

REGULAR MEETING

Salute to Flag: 8:04pm

OPENING STATEMENT:

This is the Regular Meeting of the Wanaque Board of Adjustment and adequate notice has been given and it has been duly advertised by the placement of a notice in the Herald News and the Suburban Trends on January 11, 2017 respectively, and a notice thereof has been posted on the bulletin board in the Municipal Building in the Borough of Wanaque and a copy thereof has been on file with the Borough Clerk

ROLL CALL: Chairman Jack Dunning, Vice Chairman Bruce Grygus, Members Frank Covelli, Barry Hain, Peter Hoffman, Donald Ludwig, Michael Levine, Suzanne Henderson, and David Karp and Attorney Ronald Mondello and Engineer Christopher Nash

**Application #ZBA2016-05 – MKR Enterprises, LLC
17 Park Street, Wanaque, NJ (Block 240/Lot 3)**

APPLICANT'S EXHIBIT

A-20 Compliant Parking Concept (Conceptual Sketch) prepared by Petry Engineering

Michael Rubin, Esq. of 1330 Hamburg Turnpike, Wayne, NJ, Attorney for the Applicant. As I recall from my notes, Mr. Petry was and will continued to be cross-examined, and he is ready to proceed.

**Attorney Mondello to Attorney Fernicola: Your witness.
Paul Fernicola, attorney for Mr. and Mrs. Bellante.**

Attorney Fernicola, to Engineer Petry, can you tell this Board when did the restaurant/bar use of the subject project become a non-conforming use?

Engineer Petry answered when the zoning ordinance was implemented that zoned the property residential.

Attorney Fernicola questioned what was the date of that?

Engineer Petry answered I don't know the exact date.

Attorney Fernicola questioned can you approximate for us what you believe to be the estimated date?

Engineer Petry answered 1956.

Attorney Fernicola questioned did you review the ordinance from 1956?

Engineer Petry answered I did not.

Attorney Fernicola questioned do you believe it is important to know the date when the restaurant/bar use of the subject property became a non-conforming use?

Attorney Rubin commented I assume Mr. Chairman these questions are asked to Mr. Petry's testimony as a Planner, rather than as an Engineer.

Attorney Fernicola stated I don't know that it makes a difference since he testified in both capacities.

Attorney Rubin stated correct and as long as it is clear that he testified in both capacities.

Attorney Mondello asked Engineer Petry if he can answer the question.

Engineer Petry answered yes I would think that the significance of when the restaurant use was established prior to the implementation of the ordinance is significant in terms of establishing the pre-existing, non-conforming use, but I think the Board has already voted on that.

Attorney Fernicola stated you are here on an application and your testimony is in support of expanding that pre-existing, non-conforming use. Correct?

Engineer Petry answered that is correct.

Attorney Fernicola questioned do you also agree that it is important to know the character and intensity of the restaurant/bar use at the time it became a non-conforming use?

Engineer Petry answered I think that is a difficult question to answer in terms of pinning it down. In terms of what was offered there and what

Attorney Fernicola stated that is not my question. My question is a little bit different. My question is would you agree that it is important to know the character and intensity of the restaurant/bar use at the time it became a non-conforming use?

Engineer Petry answered I don't know if that's as significant.

Attorney Fernicola questioned as significant as knowing when it became a non-conforming use?

Engineer Petry answered yes.

Attorney Fernicola questioned is that what you mean?

Engineer Petry answered yes.

Attorney Fernicola questioned are you able to identify for the Board whether or not the outdoor service of food and alcohol of the subject property was only seasonal when that use became a non-conforming use of the subject property?

Engineer Petry answered I can't say for certain that I know the answer to that.

Attorney Fernicola stated so you don't know if the outdoor was seasonal use when it became a non-conforming.

Engineer Petry stated no, it seemed to have been described that way by the witnesses in the first portion of the application. They said that it was in nicer weather and I would take that to mean seasonally, yes. I can't say for sure that I know it wasn't used in a variety of seasons.

Attorney Fernicola questioned are you able to identify to this Board, or for this Board, the frequency, or how often, the outdoor service of food and alcohol was occurring at the subject property when it became a non-conforming use?

Engineer Petry answered I believed the testimony went back to the early 1950's from the people that spoke here at the initial part of the hearing, but I can't tell you more than what they said.

Attorney Fernicola, wording his question a little differently, questioned in a given year what was the frequency, or how often, was the outdoor service of food and alcohol occurring at the property at the time it became a non-conforming use?

Engineer Petry stated I cannot answer that question.

Attorney Fernicola, at that same time period when it became non-conforming, can you identify for this Board the hours of operation for the duration of when food and alcohol were being served at the subject property at the time it became a non-conforming use?

Engineer Petry stated I can't.

Attorney Fernicola questioned are you able to identify for the Board the capacity, or the number of patrons, that were utilizing or being served outdoors at the time that the outdoor service of food and alcohol became a non-conforming use on the property?

Engineer Petry stated I can't identify a number of people.

Attorney Fernicola questioned can you identify, or do you have knowledge of, the physical improvements that existed in the outdoor area to accommodate the outdoor activity at the time it became a non-conforming use?

Engineer Petry stated only the testimony that was put forth by the witnesses in the first part of the hearing.

Attorney Fernicola questioned do you know the number of chairs that existed at the time it became non-conforming?

Engineer Petry stated no I don't.

Attorney Rubin commented Mr. Chairman I haven't said anything over this line of questioning but I think it is time now to enter an objection to this line of questioning.

These are all questions that counselor should have asked all of those people who were here in the first part of the application; all of the patrons. These are the questions that should have been asked but obviously weren't, but now trying to ask these questions of someone who obviously wasn't here because the site engineer, Engineer Petry, was retained to testify as to this hearing. So obviously, he wasn't here in the 50's, 60's and 70's as a patron. He is not a fact witness; he is an expert witness. These are all questions that should have been asked to all of those patrons who were here and lined up and testified to the best of their ability to this Board over several meetings, but this is not the appropriate witness to ask those questions.

Attorney Fernicola stated, first of all I don't concede that they weren't asked of those witnesses, that is first and foremost for the record and I'll ignore that for this purpose. You're here and has acknowledged on an expansion of a non-conforming use and, in order to judge this application to determine if it warrants a D-2 Variance/Use Variance, you have to know the magnitude of the expansion. To know the magnitude of the expansion, you have to know what was there at the time it became non-conforming. He is here as Attorney Rubin said a few minutes ago, not as an Engineer, which is his primary occupation, but they also offered him to this Board as a Planner and, therefore, that is why it is relevant to

this Board respectfully in your deliberations to know what the magnitude of the expansion was.

Attorney Mondello stated I am going to allow it. I don't think that the exact specific measurement of what was versus what was occurring today is that relevant, but I am going to allow this testimony.

Attorney Mondello, to Engineer Petry, can you answer this question or you may have forgotten the question.

Attorney Fernicola stated the last one he answered. He said he didn't know the number of chairs. Do you know the number of tables they had outdoors at the time it became non-conforming?

Engineer Petry stated no.

Attorney Fernicola questioned do you know whether they had outdoor lighting in the rear of the property at the time it became non-conforming?

Engineer Petry stated I don't know for sure, no.

Attorney Fernicola questioned do you know whether or not there was sound amplification in the rear of the property at the time it became non-conforming?

Engineer Petry answered only what was stated by the previous witnesses.

Attorney Fernicola questioned what is your recollection of what was stated as far as sound amplification back in the 50's?

Attorney Rubin objects to the question because it is not up to this witness as to what was said; it is up to the Board's recollection as to what was said and not what Engineer Petry recollects the witnesses said. It is an improper question.

Attorney Fernicola stated he just said the only thing he knows is based upon what the witnesses said and I asked, okay what is your recollection of what the witnesses said.

Attorney Rubin stated improper question. It is the Board's recollection that counts. No one else's.

Attorney Mondello stated I am going to allow it because obviously Attorney Fernicola is trying to attack the credibility of Engineer Petry with respect to planning testimony. Did he go back and review the testimony of the prior witnesses to see what was back then versus what is now. He is trying to get some type of measurement as to what increased in intensity occurred. Now, the Board has already decided that there has been some level of expansion, some level of intensity. I am not so sure that the board has to know specifically what that level of intensity is, but they know that there was an expansion, so I am going to allow the question, if you can answer it.

Member Covelli wanted to say a point of word at this point counselor, it seems to me that you are in charge in terms of the legal aspects of this, and I just hope that we're not going to spend the rest of this meeting re-hashing everything that has come out in testimony.

Attorney Mondello stated to Attorney Rubin's point.

Member Covelli continued what has already been laid out and I am having trouble understanding the relevance of this questioning. I want to give Attorney Fernicola as much latitude as possible in this deliberation process, but I don't want to re-hash either the three votes that we took previously on this, that brought us to this point, or all of the testimony of 20 plus witnesses that have been here to date.

Attorney Fernicola stated I am almost done, so I am not going to prolong at this avenue, but again it goes to the issue in order to grant the variance you have to have some

understanding as to what existed when it became a non-conforming use so you can determine whether or not you should grant an expansion. Quite frankly the record in this case is devoid, and as your counsel said, it is really devoid of any testimony as to what the character and intensity of that use was at the time it became non-conforming. So this is my last question on this area and then I am going to move on. What was your recollection as to the witnesses' testimony concerning whether there was sound amplification equipment at the rear of the property at the time it became non-conforming?

Engineer Petry answered at least one witness indicated that there was no sound system outside; they just cranked up the radio.

Attorney Mondello commented fair enough.

Attorney Fernicola questioned would you agree that the outdoor service of food and alcohol at the subject property is inconsistent with the property's residential zoning classification?

Engineer Petry answered no.

Attorney Fernicola questioned can you identify for me any single-family homes that you are aware that sell food and alcohol that served outdoors at the property?

Engineer Petry answered the key word here is "sell" and in your question I don't think that's what you said; you said "serve".

Attorney Fernicola questioned is it your understanding that Mr. Ryan charges for the food and alcohol, correct?

Engineer Petry answered yes.

Attorney Fernicola, the Tree Tavern, to your understanding, is not a non-profit operation?

Engineer Petry answered that is correct.

Attorney Fernicola so it is your testimony to this Board that, in your professional opinion, that you believe that the outdoor service of food and alcohol at the subject property is consistent with its residential zoning classification?

Engineer Petry answered the key difference here is in your current statement you again use the word "serve" and I would again say yes it is consistent because one can serve food and alcohol in one's residence to one's guests in an outdoor situation. It is expected.

Attorney Fernicola stated since you answered it that way, is a for profit sale of food and alcohol, which is served to the patrons outdoor at the subject property, consistent, in your opinion, with the property's residential zone?

Engineer Petry answered it is not; that is why we are here.

Attorney Fernicola questioned did you review the Borough's Master Plan?

Engineer Petry answered yes.

Attorney Fernicola questioned what was the date of the Master Plan that you reviewed?

Engineer Petry answered, off the top of my head, I don't remember.

Attorney Fernicola questioned do you recall what the Master Plan recommended for the use of the subject property?

Engineer Petry answered it is and remains residential in its zoning classification.

Attorney Fernicola questioned what is the density of the residential use recommended for the subject property in the Borough's Master Plan?

