

BOROUGH OF WANAUQUE
BOARD OF ADJUSTMENT MEETING

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

X

DATE: December 7th, 2016
TIME: 8:27 p.m.

BEFORE: PATRICIA PUCCIARELLO a
Notary Public and
Court Reporter of the
State of New Jersey

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1 BOARD OF ADJUSTMENT THERE BEING PRESENT:

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5 MEMBER BARRY HAIN
6 MEMBER PETER HOFFMAN
7 MEMBER MICHAEL LEVINE
8 MEMBER SUZANNE HENDERSON
9 RONALD P. MONDELLO, Board Attorney
10 CHRISTOPHER NASH, Board Engineer

11
12 A P P E A R A N C E S

13 LAW OFFICES OF A. MICHAEL RUBIN
14 BY: A. Michael Rubin, Esq.
15 1330 Hamburg Turnpike
16 Wayne, New Jersey 07470
17 Attorney for the Applicant, Tree Tavern Wine
18 Bar

19 PAUL V. FERNICOLA & ASSOCIATES, LLC
20 BY: Paul V. Fernicola, Esq.
21 219 Broad Street
22 Red Bank, New Jersey 07701
23 Attorney for Mr. And Mrs. Bellante

24
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1 I N D E X

2

3 WITNESS DIRECT CROSS REDIRECT RECROSS

4 GLENN ANDERSON

5 By Mr. Rubin: 8 21

6 By Mr. Fernicola: 21

7 MAURICE HOUCKES

8 By Mr. Rubin: 24 33

9 By Mr. Fernicola: 28

10 GILBERT FOULON

11 By Mr. Rubin: 37

12 By Mr. Fernicola: 39

13 JIMMY HERRICK

14 By Mr. Rubin: 47

15 By Mr. Fernicola: 51

16 JOSEPH BERKEMYER

17 By Mr. Rubin: 54

18 By Mr. Fernicola: 57

19 ROGER REDNER

20 By Mr. Rubin: 62

21 By Mr. Fernicola: 65

22 MIKE RYAN

23 By Mr. Rubin: 71

24

25

1 (Application on record at 8:27 p.m.)

2

3 CHAIRMAN DUNNING: The next
4 application, which is 2016-5, MKR Enterprises, 17
5 Park Street.

6 MR. MONDELLO: Welcome, Mr. Rubin,
7 please enter your appearance.

8 MR. RUBIN: Mr. Chairman, sir,
9 members of the board, once again in this
10 application, I am Michael Rubin. I'm an attorney
11 for the applicant with offices at 1330 Hamburg
12 Turnpike, Wayne Township.

13 When we left off last time, the
14 applicant was testifying. However, there are a
15 number of folks that we've asked to come this
16 evening as part of the applicant's case to show
17 some of the historical perspective of this
18 application. And since it is part of the holiday
19 season, I wanted them to come in, do their thing
20 and be done and hopefully, leave to do other
21 things. So we're going to be calling them out of
22 turn.

23 After those folks are finished, we'll
24 come back to Mr. Ryan to do some redirect to clear
25 up some of the questions that were asked.

1 The main reason that I'm presenting
2 these witnesses is to show that there is a
3 preexisting, nonconforming use that has preexisted
4 zoning in the area. And looking at some of the
5 records and we spoke about this the last time we
6 were before you, it appeared that 1979 was a key
7 date, but that's apparently when everyone agrees
8 that the zoning ordinance was adopted for this
9 area, so that becomes key in what some of these
10 witnesses are going to testify to as things progress.
11 So hopefully, we could be able to go through them
12 all this evening and start Mr. Ryan, so we could
13 finish or at least do most of the applicant's case
14 this evening.

