Council where its a fast food restaurant?

**Mr. Connors:** No. In 1970 you didn't need a special permit for a fast food restaurant. It didn't come about until 1986. But the building inspector was of the opinion in 2001, so long as you built on the footprint of what was there in 1970, I'm going to give you a permit. And he did that in September of 2001 and then in December 2001, he issued a certificate of occupancy.

(Mr. Connors went back to his brief and exhibits.)

Mr. Connors: So, I kind of summarized those issues and I can go back to the Powers Test if anyone wants to review that but I do believe that using that test, and if you read the Powers Case, if you had an opportunity to do it, it isn't great in taking you to the elements. It kind of says there are a bunch of cases where they say the continued use is okay and here's a bunch of cases where the continued use is not okay. So you just kind of have to look at those cases.

The major case was the Town of Bridgewater vs. John Chuckran and that's kind of where it came from. The guy had he was producing say four cubic yards of cement incidental to his contracting home building and then all of a sudden he's producing thirty-five cubic yards of cement that he's selling at retail and the court said you've expanded it dramatically . You changed the nature and the purpose. Initially you were a home building who incidentally needed cement. Now you're selling cement to other home builders. So in that case they found they were increasing the nonconforming use to such an extent that it was no longer permitted under the zoning code. So I would say just by analogy that's not happening here. It's the same continued use and its more of an improvement to the property to really kind of put a modern shine on it and two, to make it ADA compliant.

So that was the Part One of the Appeal of the Decision of the Building Inspector. I've given the board a copy of the Powers case and the Town of Bridgewater vs. the Chuckran case. I also have a copy, it's not in my brief, but I do have a copy of the original permit that was permitted in 2001 if anyone would want to see it. In that permit signed by Ralph Gaudet, it states that Raze Existing Fast Food Restaurant with Drive Thru Window and accessible garage and replace with new modernized similar facility and update parking and driveways according to the Traffic Commission recommendations as per submitted plans and specs.



So in 2001, he simply allowed them to tear down the old building and reconstruct a new one.

So alternatively, if the board was to find that we are substantially extending the nonconforming use there, then we would respectfully ask for a special permit to do so. That would be a special permit under 3.7222 to alter a nonconforming use. In 3.722, there's language in there that provides that you may alter or expand a nonconforming use provided that you don't expand it more than ten percent of the ground floor area of the building. So, again, the ground floor area of this building shall remain the same. It's not changing. The alterations as I have outlined will not affect the footprint whatsoever of the building. That shall remain unchanged so the alteration is an improvement to the site but it's not adding any percentage increase in the ground floor area of the building. It shall remain unchanged. We exceed all the parking requirements under the code. We meet all the requirements of the structural dimensional setbacks of the property.

The proposed alterations shall not enlarge the ground floor area of the building. There's no additional interior floor area is proposed.

Mrs. Rando: Are there any questions?

Mr. Sergi: Madam Chair, just one. Whenever you mention landscaping, my ears kind of perk up. So I'm curious as to what type of landscaping you are going to have there. I think it would be nice if you would.

Mr. DiNato: I think wherever the existing beds are, we will refresh them and get new plantings, new striping in the parking lot and resealing.

Mr. Sergi: Okay.

**Mr. DiNato:** The building is up to the street line so there's nothing that we can do.

**Mr. Connors:** There's like a two/three foot bed. It sits in front of the building but there are some tired plants there.

**Mr. Sergi:** So you can replace those plants. That would be nice. I mean I think it would be a nice touch.

**Mrs. Rando:** How many handicapped parking spaces did you say you have?

**Mr. Connors:** Today we have four and we are taking away two.

**Mr. DiNato:** Today we don't meet zoning regulations right now because we don't have specific van isle width. As I said right now the sidewalk is flush with the roadway and cars approach upon the sidewalk. We are putting in a six inch curb and what we are doing here is that we have when we open out from the door and they're on a landing and you go a ways and then there's an easier ramp that brings you down to the level landing that lets you out into the isle and then there's two spaces on each side. It's a little bit different than what's out there now. As I said the spaces out there don't comply with the ADA regulations.