Engineer Petry answered the minimum lot size requirement for this zone is 15,000 square feet.

Attorney Fernicola questioned do you recall the density?

Engineer Petry answered I don't recall the density.

Attorney Fernicola questioned would you agree that the outdoor sale of food and alcohol at the subject property is more disruptive to the neighborhood than the indoor sale of food and alcohol at the subject property?

Member Covelli stated I am sorry I didn't hear the question.

Attorney Fernicola stated my question was would you agree that the outdoor sale of food and alcohol at the subject property is more disruptive to the neighborhood than the indoor sale of food and alcohol at the subject property?

Member Covelli stated I heard you; it didn't register.

Engineer Petry stated I would not think there is a significant difference, no.

Attorney Fernicola questioned would you agree that the neighborhood is affected by an increase in the intensity of the outdoor use of the subject property for the service of food and alcohol.

Engineer Petry answered yes.

Attorney Fernicola stated in this application would you agree that the applicant is proposing an expansion of the commercial parking lot in the front yard?

Engineer Petry answered no.

Attorney Fernicola questioned how many parking spaces did this Board approve in 2005 when the applicant came before it to request a Use Variance for the expansion of the apartment?

Engineer Petry answered 26.

Attorney Fernicola questioned there were 26 parking spaces in the front yard?

Engineer Petry answered there were 26 spaces total.

Attorney Fernicola questioned how many parking spaces existed in the front yard based on the approvals that were granted in 2005?

Engineer Petry answered 2.

Attorney Fernicola questioned how many parking spaces are being proposed in the front yard on the subject property as part of this application?

Engineer Petry answered 2.

Attorney Fernicola questioned as part of this application, do you know whether or not the applicant is proposing outdoor cooking in the rear of the property if this application is granted?

Engineer Petry answered my understanding is that there is no outdoor cooking.

Attorney Fernicola stated, if I recall your testimony, the three justifications that you gave to the Board for the granting of the D-2 Variance for the expansion of a non-conforming use was the addition of landscaping, drainage improvements and parking improvements on the property. Is that correct?

Engineer Petry answered I think I might have worded it differently, but you cited three sections that I touched on, yes.

Attorney Fernicola questioned if the subject property permitted a commercial use of the subject property, do you agree that the Borough would require landscaping and stormwater management as part of an application for the property?

Attorney Rubin objects to the hypothetical nature of the question. I think we've gone beyond the scope of his direct examination and certainly beyond the scope of what this application is all about.

Attorney Fernicola commented it is clearly not beyond the scope because, first of all, he just acknowledged what the three factors he gave to the Board and this is specifically tailored to those factors that he said the Board should rely upon in granting the Use Variance. Now what we are pointing out that if the property was zoned commercial landscaping and stormwater management would be required and, therefore, they are not offering anything in addition to justify a Use Variance approval.

Attorney Mondello commented I agree with Attorney Rubin. We are not going to allow it; if you could ask another question.

Attorney Fernicola stated could you be clear as to what the basis of not allowing it.

Attorney Mondello commented I agree with him that you have gone beyond the scope of his direct testimony. The hypothetical is, in my opinion, confusing to the fact finders. Most of the case law when you are dealing with a D-2 Variance, they talk about beautification, they talk aesthetics so I am not so sure how that hypothetical, that if this was a commercial property, we would need a-b-c&d anyway is relevant.

Attorney Fernicola stated, for the record, not a single member of the Board, who is the fact finder, indicated that they were confused or had any ambiguity with the question.

Attorney Mondello commented they are all smarter than me, but it confused me.

Attorney Fernicola stated my point basically is that you are the counsel to the Board.

Attorney Mondello commented I have made my ruling; you've made your objection clear and we will have a judge take a look at it, or you will have a judge take a look at it; it is now 8:30 and I am asking you to simply move on.

Attorney Fernicola questioned do you agree that the drainage improvements in the rear of the subject property are proposed because of the expansion of the paved portion of the parking lot?

Engineer Petry answered no. In fact, quite the opposite is true and I made that point in my direct testimony. The ordinance does not require detention unless we increase impervious by an acre and we have not done that.

Attorney Fernicola stated my question is different. My question was do you agree that the drainage improvements proposed in the rear yard are proposed or generated because of the increase in paving of the parking lot and it is to therefore transport the stormwater from the rear yard to the front yard because you have more coverage?

Engineer Petry stated I will answer it again in a different way to make my point a little clearer. The ordinance only requires detention if the application is deemed a major development. A major development in the stormwater management section of the ordinance is defined as something that increases impervious by an acre or more. Now there is a subsection of the same ordinance that drops that done to a quarter acre or more, but we are not increasing impervious by a quarter acre or more. We are not increasing impervious by an acre, we are not disturbing an acre and, therefore, there is no stormwater management required for this application.

Attorney Fernicola stated, again, that is not my question, so let me ask it a little bit different. You are familiar with the improvements for this rear parking area that were approved in 2005?

Engineer Petry answered yes.

Attorney Fernicola questioned can you identify your understanding of what was approved for the rear parking area in 2005 by this Board?

Engineer Petry answered yes. It was a parking area expansion that was approved at that time and included a detention system or a drainage system that was part of that improvement and that drainage system was not built per the plan, but was built to the same volume as the plan.

Attorney Fernicola questioned would it be necessary to construct the drainage improvements that are proposed in this application at the rear of the property if the applicant had constructed the drainage system in accordance with the 2005 approval?

Engineer Petry answered no. It is not required now. It is something that we are offering as a benefit to overall project.

Attorney Fernicola questioned did you review the 2005 Resolution of this Board when it granted the Use Variance?

Engineer Petry answered yes.

Attorney Fernicola questioned would you agree that the applicant agreed to limit its use to 66 seats?

Engineer Petry answered yes.

Attorney Fernicola commented let us go back to the 2005 approvals that were granted. Do you agree that if this application is granted, that there would be more cars using the parking lot then the number of cars back in 2005?

Engineer Petry answered yes.

Attorney Fernicola questioned are you aware that the Superior Court imposed an injunction preventing or restricting the outdoor service of food and alcohol at the subject property in January of 2016?

Engineer Petry answered I didn't know exactly when it was, but I knew there was an injunction, yes.

Attorney Fernicola questioned would you agree that the level of activity of the parking lot at the subject property will increase since the imposition of the injunction if this Board grants the Variance to allow the expansion of the non-conforming use.

Engineer Petry answered it may increase, yes.

Attorney Fernicola questioned would you agree that an increase in the use of the commercial parking lot at the subject property in a residential zone be detrimental to the neighborhood?

Engineer Petry answered I would say that the increase in use of the parking lot could impose some detriment in this instance given the seasonal nature and the conditions that the applicant has imposed I would think that it's minor in nature.

Attorney Fernicola: Thank You. I have no further questions for Engineer Petry at this time.

Board requests recess.

Recess 8:34:58

Reconvened 8:39:05

Let the record show that everyone is present that was present before the recess.

Attorney Mondello: Attorney Rubin any other witnesses?

Attorney Rubin commented that the last time we were here, one of the Board Members asked that I bring back Mr. Ryan to reiterate, if he hadn't already testified, but to make it clear as to proposed hours of operation, months of operation, and such. This would round out the testimony.

Vice Chairman Grygus: Before we don that, can we open up the questions for Engineer Petry's testimony as a Planner.

Member Covelli also commented that I have a question for Engineer Petry based on my thought process since he testified.

Attorney Rubin stated I will step down and await your questions.

Member Covelli: Engineer Petry something you said at the last meeting made me think for a while. It had to do with your presentation on adding parking in the rear and you said it was something, and I don't want to quote you, but my recollection was that it was something that the applicant didn't want to. You could do it, but you didn't want to do it. I thought about that and I remembered that in my visit to the site there is rock in the back.

Engineer Petry: Member Covelli I actually anticipated that question from Attorney Fernicola.

Vice Chairman Grygus commented before you answer that question that Frank poses because clearly one of the biggest potential negative impacts for this is something that is always been brought up is parking. How do you solve that? I personally believe anything off site is far too difficult.

Member Covelli: Can I finish my questions – My recollection Engineer Petry of the site is there is rock in the back.

Engineer Petry stated you are right. What we did was we prepared a Compliant Parking Concept Plan, which I'll hand out copies to the Board and Attorney Fernicola and anybody else.

Attorney Fernicola questioned has this been previously submitted to Engineer Nash?

Engineer Petry answered it has not been. It is a Conceptual Parking Plan –it is a Sketch. Basically what we've shown in this plan is how we would get the additional 6 spaces and to do that we would need to expand into the rear area where the rise is now and that would probably require removal of rock based upon what I have seen in that area. In fact, the detention design that we did didn't include any cut for that reason. There is exposed bedrock back there.

Member Covelli stated that was my recollection and, again, I am not here to design your application, but some of the things I do remember of the testimony was that as the property sits, as we speak today in its current state, that area is handicapped accessible, the outdoor area.

Engineer Petry stated no, it's not. We can make it handicapped accessible, but it's not handicapped accessible today.

Member Covelli stated as you had proposed. There was no rock blasting in what you proposed.

Engineer Petry stated correct.

Attorney Fernicola asked that this Conceptual Plan be marked and Exhibit.

A-20 Compliant Parking Concept (Conceptual Sketch) prepared by Petry Engineering

Member Covelli continued that as you proposed it, there was handicap accessibility and I'm also thinking of the blasting because I understand there is blasting going on Mountain Avenue. I am not sure that is beneficial to the neighborhood for there to be more blasting going on. It was just my recollection that your plan was to understanding the physical constraints of the property that you were maintaining accessibility or creating it with minimal changes to create access and I thought that was a good thing. I don't think you made that point.

Vice Chairman Grygus continued I think had it not been for some of the offsite impacts we might not be here now today and that is going the biggest potential negative to the surrounding residents as some of the residents testified. I think any proposal for offsite is very difficult to enforce and could it be granted in perpetuity I don't think we ever really addressed that issue either with respect to the spots at Berta's. So what is your choice; your choice is either expand your parking or reduce your requirement, either of the two. In looking at what your plan has here I mean that expansion is in the area now that is flat and that you currently have the pits, the bocce courts, so

Engineer Petry interjected that is actually up on a rise. It is one of the reasons why we need to establish handicapped accessibility to that point. To push this into that seating area and then push the seating area back would require some form of rock removal. In my opinion, for a seasonal outdoor use, that is not a practical approach to design. I know that the owner offered in his initial testimony to provide valet parking on site on the weekends, when it became busy and he knows when it will be busy, when it is good weather or when he has reservations to fill up his restaurant and if one were to accommodate that on site, you could provide those additional 6 spaces on site using valet parking by stacking the cars.

The owner, through my testimony at the last hearing, also offered to limit the number of patrons. Your parking ordinance mentions restaurant parking three different places. In the General Provisions it talks about restaurants indoor seating only 1 space for every 4 seats plus 1 space for every 2 employees. In two different zones, it talks about parking differently. In the Redevelopment Zone, along Ringwood Avenue, it talks about parking for restaurants as 1 space for every 4 seats; that is it. In another section, the Downtown District, it talks about restaurant parking with 1 space for every 4 patrons and 1 space for every 2 employees. There are three different standards within your own ordinance and if one were to look at the different standards and how they apply to this particular site, you would get different parking requirements. The offer that the applicant made to limit the number of patrons is not an unreasonable one in that it would bring the site by limiting the number of patrons on site inside or out, to whatever complies with the parking.