15 I would call our first witness,
16 Mr. Glenn Anderson, if he could come up.

17 MR. FERNICOLA: Mr. Chairman, if I
18 could just state my appearance.

19 MR. MONDELLO: Mr. Fernicola,
20 welcome. Nice to see you again.

21 MR. FERNICOLA: Thank you. Nice to
22 see you, counsel.

23 Members of the board, Paul Fernicola,
24 Red Bank, on behalf of Mr. and Mrs. Mark Bellante.

25 And just to refresh some of the

1 issues since we were last here September 7th, we
2 discussed some of the legal issues, your counsel
3 gave you one ruling. But one of the issues that's
4 still pending, if you recall, we had introduced as
5 011, the resolution of approval from 2005, in
6 which that gave need to the deed restriction and
7 that the existing use was 50 chairs, 50 barstools.
8 It's our position that, based upon the deed
9 restriction, as a condition of approval, that this
10 board is without jurisdiction to give an
11 interpretation to lift the deed restriction, but
12 that can only be done by the superior court.
13 Thank you very much.

14 MR. MONDELLO: I do believe I did
15 rule, it's in the minutes, but thank you.

16 MR. FERNICOLA: You ruled on the
17 20-day issue, not on the deed restriction issue.

18 MR. MONDELLO: I mean, I said that
19 you cannot simply refer to some testimony in the
20 minutes with respect to a deed restriction. The
21 deed restriction would have to be specific, it
22 would have to be directed towards a particular
23 restriction. And instead, it was -- well, I'm
24 positive I ruled on it. Let's get things rolling
25 here.

1 Mr. Rubin, thank you so much for
2 providing the stenographer. The board thanks you
3 and the board secretary thanks you.

4 MR. RUBIN: I'm sure the board
5 secretary thanks us.

6 MR. MONDELLO: Let's call that first
7 witness.

8 MR. RUBIN: Great. Mr. Anderson, is
9 he here?

10 MR. MONDELLO: Good evening, Mr.
11 Anderson, if you would approach the mic and raise
12 your right hand.

13 (Witness sworn)

14 MR. MONDELLO: Please state your
15 name, spell your last name and give us your
16 address.

17 MR. ANDERSON: Anderson, Arthur
18 Glenn, A-n-d-e-r-s-o-n, 537 Ringwood Avenue,
19 Wanaque.

20 MR. MONDELLO: Your witness.

21 DIRECT EXAMINATION BY MR. RUBIN:

22 Q. Mr. Anderson, are you familiar with
23 the restaurant known as Tree Tavern?

24 A. Yes.

25 Q. And are you familiar with the present

1 ownership, Mr. Ryan?

2 A. Most certainly, yes.

3 Q. And could you advise the board,
4 because this is really why we're here on this part
5 of the case, as to what's been happening on the
6 site of the Tree Tavern Restaurant, especially in
7 the outdoor area, which is the subject of this
8 application. What's happening back there at the
9 present time? First we'll start now and then work
10 our way back.

11 MR. FERNICOLA: I'm going to object,
12 because that's not the scope of this hearing. So
13 is he here for an interpretation that there was a
14 preexisting use in 1979 --

15 MR. RUBIN: Well, we'll get there in
16 about two minutes.

17 MR. MONDELLO: Let's hear it.
18 Objection noted. You can answer the question.

19 Q. What's going on today?

20 A. Now, you're talking prior to not
21 using the outside because of this --

22 Q. Right.

23 A. Okay. Prior to that, Mike fixed it
24 up, did a beautiful job. He fixed up the outside.
25 He had an area, he basically was having food

1 outside, picnic tables, things like that, and
2 other tables in the surrounding area, which was
3 beautifully done, all nice, neat, and serving
4 alcohol out there at the same time. It's been
5 quiet. It's been fun, and that's exactly the way
6 this town was used to that. They had quite a few
7 places back in the day to allow people to go out,
8 enjoy their neighborhoods, have a few libations in
9 their neighborhoods, stay close and have fun,
10 basically, have fun.

11 Q. Mr. Anderson, the question now
12 becomes the preexisting nonconforming use, and
13 we've established 1979 as a key date.

14 Do you know from your own knowledge,
15 whether there was a use of the restaurant in the
16 outdoors from earlier than 1979?

17 A. Yes.

18 Q. And how do you know that?

19 A. I've been there several times.

20 Q. And could you be a little bit more
21 explicit? Could you tell us how many years before
22 that, was there anything that you recall that was
23 happening in those days, who the owners were?