**Mrs. Rando:** I can't understand four seats and only two parking spaces.

**Mr. Connors:** It conforms to the ADA regulations.

**Mrs. Rando:** Is there any state regs to the number of tables?

**Mr. DiNato:** I'm sure there is and that's why the new layout.

**Mrs. Rando:** So you think it does.

**Mr. DiNato:** It does.

**Mr. Connors:** They actually did an ADA analysis by a separate engineer who did an ADA compliance analysis and the building itself due to the issues they have I think they received a grade of a “C” so it almost flaunts the ADA compliance. These improvements will bring it up to an “A” level. So I know what you are saying, you’re going from four to a two. Hows that an improvement, but it meets the code but also right now if you ever go by there these four handicapped spaces are not utilized, not four of them and that will allow two regular spaces on this side of the building where right now there’s zero.

**Mrs. Rando:** Is there anyone in the audience that is in favor of this petition?

(Two people raised their hands.)

Is there anyone seeking information? Seeing none, is there anyone in opposition?

Seeing none.

Now, you are asking us, if I understand correctly, to appeal the decision of the building inspector and if we don’t then you would turn around and ask for a special permit?

**Mr. Connors:** Yes. So it’s kind of a two part test. But, it’s an alternative theory but my point was that I believe that we should have been granted the special permit in the first place. He told me I needed to go to the city council. I can’t go to the city council. It’s been there since 1970. So he said you need to go get a special permit but I didn’t want to have to

come back here and lose the case and come back next month and ask for it so I put them both together.

But I drafted a decision that would allow for either an alternative theory. The findings of fact are the findings of fact.

In the decision, I put Decision #1 and #2. #1 would overturn the decision of the building inspector and order that he issue a permit provided that it conforms to the state building code and then #2 would be a finding that it meets the criteria of the special permit.

Mr. Sergi: I will make a motion that we waive the reading of the Proposed Findings of Fact since it has been on file in the Law Department and the board has had a chance to read them.

Mr. Cotton seconded the motion and the board voted to waive the reading of the Proposed Findings of Fact.

Mrs. Rando: On the Proposed Decision?

Mr. Sergi: In a similar fashion, Madam Chair, I propose that we waive the reading of the Proposed Decision since it's been on file.

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

Mr. Connors: So, Madam Chair, just not to interrupt you but so I have in the Proposed Decision #1, that would be addressing the issue of the decision of the building inspector and #2 would address the issue of the special permit. It's one or the other, not both.

**Mr. Sergi:** Could I just add one condition to the decision? Counsel, would you mind adding this condition that you will replace and maintain the landscaping in the parking lot and along the front of the building on Main Street. That would be number 3.

In the Proposed Decision, Mr. Squillante asked that (2) be deleted all the way to (3). Also on Page 3, delete special permit and add “decision”. So it should read: The granting of this decision is subject to the following conditions.

**Mr. Hickernell:** I’ll make a motion that we adopt the proposed decision on #1 and delete #2.

**Mr. Sergi** seconded the motion.

**Roll call:** Mr. Sergi, yes; Mr. Hickernell, yes; Mr. Squillante, yes; Mr. Cotton, yes; Mrs. Rando, yes.

**Mr. Connors:** Madam on the decision I’m just adopting number one and the only thing is if you go to page 3 cross out that first paragraph but I think just to make sure that we keep the conditions in there, so the granting of this decision is subject to the following.

On motion of Mr. Hickernell, seconded by Mr. Sergi, the board voted to adopt the Proposed Findings of Fact as the board’s Findings of Fact

**Roll call:** Mr. Sergi, yes; Mr. Hickernell, yes; Mr. Squillante, yes; Mr. Cotton, yes; Mrs. Rando, yes.

**Mrs. Rando:** Do I have a motion on the Proposed Decision, as amended?

**On motion of Mr. Sergi, seconded by Mr. Squillante that the Proposed Decision as amended becomes the Board's decision.**