Member Ludwig stated that is kind of hard to police though.

Engineer Petry continued every building in every municipality has an occupancy limitation. The occupancy limitation for Tree Tavern is 70 people for the restaurant.

Technically there is 5 staff and that is the testimony you've heard and 66 seats so that is 71. You couldn't fill every seat and be compliant if you have 5 staff on and be in compliance with your occupancy code.

Member Covelli stated I know you are on a roll and got a point to make here, I just need a point of clarification or definition. You are defining a patron as a person there versus a seat.

Engineer Petry answered correct.

Member Covelli continued so what you are saying is if there is a seat inside and outside that is 2 seats and if there was a patron that was inside and then went outside it is 1 patron.

Engineer Petry stated what I am saying is if there is 94 patrons on the site, whether there are 50 outside and 44 inside or 66 outside and 28 outside that is what the site can accommodate in terms of parking and it is based upon the number of patrons that are there; it is the number of parking spaces that you need.

Member Covelli questioned that is the different in the ordinance and how it is written.

Engineer Petry answered yes.

Member Covelli, questioning Engineer Nash: Do you agree with that?

Engineer Nash answered yes.

Vice Chairman Grygus, going back to what I said then, understanding the sensitivity of parking, both in the past and potentially going forward, in your opinion, and I don't know if you can answer this, do you think your applicant would be willing to either increase the number of parking spaces or bring the occupancy down to accommodate the spaces that are provided.

Engineer Petry answered we are increasing the number of parking spaces by 5 over what exists.

Vice Chairman Grygus stated so you are increasing the number of parking spaces up to the 40 spaces.

Engineer Petry stated the 37 spaces that are required from 31.

Member Covelli stated you are at 32 with how you drew it and you would need 37 based on your calculation. This is in your previous last month's testimony, and that's the difference.

Engineer Petry answered yes, correct.

Vice Chairman Grygus questioned do you think your applicant is either willing to increase 5 additional spaces, or reduce the maximum occupancy commensurate with being short 5 spaces?

Engineer Petry stated he is absolutely willing to reduce the maximum occupancy to comply with the number of spaces.

Member Covelli questioned to the 32?

Engineer Petry stated the occupancy being patrons, not seats, but yes he willing to limit the maximum occupancy for inside and out down to 94.

Vice Chairman Grygus stated that is what you originally proposed. That is calling for 37 spaces.

Engineer Petry answered no. What calls for 37 spaces is the number of seats, which is 50 and 66.

Vice Chairman Grygus stated okay, but I mean I think you're kind of splitting the baby here. To me, I don't see an occupant going there and not taking a seat.

Engineer Petry stated no. I am saying that in the nicer weather more people are going to be outside and the inside seats are going to be empty. That is what happens in these facilities that have indoor/outdoor. You can only take a certain number of reservations. Vice Chairman Grygus stated let me just put it to you this way. Right now based upon the number of seats and/or stools or tables or whatever, it comes up with a requirement of 37 spaces.

Engineer Petry stated that is correct.

Vice Chairman Grygus stated you are providing 32.

Engineer Petry stated correct.

Vice Chairman Grygus questioned is your applicant willing to either increase the 5 spaces or delete the commensurate number of tables and/or seats to get down to the 32 spaces?

Engineer Petry answered that is a question you can ask my client because I think he is the next witness.

Member Covelli stated I have to be clear because that is why I asked him we are quoting two sections of the ordinance; one refers to seats and one refers to patrons. You asked the question on seats, and he answered the question with patrons.

Vice Chairman Grygus stated that is why I rephrased the questions to seats.

Member Covelli stated your representation on behalf of your client was that you are going to reduce the number of patrons.

Attorney Mondello stated we are going to wait for Mr. Ryan to talk about that.

Member Covelli continued that Engineer Petry was talking about what the occupancy rating from the Fire Subcode Official is for the building.

Engineer Petry answered yes and occupancy is 70.

Member Covelli stated you said 70 and you said if we fill the seats and had 5 employees we would be over by 1.

Engineer Petry answered that is correct.

Member Covelli stated I am not sure you finished the thought where you were going with that.

Engineer Petry stated the statement of the existing condition is that is policed now, and actually policed by the fire official and they are the persons required to ensure that occupancy doesn't exceed the standard. Now whether that occupancy is inside or outside, if there is an occupancy limit for the facility, there's an occupancy limit for the facility.

Chairman Dunning stated the Fire Department is not going to limit the outdoor use. You are only talking the interior use.

Engineer Petry stated if the Board sets a standard and sets a maximum occupancy for the site, the Fire Department has the opportunity to enforce that.

Chairman Dunning stated if we say the maximum occupancy is 70 persons, in or out, if the restaurant is full, nobody can sit outside.

Engineer Petry answered that is correct. In fact, we wouldn't be here because that is not an expansion.

Chairman Dunning stated you would still have the outside seats and now you deal with capacity.

Member Covelli stated nobody new could sit. If the restaurant had 70 people who all ate dinner and then decided they want their dessert outside and 25 of them got up and walked out, we didn't change the occupancy of the site. We re-arranged where they're located.

Engineer Petry stated correct.

Chairman Dunning stated but you are sharing the site.

Engineer Petry stated yes.

Chairman Dunning stated my thought is this; we are talking about a variance that runs with the future of the property, not with Mr. Ryan. Mr. Ryan five years down the road sells it. A hi-tech person buys it and he replaces the kitchen with modern equipment and can produce enough food for 200 people in the same space. Now he has 66 people inside and 20 or 30 people outside. How do we deal with that?

Attorney Rubin answered he has to come back here.

Engineer Petry stated no. If we limited the outside seats to 28, we would be fully compliant with your parking ordinance regardless of which one you looked at. So if we had 66 inside and 28 outside, we are fully compliant with parking and wouldn't need a parking variance.

Chairman Dunning stated correct.

Vice Chairman Grygus stated which I said that it is either that choice or to add the 5 spaces.

Engineer Petry stated I understand and I suggested that you ask my client.

Member Covelli asked to repeat the number.

Engineer Petry stated 66 inside and 28 outside would have us fully compliant with the parking that is proposed.

Member Covelli and Vice Chairman Grygus stated which brings you to 94.

Engineer Petry stated no, it doesn't bring you to 94, and that is what we parked for.

Attorney Fernicola stated what they are proposing is 50 seats outdoor in addition to the 66.

Vice Chairman Grygus stated actually it is 60 after looking at the plan and adding it up.

Attorney Fernicola stated the plan doesn't match.

Attorney Mondello questioned what is maximum number of seats outside that your plan indicates?

Engineer Petry answered the parking calculations are based upon 50, so I will say 50.

Vice Chairman Grygus stated there is actually 64.

Attorney Mondello stated 66 inside and 64 outside, so 130 people theoretically.

Engineer Petry stated I have 8 at the bar; 6 at stools at high top tables for 14; 8 tables with umbrellas with 4 chairs each and have 4 chairs under an existing canopy.

Member Covelli requested Engineer Petry go over the numbers again.

Engineer Petry: 8 stools at the bar; 6 stools at 3 high top tables

Vice Chairman Grygus stated your plan says 8 stools at 3 high top tables (SP-2) dated 5/26/17.

Engineer Petry stated there is a 6/23/17 plan.

Attorney Mondello stated our Engineer says 50 seats are proposed for outside.

Member Covelli questioned how come you gave us 34?

Engineer Petry questioned how come you gave us 34 what?

Member Covelli went over numbers written by Jennifer. 8 bar stools; 6 high top tables with 3 chairs each

Engineer Petry said no – 6 stools at 3 high top tables

Member Covelli stated that is 18

Engineer Petry said no – 6 stools total for 2 at each table; 8 stools at the bar; and there is 8 tables with umbrellas with 4 chairs each; and the existing canopy with a table and 4 chairs is to remain as well.

Vice Chairman Grygus questioned so your outdoor seating you are proposing is 50 seats. If you take 50 and divide it by 4 would be 13 spaces (rounded up)

Engineer Petry stated yes it is 12-1/2 spaces. If you looked at the parking calculations at the bottom of the Site Data Chart there is 4 spaces designated for the dwelling units; there is 16-1/2 spaces for the inside seating; there are 3 spaces designated for employees; 12-1/2 spaces for the outside seating and there is a 1/2 space for the additional employee for a total requirement of 36-1/2 and we called it 37 spaces.

Vice Chairman Grygus questioned you are proposing?

Engineer Petry answered 31 spaces.

Vice Chairman Grygus stated you are 6 spaces shy.

Engineer Petry concurred; we are 6 spaces short. The 31 spaces, if you say 4 are for residents that leaves me 27; 16-1/2 are for the patrons in the restaurant at 66 seats; 3 are for employees at the restaurant; 1/2 is for the employee outside that leaves 7 spaces and if I multiple that times 4 I get 28 seats outside, we would be fully compliant with the proposed parking. 28 outside seats and 66 inside seats which is how I came up with the 94 number for total occupancy for the site.

Vice Chairman Grygus stated but you are proposing 50 outdoor seats.

Engineer Petry answered yes we are.

Vice Chairman Grygus questioned how are you going from 50 to 28?

Engineer Petry answered that is our parking variance requirement.

Member Hoffman stated that is not what they are proposing but 28 would make it compliant.

Engineer Petry stated right. As I said, whether the 94 people are partially inside and partially outside doesn't make any difference, but as I also said the parking shortfall on a night if the whole place were full could be accommodated on site through the use of valet parking because they would stack the cars in the rear area and valet would accommodate that, and that is what Mr. Ryan offered at the beginning of the year.

Member Covelli stated I see a problem with that number; the 50 outside. The problem I see with that is going back to the variance of 12 years ago where we were assured there would be no more than 66 inside. When you have that many more outside, if you follow your train of logic that has been presented by the applicant that it is the same people moving in and out, and when you have that kind of intensity outside, you are going to have the propensity, I can't say you will, to overload the inside. How many people have to go to the restroom?

Engineer Petry stated the restroom, as I indicated in my testimony at the last hearing, is compliant.

Member Covelli stated that is not my point. It is the amount of people and when you have that many people on the site, how many are moving in and out and how you can't say I'm sorry you can't leave your seat and go inside right now to make a phone call, go to the restroom, to go ask a question, to get a menu or go do something else. I don't see how that becomes an enforceable issue. I see that as a backyard encroachment to the variance that was granted in 2005.

Vice Chairman Grygus stated I guess the question has to go to the applicant. Are you willing to either add the 6 spaces or reduce your number of seats that comply with the 31 spaces.

Member Covelli stated I think you have to work under the premise of what would happen if whatever the number is that's established is in fact what happens; what is there. Not that on one side you are presenting that people are going to move in and out and that number doesn't change. But to add 50 more outside, that is a big jump in my opinion. Vice Chairman Grygus agrees with Member Covelli.

Attorney Mondello: Anything else for Engineer Petry? We will get Mr. Ryan up here.

Attorney Mondello: Members of the public that have questions only for Engineer Petry on any of his testimony - hearing none, seeing none.

Attorneys request recess.

Recess 9:05:42

Reconvened 9:13:27

Let the record show that everyone is present that was present before the recess.