24 A. Yes, when Polly's owned it in the
25 60s, right, and early 70s, just before I went in

1 the service. I've been there several times with
2 my father. There was several groups, different
3 groups they would have, especially on the
4 weekends, right, there'd be people out always
5 playing the Bocce Ball, there'd always be the old
6 time groups. They'd have a tent outside where
7 they'd be having clam bakes, they'd have corn,
8 they'd have hamburgers, beer, the whole setup.
9 They'd have picnic tables there for the children
10 in order to play and stay out of the way of the
11 adults. And as I said, I started going there as a
12 youth with my father.

13 Now, there was many groups in this
14 area then, 39 Boys and Gates, and they actually
15 had their own club membership, which I was in the
16 service when they formed that, there's somebody
17 else that could talk more about that. But as I
18 said, it was a great place to go. And we'll go up

19 --

20 Q. We're talking specifically about
21 prior to 1979.

22 A. That's correct, that was all prior.

23 Q. And it was called Polly's at that
24 time?

25 A. Yes.

1 Q. And then, eventually, it became Tree
2 Tavern in later years?

3 A. Right. It was Andrew's in between
4 and then Tree Tavern, correct.

5 Q. So is it your testimony that would
6 have been happening in the outside continued all
7 through the years?

8 A. Yes.

9 MR. RUBIN: Thank you. Your witness.

10 MR. MONDELLO: Mr. Fernicola, your
11 witness.

12 MR. FERNICOLA: Thank you.

13 CROSS EXAMINATION BY MR. FERNICOLA:

14 Q. Mr. Anderson, can you identify for
15 us, where was the location of the Bocce Ball pit.

16 A. The Bocce Ball pit was on the
17 right-hand side. If you're facing from the road
18 facing onto the property, it's on the right-hand
19 side.

20 Q. Would you agree that the Bocce Ball
21 pit, where it's located on the property, now owned
22 by the Bellante's where their home is, to the
23 right of Tree Tavern?

24 A. Well, I'm not familiar with the
25 actual boundary, as far as that goes. I mean,

1 you're asking a question now that -- obviously,
2 there's been some physical changes to it.

3 Q. So you can't tell this board whether
4 the Bocce Ball pit was located on the property
5 that is now owned by Mr. Ryan. Is that what your
6 testimony is?

7 A. Because I'm not a witness of the
8 actual boundaries and things like that, no, I
9 can't. That would be a lie. But I will say, as
10 far as the way it looks and the way it's setup now
11 that, yes, it was on Tree Tavern property now.
12 Now if you're asking me, as I said, to say
13 officially, I don't know. I mean, I don't have
14 the --

15 Q. So just so we're clear, you don't
16 know whether the Bocce Ball pits were, in fact,
17 located on the property currently owned by
18 Mr. Ryan. Correct?

19 A. I can't testify to say. Again, I'm
20 not a surveyor, so I don't know the answer
21 exactly. As far as, it was used as Polly's, that
22 was used by them.

23 Q. Do you know whether or not the prior
24 owners of the Tree Tavern property, the owners
25 prior to Mr. Ryan, whether or not they ever had a

1 lease to utilize the property now owned by Mr. and
2 Mrs. Bellante?

3 A. Of course not. I would have no way
4 of knowing that, nor would I need to.

5 Q. Mr. Anderson, let me show you four
6 photographs that I'm going to mark.

7 MR. FERNICOLA: We left off last time
8 at 011 for the objector's side.

9 MR. MONDELLO: Correct.

10 MR. FERNICOLA: So mark this 012.

11 MR. MONDELLO: Yes. So 011 is --

12 MR. FERNICOLA: No, I'm sorry, it's
13 012.

14 MR. MONDELLO: I'm sorry, it's 012,
15 is four pictorials?

16 MR. FERNICOLA: Yes.

17 MR. RUBIN: Four photographs.

18 (Exhibit-012, Four Photographs,
19 marked for identification)

20 Q. Mr. Anderson, can you take a moment
21 and look at the four photographs that I've marked
22 as 012, and whether or not --

23 MR. RUBIN: Is this for
24 identification at this moment?

25 MR. FERNICOLA: Well, counsel, I'm

1 trying to lay a foundation with the witness. You
2 have to let me complete my question.