**Roll call: Mr. Sergi, yes; Mr. Hickernell, yes; Mr. Squillante, yes; Mr. Cotton, yes; Mrs. Rando, yes.**

**Mrs. Rando: Will the clerk please read the Petition in Case No. 2016-43?**

**The clerk then read the petition of Cellco Partnership d/b/a Verizon Wireless. Owner: Brandeis University in an application for Telecommunications Act Use and Dimensional Variances. Subject Matter: Install wireless communications equipment, consisting of stealth antennas and equipment on the rooftop and facade of the Brandeis University Volen Building mounted inside of four stealth canisters and four antennas mounted to the facade (paint to match) and a 20'-0" x 15'-2" stealth enclosure on a metal frame for the installation of its rooftop equipment cabinets. Location and Zoning District: 415 South Street, Map R067, Block 008, Lot 002. Residence A-3 Zoning District:**

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

**Daniel D. Klasnick, Duval & Klasnick LLC, 210 Broadway, Suite 204, Lynnfield, MA representing Verizon Wireless came forward.**

**Mr. Klasnick: Initially I did want to note for the record, that I believe a letter was submitted by Brandeis University.**

**Mrs. Rando: We have the letter.**

**Mr. Klasnick: Well I think that this board is probably aware and typically wireless communications facilities go before the city council for a special permit. That's the process that I followed previously. In this particular instance, the location of the property Brandeis University where the coverage gap is with a significant gap needs to be addressed is located in a Residential A3 Zoning District. Under your ordinance there's specified zones in which roof top and facade mounted antennas wireless communications equipment is allowed. Residential A-3 is not one of those zones.**

**Under your ordinance, although it doesn't specify that this board is empowered to grant use variances. What we tried to describe in our brief is in addition to looking at your ordinance and state law it's also necessary to consider the Telecommunications Act.**

**If I may, there are certain requirements that have been imposed by the Telecommunications Act and I'll just read those in if I may.**

**It basically passed in 1996 codified at 47USC, Section 332 that Congress placed five major limitations on municipal powers with regard to decisions on citing wireless communications facilities.**

**First, a municipality may not reasonably discriminate against the provider of functionally equivalent services.**

**Secondly, any decision shall not prohibit or have the effect of prohibiting the provision of personal wireless service. The municipality may not consider the environmental effects of radio frequency omissions if the omissions comply with FCC Standards. Municipalities must act within a reasonable period of time. The FCC has made a ruling basically for this type of facility that's 90 days when the application was accepted. And also the decision must be in writing and supported by substantial evidence.**

**Mr. Klasnick then summarized his brief into the record and went over the packet of materials attached to the brief. He also went over the plan to show where the antennas will be located.**

**When you consider that the University has over five thousand students, probably a thousand faculty and supporting individuals, the campus alone, I would submit represents an area of substantial need but if there is a gap that satisfies the requirements of the Telecommunications Act provide for a significant gap in service.**

**So in regard to the standards we asked this board to apply, we outlined in our memorandum certain provisions of the Telecommunications Act that the courts have interpreted local municipal boards must take into consideration when looking at these types of facilities following the fact that the wireless service provider has illustrated that there was a significant gap in service which I maintained that we have done with our affidavit, maps and other materials. So basically the standards that this board is asked to apply is that even though under your ordinance you're not authorized to grant use variances. The courts have interpreted this differently. They said if the carrier illustrates that there's a significant gap in coverage the board must grant whatever relief is necessary so that they can construct that facility.**

**In our brief we specifically said that the purpose is to establish national standards that apply to zoning applications for the wireless facilities. These standards pre-empt inconsistent state and local laws. So they must be considered by zoning boards in making decisions on applications for wireless facilities.**

**We went on further to state that courts have generally found that regardless of the intentions of the local authority certain standards are akin to a prohibition of wireless service.**



One example of that criteria that is akin to an effective prohibition is where a use variance is required for a wireless facility that the zoning ordinance does not allow the use to be granted. Further setting out criteria under the zoning law that no one could ever meet is an example of an effective prohibition. Specifically the courts of the first circuit have found that the need for a closing a significant gap in wireless coverage in order to avoid an effective prohibition of wireless service constitutes another unique circumstance when a zoning variance is required.

So basically the cases of the first circuit are clear that the wireless carrier meets the criteria in the Telecommunications Act for the construction of the wireless facility. The local Zoning Board must issue the relief in whatever form is necessary to authorize the construction.

In the case of our application, with the prohibition of wireless facilities in the Residence A3 Zoning District, the appropriate relief would be in the form of the use under the Telecommunications Act.