Attorney Fernicola has a question for Engineer Petry concerning A-20. Is the applicant proposing to amend its application to construct these additional 6 spaces depicted in A-20? Engineer Petry answered no.

Attorney Rubin called again Mr. Ryan.

Attorney Mondello: Mr. Ryan you remain sworn.

Attorney Rubin: Mr. Ryan, as you have been sitting in the audience, you have heard the discussion between all parties and you have heard that the Board is quite concerned about the number of seats and the number of parking spaces.

Mr. Ryan stated yes.

Attorney Rubin stated we have discussed this at length and have been discussing it for a number of months. Is it your position and if we be fortunate enough to have a resolution of approval, that you would agree to 28 seats in the outside area of the site; 66 seats which are existing in the inside of the present restaurant facility based upon 31 parking spaces.

Mr. Ryan stated yes, I would do that.

Attorney Rubin stated the 31 spaces would be compliant so no parking variance would be required based upon those numbers.

Mr. Ryan stated correct.

Attorney Rubin stated the other question that I have was something that one of the Board Members asked us about a month or two ago about the hours of operation and months of operation. Could you talk about the hours of operation because we never really pinned that down, and if there be any resolution of approval that should be part of it.

Mr. Ryan stated depending on the weather the season can be May through October.

Sometimes it gets very cold in October, but sometimes October is beautiful. Seasonality would be May through October.

Attorney Rubin questioned everything is seasonal for the outside?

Mr. Ryan answered yes. In my renewal, when the Council renews the liquor license every year, they put in some hours which I would like to mention and would like to keep. In the Resolution from 2013, for example, "The hours and days of outside operation would be limited to Monday through Thursday from noon to 10 p.m., and Friday, Saturday and Sunday from noon to midnight."

Attorney Rubin questioned and that is your Resolution from the Governing Body?

Mr. Ryan answered yes, that was the liquor license renewal.

Attorney Rubin stated and it is your request to this Board to have the same restrictions that are in the Resolution of approval by the Governing Body be a part of this Board's deliberations with res same restrictions?

Mr. Ryan answered yes I would.

Attorney Rubin stated there are some other restrictions regarding entertainment and playing of radios and all of those restrictions on your liquor license you are asking that they be made part of the deliberation of this Board as to any approval that you may be fortunate enough to obtain.

Mr. Ryan answered yes, that is true.

Vice Chairman Grygus questioned those are your restrictions, what are your typical hours of operation and days?

Mr. Ryan answered right now we are opened Tuesdays through Saturdays and we are open until 11pm/11:30pm and we open at 4pm.

Vice Chairman Grygus stated that is in violation of the Council's approval was only until 10pm.

Mr. Ryan stated no, 12pm.

Vice Chairman Grygus stated 12pm to 10pm Monday through Thursday.

Mr. Ryan stated we are talking about the outside.

Vice Chairman Grygus stated these are your typical hours for outside.

Mr. Ryan answered correct. The bar outside was shut down at 10pm.

Member Hoffman stated 12pm to 10pm.

Mr. Ryan stated those were the hours of service and people could stay out there until 11pm. The hours can changed based on what the business requires as long as they were within the Resolution.

Vice Chairman Grygus questioned what right now, before you got the injunction, what were the days and hours of operation for the outside service?

Member Covelli wanted to amend the question and tell us what they were for the inside and for the outside because we seem to be mixing.

Mr. Ryan answered there were no restrictions on the inside. Whatever the town ordinance is 3am, or whatever it is.

Member Covelli stated ever the town ordinance is for any liquor establishment and any other bar in town.

Mr. Ryan stated the outside area was from 4pm to 10pm for service, but you could stay out in the yard until 11pm. Tuesday through Saturday were the days.

Member Hoffman questioned closed Sundays and Mondays?

Mr. Ryan answered closed Sunday and Monday right now, yes.

Member Covelli questioned are you planning on opening Sunday and Monday?

Mr. Ryan answered it is possible.

Member Covelli questioned yes or no?

Mr. Ryan answered I don't know. I am not sure of that. I don't want to restrict it right now. I am allowed to as an operation in town to operate seven days a week.

Vice Chairman Grygus stated but the Resolution that the Mayor & Council had only applied to the indoor use.

Mr. Ryan corrected the comment. It applied to outdoor use.

Vice Chairman Grygus stated so if you still had people on site past 10pm, then you were in violation.

Mr. Ryan stated if they were inside it was okay.

Vice Chairman Grygus stated that you just got done saying that you shut it down at 10pm, but people could hang out until 11pm.

Mr. Ryan answered right.

Vice Chairman Grygus stated and that is outside.

Mr. Ryan answered yes.

Vice Chairman Grygus stated so in essence then you were in violation of that approval.

Attorney Mondello stated I don't know whether or not the Governing Body has a right to impose

Attorney Fernicola stated well actually they didn't

Attorney Mondello commented could you give me one second

Attorney Fernicola continued but the judge already ruled they did it. It's not if; there is a ruling by a court order. That is why he granted the injunction so it's not a hypothetical; he made a ruling.

Attorney Mondello questioned the judge made the decision that the Governing Body had the right to limit those hours?

Attorney Fernicola answered, no. What he found that the Governing Body didn't have the right to give him approval for any hours outdoor that they needed to come to this Board.

Attorney Mondello stated agreed. Governing Body had no authority to say you are going to operate your massage parlor until 1am.

Vice Chairman Grygus stated so the point being if the Board were to rule favorably on this, one of the conditions could be to set hours?

Attorney Mondello answered not really. You could ask him what hours he wants and if those not what the Board thinks they should be, I think you have a problem.

Vice Chairman Grygus commented I think 11pm or midnight, surrounded by residential.

Attorney Mondello commented I don't necessarily disagree, would you Mr. Ryan?

Mr. Ryan answered right.

Attorney Mondello stated they are concerned that it's midnight and people are still in the backyard is that what I am hearing?

Member Covelli stated the Noise Ordinance in the Borough of Wanaque is 11pm, isn't it?

Attorney Mondello stated I don't know, I have to check. Continue please.

Member Covelli stated, when we look at the Governing Body Resolution, and I don't want to get Attorney Fernicola charged up, all I want to say is whether that Resolution is valid or not, the fact is it deals with a liquor license, which is an annual renewal. What we are granting here is a permanent variance that doesn't recognize an annual liquor license. It

doesn't even recognize who the owner of the property is. It recognizes the parcel of property. While we can use that as a reference point, I don't think what they pass or what they approve or what goes into them making a judgment or determination is the same standard that we are using here. That is all I am going to say, so I consider what the Governing Body did; I don't consider that gospel. Again, every year they pass a liquor license and I don't next year they say something different for whatever their reason is, right, wrong or indifferent and, if you disagree with them, you take them to court. We are here to grant a variance.

Attorney Mondello commented let us not lose sight of the fact that this is a legal pre-existing, non-conforming use and I quite frankly forget what the testimony is, but if there were folks in the backyard until midnight, so be it. If there were folks in the backyard until 11pm, that is what they were allowed to do. That is what they did and it is a pre-existing use.

Attorney Fernicola commented there was never any testimony to that.

Chairman Dunning stated the ABC Board can set whatever hours they want.

Member Covelli stated, I also don't think though that any business, this is not specific to Mr. Ryan, if ABC Bar was located on Ringwood Avenue and they were whooping and hollering at midnight to the point that it was a violation of the Noise Ordinance, it doesn't matter. It is a violation of the Noise Ordinance.

Attorney Mondello stated that is very different. There has been a lot of litigation. Quick Chek wants to be open 24/7. Mayors try squash and sometimes they get into trouble. See if you can resolve the issue as to hours and move on.

Member Covelli, to Mr. Ryan, you are basically telling us that this outdoor operation is a six-month proposition, give or take, because May to October is six months.

Mr. Ryan agreed.

Attorney Rubin stated weather permitting.

Mr. Ryan stated right.

Attorney Rubin stated there are some years that October is fine and there are some years you can't even go outside in the month of October.

Mr. Ryan stated likewise in May.

Attorney Rubin stated everything is dependent on weather, but we have been using this Resolution and just to make it very clear noon (12pm) to 10pm on weekdays Mondays through Thursdays is in the Resolution and that's what Mr. Ryan has to abide by. It has to be 10pm by the Resolution of the Governing Body.

Attorney Fernicola stated I am going to address that in a minute.

Attorney Rubin stated and the weekends it says Friday, Saturday and Sunday from noon (12pm) to midnight for outdoor only but I believe Mr. Ryan has already said that perhaps that can be lessened a bit.

Vice Chairman Grygus, to Mr. Ryan, what would be your response to that?

Mr. Ryan stated we are permitted to be open outside before this whole thing started and the bar has no service after 10pm and people can stay out there until 11pm.

Vice Chairman Grygus stated so then your proposal would be Friday through Sunday from 12pm to 11pm.

Mr. Ryan answered yes.

Member Levine stated but they could get a drink inside and bring it outside.
Mr. Ryan stated we have to close at 11pm. We would have to be done out there at 11pm.
Member Covelli questioned outside?
Mr. Ryan answered yes.
Member Covelli questioned and inside?
Mr. Ryan answered the ordinance is 3am
Vice Chairman Grygus stated so we are talking Monday through Thursday 4pm to 10pm;
and Friday, Saturday and Sunday 4pm to 11pm.
Mr. Ryan answered yes.

Member Covelli stated Mr. Ryan you testified/talked softly – Did you say that you amended the outside seating to 28?

Mr. Ryan answered yes.

Vice Chairman Grygus stated so there is no parking variance required.

Vice Chairman Grygus contained that the only parking variance that would be required, Engineer Nash correct me if I am wrong, would be the 2 spaces that are still in the front yard.

Engineer Nash answered that is correct; that doesn't change.

Member Covelli stated so that is 94 patrons with 5 employees.

Vice Chairman Grygus stated 94 seats and the employees and the residents brings it down to what is 31 spaces that he is providing.

Member Covelli stated but effectively there could be 99 people on the site. If 28 seats were filed outside, 66 seats inside and 5 employees.

Chairman Dunning added and the residents, which is 2 more cars.

Vice Chairman Grygus stated that is in the parking calculation already. We can debate the merits of the parking ordinance, but that's a whole other story; not for here.

Attorney Mondello: Any other questions for Mr. Ryan? Hearing none-seeing none

Attorney Fernicola hasn't cross-examined him yet. Mr. Ryan you talked about the Council, but the fact of the matter is that in 2010 when the Council first allowed you to begin serving food and alcohol outdoors, your hours of operation were restricted to Friday, Saturday and Sunday 2pm until 9pm. Correct?

Mr. Ryan answered I believe so.

Attorney Fernicola stated and specifically this is O-7 that has been marked way back when and, I think it was September of 2016, it was the Memorandum from Sgt. Calabro to the Chief that his recommendations were incorporated into the Council's Resolution in 2010.

Mr. Ryan stated I believe so.

Attorney Fernicola stated so you were restricted outdoor operations is limited Friday, Saturday and Sunday 2pm to 9pm, correct?

Mr. Ryan answered yes.

Attorney Fernicola continued and no entertainment outside, this should include live entertainment as well as electronically produced or amplified, i.e., radio, cd or any recording. That was incorporated in the Council's Resolution?

Mr. Ryan answered I believe so, yes.

Attorney Fernicola questioned would you agree to this condition that the outdoor operation would go back to what the police had recommended, Friday, Saturday and Sunday 2pm to 9pm and no entertainment outside, either live or electronically?

Mr. Ryan answered when the Governing Body changed that in the following two years to the longer hours that was the agreement of Jack Reno, the Chief.

Attorney Fernicola questioned you mean that was the one that there was no public discussion, just a Resolution adopted?

Mr. Ryan answered no, I don't know that.

Attorney Mondello stated the answer is no. He is not willing to go to the 9pm.

Attorney Fernicola questioned and you are not willing to limit to the Friday, Saturday and Sunday as recommended by the Wanaque Police Department in 2010?

Mr. Ryan answered no. That recommendation was withdrawn the next year.

Attorney Fernicola questioned do you have anything to substantiate that that the Chief withdrew that?

Mr. Ryan stated the Resolution with the Chief's input. The one that I just read from.

Attorney Fernicola questioned do you have a document from the Chief, like this Memorandum, that it was his recommendation?

Mr. Ryan answered I don't.

Attorney Fernicola stated I have nothing further.

Attorney Mondello: Any members of the public have any questions for Mr. Ryan?

Hearing none – seeing none

Attorney Mondello: Attorney Rubin do you have any other witnesses?

Attorney Rubin: No sir.

Member Covelli, before Mr. Ryan steps down, we have established hours and we have established days, so for insurance, which is what I do for a profession, we use the terms severity and frequency. You have established severity in terms of the time and frequency is how often it is going to happen. Conceivably, are you saying every Monday, Tuesday, Wednesday, Thursday, Friday, Saturday and Sunday there are people outside. Right off the bat, you said that you've voluntarily are closed Sunday and Monday.

Mr. Ryan answered right.

Member Covelli continued but you have no restriction from the Borough, from this Board or from anybody.

Mr. Ryan answered no.

Member Covelli continued that says you couldn't be open seven days a week.

Mr. Ryan answered right.

Member Covelli stated you could have a group of people out there every day of the week.

Mr. Ryan stated it's possible.

Member Covelli stated it's possible so we're back to the frequency. Are there any proposal to limit the frequency of how that happens?

Mr. Ryan answered I am not sure what you mean.

Vice Chairman Grygus stated, in other words, I think he is asking will you testify to say that you plan on remaining closed on Sundays and Mondays.

Member Covelli stated no that wasn't my question.

Vice Chairman Grygus stated I don't think he can predict who is going to show up when. Member Covelli stated my example was my neighbor's kid graduates and they have a graduation party and I watch them haul in all the beer, all the booze and alcohol that comes along with it, the food and the catering truck pulls up and they have one hell of a blow out and it goes. We are all good neighbors and we appreciate the Peter graduated law school or medical school and we are all going to bite our tongues because, quite frankly the party goes on until 1am or 2am having a great time. But, at the end of the day, that doesn't happen every night. Peter doesn't graduate from medical school every day. This is a business that is in business effectively seven days a week. Is there some balance; is there some way that you are proposing that the neighbors aren't subjected to outdoor dining and noise every night?

Mr. Ryan stated I am not sure how to answer that other than that in the restaurant business and, in Tree Tavern particularly, the beginning of the week is always very slow. We have people come out to eat on Fridays and Saturdays mostly, so the earlier part of the week is always less customers in the building. Right now we probably have three people in the building. Right now as we speak. The beginning of the week is always a slower time because people are getting home from work, they eat dinner and they stay home.

Member Covelli questioned so you don't see a frequency problem

Mr. Ryan stated no.

Member Covelli continued in terms of there are parties booked, things of that nature because you have, and I have been there in the past, fundraisers for various organizations in town.

Member Ryan answered yes.

Member Covelli continued the events I were at have to be indoor. But the point of the story is someone could book a party conceivably outside, couldn't they?

Member Ryan answered it is possible. Right now we are closed on Sundays, but if someone wanted to book a party outside on Sunday, they could do that.

Member Covelli continued Sunday afternoon, Mr. Ryan can I book a party or I want to have a fundraiser for the cheerleading squad and I want to book the facility, that can happen?

Mr. Ryan answered yes.

Member Levine questioned how do you limit the severity of the loudness of the music or the noise, is there a restrictive covenant that limits you to how loud you can crank up the amplifiers on the music.

Mr. Ryan answered we don't play it loud. We just don't do that but in the meantime I follow whatever the ordinances are in town.

Member Mondello stated after 10pm nothing more than 80 decibels, which is nothing; it's a lawn mower.

Attorney Rubin stated the Resolution says he must go along with the Code of the Borough of Wanaque Chapter 82 Noise.

Attorney Fernicola questioned did the Borough adopt the State Ordinance because I know it is 55 decibels in the State Model Ordinance.

Engineer Nash stated it is lower at night.

Attorney Fernicola stated it is 55.

Member Covelli asked what hour of the day starts night.

Attorney Fernicola answered 8pm is my recollection then it goes to 55 decibels, but I could be wrong. Maybe Engineer Nash can correct me.

Engineer Nash stated I am not familiar with the Noise Ordinance, but I am looking at it as we speak.

Attorney Mondello stated as Engineer Nash looks that information up, any other questions for Mr. Ryan? Hearing none – seeing none I believe that’s the conclusion of Attorney Rubin’s case.

Attorney Rubin stated it is.

Attorney Mondello: Take it from here Attorney Fernicola.

Attorney Fernicola: I have one thing before I call my first witness that goes back to something that I had raised with this Board several months when you were considering the first part of the application. The only expert planning testimony you heard from the applicant is from Engineer Petry tonight who confirmed what I argued you with several months ago that their whole pre-existing, non-conforming use was based on the wrong date of 1979. You heard tonight, when he was asked that question, he told you it was 1956. So now that is the only expert testimony that is provided by the applicant. I am specifically requesting this Board and Counsel to instruct the Board to revisit its prior decision of the pre-existing, non-conforming use because the applicant presented his attorney and the applicant made this entire argument back then that it became non-conforming in 1979. We should you what I think was O-25 and it is now incorrect. You have testimony from the applicant that they utilized (I see Chairman Dunning you are shaking your head) but you now have the applicant’s planner who has acknowledged that it became non-conforming in 1956, not 1979. Their entire application was based on 1979.

Chairman Dunning stated the zoning was updated in 1979.

Attorney Fernicola stated that is right so the purpose of the controlling date as Engineer Petry to this Board tonight was 1956. The applicant and their attorney, and we have the transcripts and we have this argument I made back several months ago, they came in and Attorney Rubin said to you in September of 2016 and he used “the magic date is 1979” and that is when it became a non-conforming use. That was incorrect and we argued this a few months ago, now their own planner has confirmed for you that it is not 1979; it is 1956. This Board granted and made a decision that it was non-conforming as to 1979 and that is not the controlling date. The date that controls, as I argued back then, was what was the date that it became a residential zone? By their own testimony, it is 1956. I am sorry Counsel but this goes back to this argument.

Attorney Mondello stated I get it, but the deficiency is your argument, and it is a very good argument, but the deficiency is there is substantial about of testimony that food, alcohol and other beverages were served outside 1940, 1941, 1942, 1943, so

Attorney Fernicola stated Counselor you instructed this Board, the question was whether it was pre-existing as to 1979. That was the instruction you gave them a few months ago.

There was no testimony about the 40’s; my point is

Attorney Mondello stated there was and I recall it – Polly’s.

Attorney Fernicola stated no, well, but the point was there were three questions

Attorney Mondello: Motion Denied.

Attorney Fernicola stated excuse me – there were three questions you presented to the Board that night. Whether it was non-conforming in 1979 and how you can ignore now that testimony of the applicant’s own expert who told you it wasn’t 1979, it was 1956 and that is going to this stance. So this Board was charged and it deliberated on an incorrect question and you have a responsibility in your capacity as Board Officials that if you make a mistake to acknowledge it. You used the wrong date because that is what the applicant argued to you from day one and his own witness has now corrected it. So how we can just turn a blind eye and say well that’s what he argued and that was the question presented to you. It is erroneous; the whole premise of this is for you to determine what existed prior to what he told you 1956. To ignore it, is to ignore your entire charge in the last eleven months and a complete a waste of time because the wrong date was used. That is what it is Member Covelli and everyone else on the Board.

Attorney Mondello: Thank You

Attorney Fernicola: I am asking the Board to reconsider the prior grant based on the testimony tonight that it became non-conforming in 1956. I am making that specific request Mr. Chairman that the Board reconsider its prior determination that is of 1979 the outdoor service of food and alcohol was a pre-existing, non-conforming use.

Attorney Mondello: Thank You. Motion Denied. The exact question that I asked the Board “Did the serving of food and drink outside occur prior to the enactment of the zoning code prohibiting such activities.” So whether it was ’56 or

Attorney Fernicola stated we argued this

Attorney Mondello: Mr. Fernicola, please

Attorney Fernicola stated you told them 1979. Do you want to go to the transcript? Is that what you want to?

Attorney Mondello apologized for losing his patience. I want to apologize to Mr. Fernicola and I want to apologize to the Board, but if Mr. Fernicola was in front of a judge, and this is a *quasi*-judicial board, he wouldn’t be interrupting, he wouldn’t be yelling.

Attorney Fernicola commented I never yell.

Attorney Mondello commented sure you do - your emotions. We get it, it is on the record and if the Board wants to take up Attorney Fernicola’s suggestion, but I am saying that motion should be denied. I think his argument is flawed with respect to this exact date, but that is my legal opinion.

Attorney Fernicola stated it is not for your charge to deny my motion. It is up to the Members of the Board.

Chairman Dunning stated let us clear something up. Modern zoning in Wanaque started in 1956. Zoning goes back to the 1920’s. In 1956 they established the “R” Zones. This is an R-15. In 1979, they tweaked the codes. What did they change in the R-15 that affects this application?

Attorney Fernicola stated that is my point Mr. Dunning. You are making my exact point. Chairman Dunning stated no, but what did they change?

Attorney Fernicola stated the date that controls is when this area, this property became zoned residential. It was 1956.

Chairman Dunning stated it never changed.

Attorney Fernicola stated that is the point. If the date that it was non-conforming use, as a restaurant/bar with outdoor service, as this witness said and you are saying it was 1956.

Attorney Rubin on September 7, 2016 literally came in and his first sentence he said the

magic date that controls this application 1979 because that is the date Wanaque adopted an ordinance making the restaurant and bar a non-conforming use.

Chairman Dunning, let me ask you this, the 1979 ordinances didn't that originate in the court action? It is in some of the documents we started with. Where did it come from?

Attorney Rubin stated it was mentioned right before the court.

Chairman Dunning stated it came from the court action somewhere.

Attorney Fernicola stated no.

Attorney Rubin stated it certainly did because it was in the court's transcript and you will see 1979.

Attorney Fernicola stated that is why I presented you

Attorney Rubin continued stating if counsel wanted to fight about the date then, he should have done it six to eight months ago, and not tonight.