So what we try to do is lay out for this board those standards and we are certainly available to answer any questions that you might have.

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

**Mr. Sergi:** I am just curious what makes these canisters stealth? Is it the fact that they are set back nine feet from of the roof or —

**Mr. Klasnick:** Well I think if you look at the existing features of the building include these canisters. So there's a photo simulation of the facility itself. This is actually taken from the campus. (Mr. Klasnick went before the board to show them the photo simulation.)

**Mr. Sergi:** So it's supposed to blend with the color of the sky or the clouds, or - -

**Mr. Klasnick:** Well I think it's really intended to blend in with, there's already canisters located on this building, so we are intending to mirror that architectural feature of the building.

**Mr. Sergi:** So in effect it's not stealth but just matches what's there already.

**Mr. Klasnick:** And then the antennas are located inside those. So they are a friendly material.

**Mrs. Rando:** Do they have to be two hundred feet away from a residence?

**Mr. Klasnick:** Well, in regard to this facility, they're much further than that. As you can see, (referring to the plan) this is over a thousand feet from any of the abutting properties.

**Mrs. Rando:** And on the South side, there are homes.

**Mr. Klasnick:** But I mean, as far as the distance, there's nothing within a thousand.

**Mrs. Rando:** Is there not a tower in the elementary school, also?

**Mr. Klasnick:** I don't know the address for that. I know Verizon Wireless is at 130.

**Mrs. Rando:** Well, I'm a little leery because I do feel that we have to send them to the council and there are four different remarks made here: Provisions of the Zoning Ordinance Involved. And one, two, three of them are Section 10 which goes in front of the council and Section 4 that you mentioned. I feel that I would like to get an opinion from

the law department as to whether we go by 4 or we go by Section 10. And if we don't get an opinion from the law department tonight then we would have to take out everything that has to do with Section 10 in your decision and findings of fact and go with just 4 and I don't feel I have the right to do that. I think we should get an opinion from the law department.

The building inspector was quite clear in his response.

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

Mr. Squillante: There are a couple of questions on Must vs. Kirk. On Page six, Federal Law allows the Zoning Board to grant whatever relief is required. It doesn't say Federal Law forces the zoning board. And I don't know what these cases are. These cases might be exactly the same as your situation or they might not. I just haven't seen the cases.

Mr. Klasnick: Well I submitted all the cases with my legal memorandum. In regard to those cases that are cited, it's clear that once a carrier establishes that there is a significant gap in service and that its solution is really, I mean in this particular instance because the ordinance is so prohibitive as to almost we can say are hostile to these facilities by trying to carve out areas of Waltham where you cannot locate them. Looking at the cases and how they have been interpreted that's interpreted as a prohibition per se almost as to the carrier's ability and the courts requirement to consider the precepts of the Telecommunications Act. And the purpose of that act was to facilitate the deployment of wireless facilities. So to the extent that an ordinance or state law conflicts with it, it's preempted.

Mr. Squillante: I also worry about that this approach completely circumvents the city council. Essentially no one should ever go to the city council again for - - -

**Mr. Klasnick:** No. Every time, I mean the ordinance is what lays out what's required. The ordinance says, if you're in the zones that the ordinance says you can install these facilities, you go to the city council. But because in this instance it's prohibited in this zone, under state law, the board of appeals can be empowered to grant use variances and dimensional variances, obviously not the city council.

The City of Waltham, I guess, has made a policy decision not to empower you to grant use variances. Nonetheless, as I had said, under the Telecommunications Act, the board is really compelled to consider whether or not its actions will result in a prohibition of wireless services.

**Mrs. Rando:** I think I have a problem that you are trying to loop Section 4 and Section 10 together here and I think it should go to the council. But I would get an opinion from the Law Department.

**Mr. Squillante:** Just another question. My first reaction of reading this is there seems to be no other choice. I'm not sure I believe that anymore. There's a question of, are we actually prohibiting service? On Page 5, you point out that the proposed pole location reduced the number of additional new facilities required suggests that there's another way to provide service.

**Mr. Klasnick:** Well our engineer is here as well. He can speak to the coverage requirements. The only location that a facility can be located in this particular instance to address this campus in this area of South Street is within the Residential A-3 Zoning District.