Attorney Fernicola stated no because I am not the applicant. You have a fundamental issue that you've used the wrong date. The fundamental issue for you is whether or not it was pre-existing 1956 is what this witness has told you. That is what I told you several months ago. Attorney Rubin and all the witnesses tied the date and he used the exact phrase "the magic date is 1979". That is what you considered a few months ago. It is now by their own testimony the incorrect date. So what you deliberated on, as a matter of law Mr.

Dunning, was incorrect. You had to make a determination whether or not the outdoor service of food and alcohol pre-dated 1956, not 1979, but that's what the applicant argued to you. It was his burden of proof; he was incorrect. I argued that to you that night back a few months ago and I gave you the 1979 ordinance which I think is O-24 or O-25 showing that was an amendment and now Mr. Petry tonight, their planner comes in and tells you it is 1956. So everything you did was based on a foundation that is wrong. It wasn't 1979.

Attorney Mondello will repeat what he said, and I know that I indicated this to the Board that the change was adopted June 9, 1954 and I know there was testimony that this use existed prior to 1954 and I am sure the Board confirmed that and agreed with that. That is what the testimony was, but the record will speak for itself. It was amended in its entirety on December 29, 1976 and then adopted on January 31, 1979. My position doesn't change and I respect Mr. Fernicola's argument and I do believe that it is deficient in that aspect that there was a great deal of testimony that this particular condition, the serving of alcohol, beverages and food existed prior to June 9, 1954. Questions?

Member Hoffman stated I just feel like we are arguing over something that is – the issue is whether it was pre-existing or not and I think we established the fact that it was pre-existing irregardless of whether it was 1979 or 1956. To me it doesn't make that much difference; the object was that it was pre-existing.

Vice Chairman Grygus continued with and that the current is expanded.

Member Hoffman stated and you are expanding the pre-existing condition. So whether it was a magic date of 1956 or 1979 doesn't seem that much relevance to me. The relevance to me is whether or not it was pre-existing and it seemed to be something that was pre-existing prior to any zone that was mentioned.

Attorney Mondello: Let me just do this and Mr. Fernicola's correct. I don't deny motions so there is a Motion by Mr. Fernicola that we re-visit the Board's decision that you determined this was a legal, pre-existing, non-conforming use. That is his Motion. So I

would ask for a Roll Call – a No being that you disagree with Mr. Fernicola and a Yes vote meaning yes we should re-visit that issue.

Member Covelli questioned before we take that vote, are you saying that there is discussion on it because what I wanted to say was I appreciate Attorney Fernicola's passion and zeal for arguing both his points and on behalf of his client and it is admirable; however, I think Mr. Petry did an excellent job of summing up and I think we are stuck in a very small form of minutia whether it's 38 years ago or 61 years ago. But most importantly, to consider what Attorney Fernicola is proposing of hanging on what Mr. Petry said sounded to me like he was trying his best to answer question, but acknowledged, and I am not trying to put words in your mouth Mr. Petry, he wasn't there, he didn't know and he listened to the same testimony we did. The testimony we did, and actually he didn't hear all of it, he must of read it because he wasn't here, that we had no less than a dozen people come through here and I think to entertain Attorney Fernicola's Motion is to dismiss all of the testimony from the residents and the people that were here. I wasn't here and wasn't born in 1956 and I was not in this town in 1979.

Attorney Mondello: What is the Board's pleasure? You are under obligation because you've made some valid points. You don't have to take Mr. Fernicola's Motion under advisement.

Vice Chairman Grygus stated I think that we made that decision when we proceeded to the Use Variance Hearing.

Attorney Mondello stated you did make that decision, but Mr. Fernicola's point is that 1979 was being used by the Mr. Petry and that negates the entire process we went through. **Member Covelli** stated 1956.

Attorney Fernicola stated Counsel is right. My point is that you considered it as a 1979.

Chairman Dunning stated the 79 number came from the point.

Attorney Fernicola stated it was not from the court.

Attorney Rubin stated it was mentioned in the court. Counsel has forgotten. In any case, I just would add one thing and a legal thing for Attorney Mondello. There was recourse for Attorney Fernicola if he wasn't satisfied with that 1979 date as against 1956 or whatever. There was recourse rather than having some seven or eight hearings before this Board, he could have asked for what is called an Interlocutory Appeal as to that very issue and could have had that issue resolved by the court but failed to do that. He didn't bother doing that but let us go through these eight or how many hearings there have been, having witnesses come, but there could have been a recourse, there could have been a remedy for Attorney Fernicola to have that issue reviewed by the court way back, months and months ago. There is a procedure which is tried and true called this Interlocutory Appeal issue while a matter is pending before a Land Use Board but he failed to do that. Obviously, he wanted us to be here for eight or nine meetings for whatever that means and so most respectfully I think his time has passed.

Attorney Fernicola stated first of all you're the applicant and you have the burden of proof, I don't have the burden of proof. There was no resolution that was adopted by the Board so there was no Interlocutory Appeal. The court case did not determine the year Mr. Dunning. That is incorrect. They agreed, and rather than facing deposition of the municipal officials to come before this Board. This has been decided the issue of 1979 was what the applicant was arguing. The court made no determination and, in fact, it is so

clear that it is a fundamental premises of this application for a pre-existing, non-conforming use, and with all respect Mr. Hoffman, it does matter Mr. Hoffman. You have to make a specific determination as to the year it became non-conforming and was it not conforming and what you deliberated on back a few months ago because of what Attorney Rubin and applicant argued to you was 1979. So that it was you considered; that was their burden and that is what they presented to you and what Mr. Petry said was incorrect. Your own attorney now gives the date of June 9, 1954. Back a few months ago, this Board did not make a determination that it was not conforming as to June 9, 1954. You made a determination that it was pre-existing as to 1979.

Attorney Mondello stated that I disagree with completely.

Member Hoffman commented that I made a determination that it was pre-existing.

Irregardless of the date. My opinion was based on that it was a pre-existing condition.

Attorney Mondello stated that the Board found that it was pre-existing since 1940. I really think at this point we are going to have to move on.

Member Hoffman stated I am not a lawyer so I don't understand. I am just a layman and a volunteer and I listened to the testimony from the lawyers and I listed to the testimony of the witnesses and I determined, on my own opinion, that it was a pre-existing condition, regardless of whether it was 1956 or 1979.

Chairman Dunning questioned if Attorney Fernicola had A-1?

Attorney Fernicola stated yes, I do, and you know what the judge has said because I've raised this issue during the pendency of this hearing. The judge has said to Mr. Rubin you want to proceed with 1979, you do so at your own peril because when this Board gets down and it comes back to me the date I am applying is the date it became a non-conforming use. That is what the judge has told them in the springtime. I know what the Order says, but the judge wasn't making a determination. They already told the applicant, you want to keep going before the Wanaque Board of Adjustment on 1979, you go ahead because I am not going to stop the Board; they are in the middle of the hearing. But when it comes back before me, I am not applying 1979, so that is what the judge has done. And now you have this testimony from the applicant so Mr. Rubin has been told by the judge the date that controls is the date it became non-conforming, not 1979.

Attorney Rubin stated I don't know what judge you were before, but that wasn't the judge I was before. I don't know where that came from.

Attorney Mondello: I was going to say if Mr. Fernicola is accurate, well then there certainly will be a huge deficit in this application. Having said that, let us now move on since it 9:55pm.

Attorney Mondello: Attorney Fernicola your first witness.

Attorney Fernicola: Peter Steck

Attorney Mondello swore in Peter G. Steck, 80 Maplewood Avenue, Maplewood, New Jersey.

Attorney Mondello stated I have known Mr. Steck for decades and I have worked with him in Fair Lawn on different projects. Do you want to hear a quad ere of Mr. Steck's qualifications as a Planner?

Board agreed to take Attorney Mondello' word.

Attorney Fernicola questioned you are a Licensed Planner in the State of New Jersey?
Planner Steck answered yes. I was licensed in 1976 and still hold that license.

Attorney Mondello questioned your license is current?

Planner Steck answered yes.

Attorney Fernicola: Planner Steck in a typical I would ask you to describe the property, but I think it is unnecessary considering we started this eleven months. So let's jump right into it and why don't you give the Board your understanding of the applicant or the proposal that is currently before the Board.

Planner Steck stated the Board is physically aware of this property pretty intimately. There is a question that was just addressed about what the non-conforming status is. That is an important question because first of all the applicant is guaranteed the rights that existed when it became legally non-conforming. And no matter how much hours of operation or whatever happened at the time, the applicant can rely on it but can't expand it. I am going to come to this point in a moment. It doesn't answer the question to say oh they served outside in 1978, now they can serve food outside today. That is only part of the question. The question is how much, how often, how frequently and I will talk about this later. There is a well-known Supreme Court case, *Belleville v. Parrillo*, and it was buyer that went from a restaurant to a disco and the Supreme Court said you don't just say there was singing beforehand and now there is singing and so there is no change. You have to go into the quantity and intensity of it, and I will read that later.

Attorney Fernicola questioned is the date relevant?

Planner Steck answered the date is crucial because when it became a non-conforming use, and let's say in 1954, that date gives the legal non-conforming protections to the applicant. If the applicant expanded the days of operation, expanded the number of seats, expanded the paving areas, that is not authorized and that is not protected by the legal, non-conforming use. So it is not just identifying, yes there was someone singing outside in 1953. The answer is if that occurred once a year that is different than someone singing outside once a week and it is not just a matter of category; it has to do the intensity. Probably it makes sense because this is going to be a recurring theme. I have in front of me the 2017 Edition of the New Jersey Zoning & Land Use Administration, which is the common book that attorneys show up with, but I'm not an attorney. There are two things on page 724 I want to read, this is under the title, Expansion of Non-Conforming Use, and I am going to read at the top of the page.

Attorney Rubin stated I would object to reading directly from a treatise even though I am quite aware of the treaties and no the authors quite well since I have been involved also, for not as many years as Mr. Steck, but quite a few years. We would all appreciate Mr. Steck's review of what he thinks the planning matters are, but reading from the "Cox Book" really doesn't help anybody because it is improper. You can't just read from a book and say oh that is what the authors' opined as to something similar. Maybe it is what the *Parrillo* case said, maybe not, but it is up to Mr. Steck to give his opinion, if that is what he is here for as a Planner, but not to read from somebody else's treaties, which may nor may not be germane. I know the people who have written those treaties, I know the ones who have unfortunately passed away who were the progenitors of the book, including the late Bill

Cox, but that is not the purpose of having that kind of testimony. Mr. Steck has to come up with his own issues and not read from the Cox Book.

Attorney Mondello stated most planners do, in fact, use a treatise like this and most attorneys rely on a treatise like this. I am hoping that what you are about to read is not going to take five minutes so why don't you get to it Mr. Steck.

Attorney Fernicola stated and that is one of the things when we qualify someone for an expert, an expert under the Evidence Rule is specifically entitled to rely on treaties and cite the treaties. Sometimes Boards, even my own Board, to explain why when someone is qualified as an expert they get to express opinions as a lay person, they get to rely and cite the treaties and that's the whole, when qualified as an expert, that you are permitted to do. Attorney Rubin stated that is not what he is doing; he is reading a book and that is not relying.

Attorney Mondello stated Mr. Steck why don't you read what you are going to read.

Planner Steck stated this is what I rely upon. This is the top of page 724 "...because lawfully created pre-existing, non-conforming uses are inconsistent with the objectives of uniformed zoning and because the overall policy is that they be made to conform as quickly as possible whenever there is a doubt as to whether an enlargement or change is substantial or insubstantial the courts have consistently declared that it is to be resolved against the enlargement or change."

There is a description of the *Belleville v. Parrillo* case that went to the State Supreme Court and I'll read just a couple of sentences. "The Appellate Division had found that each aspect of the new business had been conducted previously". Example food had been served previously and continued to be, there had been music in the restaurant, there had been serving of alcoholic beverages and continued to be. The Supreme Court held that this quantitative analysis was improper and that focus in this type of case must be on the quality, character and intensity of the use reviewed in its totality and with regard to the overall effect on the neighborhood and zoning plan."

So I am suggesting that just to find that someone is singing outside fifty years ago, and someone singing outside today is not the totality of the analysis. You have to look at the intensity of use, the frequency, the hours of operation; they all have something to do with this.

The date when this became a legal non-conforming use, when the residential zone was established in '54, that is crucial because that is the dividing line between what the applicant is entitled to do and continue to do, and then applicant needs variances for any kind of significant expansion. When the Planner for the applicant says to you there is no substantial detriment to the public good, and no substantial impairment to the zone plan, I don't think the Board can make a decision without knowing what is the deviation that is being sought. If the applicant expanding the hours of operation by .05%, no problem. If the applicant is like doubling the number of instances that there is outdoor activity, that may be a problem. First of all we don't have a written Resolution of the Board's earlier decision so we don't have an item that sets the base line, but you need to know the base line; what is the applicant entitled to before you can say, okay what is the magnitude of expansion that they want.

Attorney Fernicola, in your opinion, if you don't know the base line, can you even determine the magnitude of the expansion that the applicant is proposing in the variance application?

Planner Steck stated you cannot. You don't have enough information to make a decision and, specifically, you don't have enough information to indicate that the negative criteria is satisfied. You have to know the quantum of this.

Attorney Mondello questioned Planner Steck if he read the six or seven hundred pages of transcripts from the dozen and half witnesses that laid out that base line?

Planner Steck answered I did not.

Attorney Mondello commented oh boy, that's a problem. All right, your witness.

Planner Steck stated first of all it is the applicant's burden of proof on this.

Attorney Mondello stated I get that, but there is a base line and you don't know what it is.

Attorney Fernicola stated Counsel, really. First of all to say that there is a problem, you are not the trier of fact respectfully. Your comments are inappropriate. It is the people who are sworn into office that are here to make that determination. Your role is to assist them, not to give them your opinion.

Attorney Mondello stated thank you Mr. Fernicola. I do appreciate that.

Attorney Fernicola continued I would ask that you to refrain for such argumentative comments like that's a problem.

Attorney Mondello questioned do you agree it's a problem that he hasn't read the transcripts?

Attorney Fernicola stated no, it is not. He answered your question that it is the applicant's burden of proof. Do you refute that, that it's the applicant's burden of proof?

Attorney Mondello stated no, but you are presenting a witness to destroy the applicant's burden of proof or to at least see if it is credible.

Attorney Fernicola stated again Mr. Mondello to make a facial expression like that is completely unprofessional.

Attorney Mondello stated you are going to tell me about facial expressions and tones and lack of brevity.

Attorney Fernicola stated yes I am.

Attorney Mondello stated I am sorry Mr. Fernicola but please don't throw stones at this house.

Attorney Fernicola stated right. You're not the trier of fact, again.

Attorney Mondello agrees.

Planner Steck stated the applicant is proposing an expansion of a non-conforming use.

And, as I just read, it is my opinion that the law discourages that. The law says if you have a legal, non-conforming use we can't close you down, we can't diminish you but the public policy is, as I read, for non-conforming uses to be eliminated as reasonably and quickly as possible and we would like to go back to residential in theory, but in any event, expansion is discouraged. That's not just the policy of this municipality's ordinance, that is the state wide policy in the Municipal Land Use Law. The applicant is expanding and, in my opinion, we don't know the magnitude at the moment. There is, in my opinion, a substantial difference obviously to someone that serves wine to their neighbors in the backyard versus a commercial operation that needs a liquor license. There are different types of operation, different types of intensities. The fact that the applicant is expanding

outside is very significant because it is more adverse to a residential neighborhood when this activity is outside. My client next door has a pool outside, has a nice rear yard and you can't live in a typical residential area if there is a party going on across the fence. And the fact that you might put up arborvitae or shrubbery is not going to stop the noise and really the length of time that people are talking, even if you don't serve alcohol at a certain time, people will be sitting there. They are there to socialize. This is not a church where you sit quietly; you are there to have fun and socialize. That is not an activity that was anticipated in a residential zone. That type of activity is harmful to a residential environment.

I want to emphasize the point that the applicant can do what it is entitled to do inside the building, the 66 seats, that's fine. Those same 66 people outside is a different level of impact. That is more impactful on the surrounding residential uses because of noise and activity. That injures what someone can reasonably be expected to do on their residential zone.

Part of my analysis was to look at the area. The area is predominantly residential. There is a restaurant up on the hill, but there are no driveways that connect to park here. That has woods, the building is set away. This is a predominantly residential neighborhood. Many one, but some two-family homes. It is a neighborhood that has sub-standard streets. The right-of-way in front of this property is 33' and the pavement is 20'. If you watch how neighbors park in the area they're party on where there is a little sidewalk; it is difficult. This is a congested area not so much because of the total volume of traffic but the streets are substandard and that means there is not a lot of forgiveness for someone that happens to park on the street. While the applicant can have parking in the rear of his property, he can't require patrons to park there, patrons park where they like, where it's legal. This is a street that is residential in character, residential in traffic, it is sub-standard in width, many areas don't have sidewalks, and it's only 20' wide. That means that accentuates the problem of commercial activity; cars coming and going to a commercial operation. With the expansion of the outdoor area, there will be more noise than would be inside, there will be more traffic, and what the Board has no basis to make a judgment is how does this frequency compare with 1954 with what the applicant was guaranteed. We have no idea and, in fact, you don't have idea this evening because the applicant is resisting any kind of constraint on the number of days of operation. If in 1954, the outdoor happened six times during the summer, he wants permission to do it every day of the week when weather is fine. If it is raining, I don't care because my client is probably going to be inside the house and the people are going to in the building drinking wine. But if it is a nice day, my client wants to use his backyard and that's when this activity will be peaking in the rear of this property.

Part of my analysis was to look at the Master Plan. When someone says this is not substantially impair the zone plan and the zoning ordinance, the zone plan is the Master Plan. Engineer Petry couldn't remember the dates, the density. I went to the County, which is a good repository for the plans and I found a number of plans there. There was an early plan in 1977, but the first kind of colored land use map is in 1983.

Attorney Fernicola questioned is this the first Master Plan that you are referring to? Planner Steck answered yes. The 1983 Master Plan was the first full blown Master Plan and it was done by Michael Kauker and it recommended a medium/high residential density for this property, which was translated into single-family homes on a 15,000 square foot lot in the ordinance.

Attorney Fernicola questioned, when you said the County, were you referring to Planner Steck answered the Passaic County Planning Board. Your documents are supposed to be filed with the County Planning Board and that's where I went to research. There was a subsequent Plan in 1992 also by Mr. Kauker but it did not change that designation. The intent of the Planning Board in policy, and again this relates to the negative criteria, is that be a single-family area with lot sizes of approximately 15,000 square feet at a minimum. This property happens to be zoned the Master Plan recommended so there is a consistency here. It is in the R-15 Zone and this zone is predominately a single-family zone. It is clear that a restaurant and people dining is a commercial operation, whether it is indoors or outdoors, that is not permitted. The environment that the neighbors should expect to rely upon is the character of a single-family zone. They can't interrupt the 1954 legal non-conforming use since the applicant is guaranteed that, but anything above that, more intensive, more frequent, more seats, and more paving is an expansion that is discouraged.

You heard the application and testimony of Engineer Petry, who is the Planner for the applicant. He offered, and the Board certainly knows the testimony but as discussed earlier this evening, there were three subject matters. He says we're improving the landscaping (aesthetics). I don't think the landscaping has anything to do in terms of mitigating noise. You need about 100' of forest to mitigate noise and you need a lot of distance. The applicant says adjacent to my client's fence there is a 7' area and I measured it this evening and there is 5-1/2' to my client's fence from the curb of that planting area. So likely, the distance is only 5' and not 7' and there is a pipe underneath there. How is the applicant going to plant a row of shrubs when there is a drainage pipe right in that area? That doesn't make sense. The applicant is saying one of the benefits is improved landscaping. What is funny about this is that the case that everybody talks about is *Burbridge v. Mine Hill* and that was a case where there was a non-conforming automotive repair use in a residential zone and the applicant said look I am going to take my repair cars off the front lawn and I'm going to put them in the back of the building and put a fence around it and yes my fenced area is bigger than what was there before, but I'm getting them off the front lawn. The court said, under the theme of aesthetics, that makes sense. You have met your burden of proof. What the applicant is talking about is like putting curtains on the window. It doesn't affect the land use impacts to have this row of shrubbery that is proposed even if the applicant could physically put it over the pipe but I don't know how he is going to do that. That does not stop legitimately the lights and the noise that goes on from people dining, talking and socializing outside. The funny thing about this application is what is non-conforming about it, is that the applicant increased the paving in the front lawn. If you drive the street, what do houses have in the front? They have green lawns. There is nothing left on this property in front. This is all paved and, in fact, the applicant is paving more of it then he was allowed to do. Part of the applicant's submission is a drainage report.

Attorney Fernicola, referring to the *Burbridge* case, Attorney Mondello made the comment when we were here in July citing that case that mere beautification is not enough to justify a Use Variance. Do you agree?

Planner Steck answered that is correct. If I put nice curtains on a non-conforming use, does that make it a wonderful use? The answer is no. Again, the *Burbridge* case is a great

example; they were taking junk cars off the front lawn and putting them behind the building. That is an aesthetic improvement. It's not painting the cars a different color. Attorney Fernicola commented that you were starting to talk about stormwater when I interrupted.

Planner Steck stated Engineer Petry submitted a Stormwater Detention Study that is dated June 23, 2017 and it documents in it the amount of impervious coverage that is being increased on the property. I believe it references an increase of 6,413 square feet. On it is a colored document that is Figure 2 that has an existing paved area in a darker green and then a tan area showing all the areas that have increased and that is why the applicant used that to say well I am going to elect to try to lessen my stormwater runoff and he calculates the square footage of those new paved areas. Those are all expansions of the non-conforming use. They were clearly not there back in 1954 and I'll show you some photographs that may help you on that. The applicant is putting a detention facility, a collection facility, in the rear yard. I don't know how many of you live in single-family homes, but I am willing to bet that you don't have detention facilities in your rear yard. Member Covelli stated he has two of them. I put them in.

Planner Steck stated good for you and questioned Member Covelli is it an open swale with a catch basin or are you just talking about the drywells?

Member Covelli stated we don't use the term drywells anymore; they are seepage pits.