**Mrs. Rando:** Because of the height?

**Mr. Klasnick:** Because of the physical location as well but also the height of the building. I suppose you could put a tower on Brandeis University as well presuming that would be less desirable than a stealth facility on a roof top. So what we submitted in our RF Affidavit and coverage maps establishes that there is a significant gap in this area. And I think that Brandeis University through its support letter further describes why they think that this is important for the operations of their campus not only for just day to day activity but also for emergency responses. So then you have South Street as well where there's that clear gap as I have shown on coverage maps that Verizon Wireless is trying to fill. So, there really aren't any other solutions and by prohibiting facilities within a residential A-3 Zoning District, I would submit that the city certainly has some difficulties and problems with the Telecommunications Act.

**Mr. Squillante:** Where are the closest parcels that are in allowed zones?

**Mr. Klasnick** went over the plan showing the zones.

**Mr. Squillante:** My concern is that essentially we are taking away the City Council's power away from them and essentially nullifying the council in its process. If I were going to cite a tower and I knew that I could go to the city council and have all kinds of restrictions on it or I could come here and tell them we have to give it to you.

**Mr. Klasnick:** Well there's nothing that prevents this board from imposing reasonable conditions as well similar to what the city council would do.

In addition, I have had conversations with the Ward Councillor, Joseph Giordano, regarding this particular facility. I know that he's reviewed it with Councillor Logan as well. So there was some efforts on my part to outreach and I also sat down with Mr. Forte and we discussed this at some length and looked at it and I provided him with a similar brief, not as extensive in regards to the Telecommunications Act. So we have tried to work

with the city within the context, but the ordinance doesn't allow the city council to grant permits for facilities in a Residential A-3 Zoning District. There's no way to get around that and when I spoke to Mr. Forte, he essentially said yes, that's true, you're not allowed in a Residential A-3 Zoning District but the City Council is the normal body that does review these things. I can certainly appreciate that this board does not want to usurp their authority but in this particular instance they don't have any authority because by the ordinance they drafted they took their authority away.

Mr. Squillante. I would send an email asking the law department to have somebody here. It would make it a lot easier if we could.

Mrs. Rando: I think Mr. Forte's sent a letter to be read into the record saying he was against it.

Mr. Squillante: So may I make a request to the law department?

Mrs. Rando: That is my wish to request to the law department to see if we have a right to do that.

Mr. Squillante: I think as I said, we may actually have no choice in this matter.

Mrs. Rando: Mr. Cotton, how do you feel?

Mr. Cotton: Well the building inspector said that we should do away with the application but I think we should get an opinion from the law department.

Mrs. Rando: All right, we have three people that feel we should get an opinion.

**Mr. Sergi:** I will go along with the wishes of the board, I guess. If Madam Chair would like to get an opinion, I'm okay with that.

**Mr. Squillante:** I agree with what he says that going back to the city council doesn't help.

**Mrs Rando:** And he's probably right but I want to know if we have the right to do that.

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

**Mr. Hickernell:** I'm satisfied that the United States Congress has spoken on this issue. So I do not need an opinion from the Law Department.

**Mrs.Rando:** So we have four people that want an opinion.

**Do I have a motion to ask the law department for an opinion?**

**On motion of Mr. Cotton, seconded by Mr. Squillante, the board voted to request an opinion from the law department.**

**Roll call: Mr. Sergi, yes; Mr. Hickernell, no; Mr. Squillante, yes; Mr. Cotton, yes and Mrs. Rando, yes. The vote was four to one in favor.**

**Mrs. Rando:** How is January 31st. The board agreed.

**Mr. Hickernell:** Where does that put us within the ninety days for action?

**Mr. Klasnick:** I think that puts us very close. I believe the application was filed on October 31st.

**Mr. Hickernell:** I don't know if we can extend that.

**Mr. Klasnick:** I mean as to the agreement, we would agree to extend it to January 31st. I can put together a letter or something or a document with a signature by the Chair or something to January 31st.

**Mrs. Rando:** We will continue Case 2016-43 to January 31st.

**Mrs. Rando:** One more motion is in order.

On motion of Mr. Sergi, seconded by Mr. Squillante the board voted to adjourn at 8:30 P.M.

*Barbara Rando, Chair*  
*12/20/16*