Planner Steck stated the applicant is re-grading the back of his property to try and collect stormwater in the back and part of the issue is that, while he might not be required by local ordinance to do this, there are potential adverse effects because of stormwater runoff. The applicant is expanding the pavement area and that Figure 2 shows all the areas that are being expanded. Again, it is my opinion that is an obvious indicia of how much this is being expanded. While it is nice to have landscaping and were this use being proposed in a zone permitting it, I suspect that the Board would require landscaping. In my opinion, it doesn't rise to the level of mitigating adverse impacts or justifying a D-2 Variance.

The applicant talks about traffic improvements. Now part of it is that the applicant has illegally paved areas that were gravel. One could say from just a narrow point of view, oh it is safer to drive on gravel than pavement but the answer is this is a residential zone. You don't have a single-family house with 31 parking spaces on it. That incurs a different aesthetic and in this instance it incurs traffic activity, which is far beyond what would be anticipated in a residential zone. In fact, the area that is being expanded to the rear, is adjacent to my client's rear yard. They would like to enjoy their rear yard. Now they are going to have cars coming and going; they are going to have headlights; they are going to have car doors open and closing; they are going to have beepers; and they are going to have people socializing in the rear. And we yet don't know the cap on the number of days or hours of operation. Mr. Ryan is saying that I know what exists today but I want the ability to do it all days and into the evening. In my opinion, the traffic is a measurement of part of the use but, again, I am concerned about the use being converted from an indoor use to an outdoor use. If someone is going to go indoors to the tavern and park there, I have to stomach that, that's fine, they have 66 seats there. But the answer is, when that same car may foster a person that is going to dine outdoors and is going to be served food and beverages outdoors, that is a different type of land use. The ordinance anticipates for adequate parking, one parking per four, in one case, patrons or four seats. How many times have you been to a restaurant where every car is filled with four people? That's not

modern life and the answer is it doesn't always register what the actual demand is. Again, this is an area with a sub-standard street system. In my opinion, the fact that the applicant is doing an increase in the pavement does not improve traffic. There is still only one way in and out of that whole parking area. There was a discussion about this already, right? The applicant is expanding the area, but there is a narrow area between the house and my client's property and, in fact, the applicant is now angling that driveway in an adverse direction. People are now going to have a harder time getting into the street because he is eliminating the encroachment of parking in that area.

Attorney Fernicola stated a moment ago you talked that you were concerned with the conversion of the indoor use to the outdoor use. In their plans and what you have in front of you, they depict what we know is physically there, they're proposing to locate this outdoor bar that is on the property line, the plumbing and electric and a roof. I didn't hear any testimony from Engineer Petry as a planning perspective. First and foremost does that represent an expansion of the non-conforming use?

Planner Steck answered without a doubt. It adds the formality; it adds the convenience of serving food and beverages outside; and it encourages the service of food and beverages outside. So it not only is a physical expansion by adding facilities there, but more importantly, it adds to the capability and ease of use of the outside.

Attorney Fernicola questioned the benefits that he identified, landscaping, parking and stormwater, are any of those related to the construction of this outdoor bar.

Planner Steck answered they are not in my opinion. Again, there is a modest increase in pavement but that parking area has one way in and out and you can't have two cars at the same time; one has to wait for the other cause there really isn't enough room to do that. So there isn't a traffic issue that is solved by this. That is not a significant benefit.

Attorney Fernicola questioned what about the outdoor area that has been constructed that has the picnic tables and the seat? In your opinion does that represent an expansion?

Planner Steck answered that is clearly an expansion of the use and, again, it accommodates with ease patrons and encourages them to dine and talk and converse outside.

Attorney Fernicola questioned do you believe that there is a negative impact to the neighborhood by the construction of this outdoor bar and the construction of this outdoor seating area with the picnic tables?

Planner Steck answered there clearly is because of the number of patrons that are there and even if they are 28, 28 people socializing and drinking is not the type of activity that is permitted in a residential zone. More importantly, just from common sense, how do you use your backyard if this going on?

Attorney Mondello, questioning Planner Steck, stated there was some testimony that, and I don't know what the frequency was, but a Ballantine bar truck would pull it, does that cause less of a problem, or more of a problem, then the bar that the applicant currently has on its property?

Planner Steck answered if the Ballantine beer truck came there at 10:00 every evening, it might be worse. If it came there once a week, it would not be worse.

Attorney Mondello: Thank You

Planner Steck stated the frequency and the noise has something to do with this.

Attorney Fernicola stated how about the testimony was that the beer truck with the taps came when private groups had a party?

Planner Steck answered again, it has to do with the frequency of it. People don't go to a facility like this to sit and their chairs and be quiet. They want to socialize, they have a good time and good for them. But the answer is that is offensive to someone across the property line where you have 5' of landscaping. That is not going to stop the lights; that's not going to stop the noise; and that's not going to stop the activity late into the evening. Attorney Fernicola questioned is a permanent bar, such as what was actually constructed at the property, a more intensive commercial use of the rear yard than an occasional beer truck?

Planner Steck answered, in my opinion, it is. Again, the state gets into this because of the liquor license laws. There is a recognition that there is special concern by the fact that there is another level of approvals needed through the issuance of liquor licenses. The applicant talks about drainage as being a special reason, a public purpose that is advanced that justifies the expansion of the non-conforming use and the applicant says that we don't have to do this. There is sign in the rear when I was there that water does come down the hill and the applicant has changed the topography in the back. Those stone areas are not neutral in terms of stormwater runoff. The applicant has put in stones surrounds as beds of gravel and that has changed the runoff characteristics of the area. There is an open pipe in the back and the applicant is proposing to reshape that. I presume the intent is to get better assurance that stormwater isn't going to flow onto the neighbor's property but this is a minor incident. In my opinion if this were a permitted use in a permitted zone you would encourage the applicant to handle the stormwater runoff the same way. There are many Boards that do this, even if it's not a requirement. I go to towns all the time where they say can you put a seepage pit at the end of house because it might not be required but the answer is we are all concerned about additional stormwater.

Attorney Mondello commented that the Chairman was asking, since he typically pulls the plug at 10:30pm, and I suggested to him that we ask how much more testimony there is so either we carry it -- Your call Attorney Rubin since I don't know how much of a cross-examination you have. Typically the Board pulls the plug at 10:30pm.

Vice Chairman Grygus stated for the sake of maybe not having to have the expert come again.

Attorney Fernicola stated I don't think we have that much longer but then there is still cross so he has to come back anyway. I would say it's 10:30pm.

Attorney Mondello: Any objections Attorney Rubin?

Attorney Rubin answered no.

Attorney Mondello mentioned that we have two new applications on and we are probably going to be telling the applicants' attorneys not to show up. That we suspect that between Planner Speck's testimony, direct and Attorney Rubin's cross that it will consume the entire meeting. Does that sound accurate?

Attorney Rubin answered probably.

Next Meeting is September 6, 2017 and applicant waives any time restrictions.

MOTION TO CARRY APPLICATION UNTIL SEPTEMBER 6, 2017: made by Member Ludwig, seconded by Vice Chairman Grygus. Motion carried by a voice vote.

PUBLIC DISCUSSION: None

RESOLUTION: None

CORRESPONDENCE: None

VOUCHERS: submitted by Boswell Engineering for the MKR Enterprises Application for \$1,358 and for Agostino Properties Application in the amount of \$582.

MOTION TO APPROVE: made by Member Ludwig, seconded by Member Hoffman. Voting yes were Chairman Dunning, Vice Chairman Grygus, Members Covelli, Hain, Hoffman, Ludwig, Levine, Henderson and Karp.

MOTION TO APPROVE JULY 5, 2017 MINUTES: made by Member Covelli, seconded by Member Ludwig. Voting yes were Chairman Dunning, Vice Chairman Grygus, Members Covelli, Hain, Hoffman, Ludwig, Levine, Henderson and Karp.

ENGINEER'S REPORT: Ryan Sylvia Application – Board Secretary handed out this Application to the Board Members and Professionals.

DISCUSSION: Invoice of Metropolitan Court Report Service, Inc. for \$1,418.

Without taking about the merits of the application, Attorney Mondello would like to discuss the transcript invoice.

Attorney Mondello stated his understanding was that the applicant did, in fact, agree to having a transcriber, which is fairly unusual, at their expense up to the point where the Board decided as to whether or not it was pre-existing, non-conforming use. Apparently, there must be some miscommunication. I circulated the e-mails that went back and forth between myself and Mr. Rubin and I thought I had said that we wouldn't need the transcriber anymore and low and behold she showed up that night after we had decided that issue. I didn't say anything figuring maybe he wanted her here. I was mistaken. Apparently, the applicant is to some extent upset about having to pay this additional invoice so it is certainly up to the Board's discretion as to whether or not the Borough pays for it or whether or not Mr. Ryan pays for it. I indicated to Mr. Rubin that I thought the Board did, in fact, save the applicant some money because we could have gone out and gotten our own Planner, at his expense, so that we've got a hired gun here, we've got a hired gone there and then we would have had a neutral Planner, which we didn't do. That is never less than \$3,500. I raised that issue so I would open the floor to try and figure out what the Board.

Member Henderson questioned who hired the transcriber?

Attorney Mondello answered the applicant's attorney did at our request and he agreed to it. It is a fairly unusual request. The telecommunication companies do it all the time.

Member Henderson stated he initially hired her and we don't direct her, they do.

Member Hoffman stated I feel it was his position to tell the stenographer to come or not. If he was satisfied with our ruling on part of the application, it was his responsibility.

Attorney Mondello stated it was imperative that we have a transcriber here because I knew it was going to be mayhem to get the testimony as to what occurred in the past without discussing anything.

Member Covelli commented like what happened tonight.

Attorney Mondello answered yes. So that's part of the record obviously. So there was some miscommunication. How does the Board want to handle it?

Member Ludwig stated he agreed to pay for it up to when the determination was made and he should have known to end it.

Vice Chairman Grygus stated especially since if we asked him for one and he agreed to pay for it then, at that point in time, how was he to assume that well then I guess they are going to start paying for it.

Attorney Mondello stated I don't disagree with that logic.

Vice Chairman Grygus stated he should have just told her don't show up next week unless you want to contact the secretary and find out if the Borough is willing to continue your services.

Attorney Mondello stated I reached out to the Borough Administrator and he said absolutely we are not paying for it. The Governing Body gives us a budget but they have to pay for reasonable expenses.

Member Ludwig stated I don't feel it is part of our expenses. How much money are we talking about?

Attorney Mondello stated I think it has to be at least \$1,200.

Member Levine stated I don't think that is material; whether it is a \$1 or \$1,200.

Member Covelli stated I like Sue Henderson's answer and I am going with that.

Board Secretary stated the bill is \$1,418. \$1,078 stated an original and 1 certified transcript, which I don't think anyone received.

Attorney Mondello stated she would only distribute the transcript when she got paid, and the Minutes are already done.

Engineer Nash stated she may not have transcribed her notes so she didn't incur an expense yet.

Chairman Dunning stated the attendance at the meeting we didn't need her at was only \$325.

MOTION TO DENY PAYMENT OF INVOICE: made by Member Ludwig, seconded by Member Henderson. Voting yes were Chairman Dunning, Vice Chairman Grygus, Members Covelli, Hain, Hoffman, Ludwig, Levine, Henderson and Karp.

MOTION TO ADJOURN AT 10:39 PM: made by Member Ludwig, seconded by Member Levine. Motion carried by a voice vote.

Jennifer A. Fiorito
Board of Adjustment Secretary