3 MR. RUBIN: Okay.

4 THE WITNESS: Can you hold on for one
5 second? I just got to go get my glasses.

6 MR. MONDELLO: Go ahead. Go ahead.

7 MR. RUBIN: Well, the question, while
8 the witness is getting his glasses. At the
9 present time, 011 is not in evidence, so it's for
10 identification at this moment?

11 MR. MONDELLO: Well, it's 012. We've
12 marked it as 012, Mr. Rubin.

13 MR. RUBIN: 012, because it's not
14 entered in evidence at this moment.

15 MR. FERNICOLA: Well, I have to be
16 able to ask the witness a question about it before
17 I can move it into evidence.

18 MR. MONDELLO: And the rules are
19 somewhat relaxed with respect to evidence.

20 BY MR. FERNICOLA:

21 Q. So Mr. Anderson, now that you have
22 your glasses, my question to you is based upon
23 your familiarity with the property, having gone
24 there with your father, would you agree that the
25 four photographs contained on 012 accurately

1 depict the condition of the property in the late
2 1970s?

3 A. This is late 1970s, but what I
4 testified here to is the 60s and up until I got
5 drafted, which is '71. So I really -- I've been
6 at the property at that time, but that's not what
7 I'm here testifying about.

8 Q. Were you at the property in the late
9 1970s?

10 A. Yes.

11 Q. Okay. Based on your recollection,
12 did the four photographs marked as 012 accurately
13 depict the condition of property in the late
14 1970s?

15 A. Yes, as far as I can see. Again,
16 it's a little bit out of context, you know, you
17 asking me that, but think about 30 some years ago,
18 40 years ago.

19 Q. Well, you're here talking about
20 events tonight that are 50 years old, right, that
21 you came to testify about?

22 A. Yes, I am, that's right, yes.

23 MR. FERNICOLA: So now that he's
24 authenticated the photographs, I will move them to
25 be --

1 MR. MONDELLO: Well, who took those
2 pictures?

3 MR. FERNICOLA: It doesn't matter,
4 he's authenticated them.

5 MR. RUBIN: I object to it. You
6 can't do that.

7 MR. FERNICOLA: No, that's not
8 required by rules.

9 MR. RUBIN: Absolutely he can't.

10 MR. MONDELLO: Hold on a second,
11 we're going to have some order here.

12 First of all, his testimony was, I
13 don't want to say ambiguous. I don't mean to be
14 disrespectful, Mr. Anderson, but he said first he
15 wasn't there during the 70s. He wasn't sure, but
16 he thinks that accurately depicts the condition.
17 So if you're going move it into evidence, at least
18 let's figure out who took the pictures.

19 MR. FERNICOLA: Right, we'll present
20 the witness, but that's not a requirement,
21 counsel. The requirement is to have the witness
22 -- it's irrelevant who took the photographs.

23 MR. MONDELLO: And what did I just
24 say, his testimony was less than, let's say
25 crystal clear with authenticating the four

1 pictures. Would you agree with me there?

2 MR. FERNICOLA: No, I disagree. And
3 I think it's going to be the recollection of the
4 board members, because the only thing that he was
5 not certain about was the location of the Bocce
6 pit. He indicated unequivocally that the pictures
7 accurately depicted the condition of property in
8 the late 1970s, that's was his testimony.

9 MR. RUBIN: I disagree that that was
10 his testimony.

11 MR. MONDELLO: But anyway, let's not
12 make a mountain out of a molehill. We're going to
13 accept that as evidence.

14 Any other questions for Mr. Anderson?

15 Can the board please take a look at
16 011 and 012, if you're finished with it,
17 Mr. Fernicola?

18 MR. FERNICOLA: Sure, that's why I
19 moved it into evidence.

20 MR. MONDELLO: Thank you, Mr. Rubin.
21 Any other questions for Mr. Anderson?

22 MR. FERNICOLA: Yes, one minute
23 please.

24 Q. When was the last time that you were
25 at the property, Mr. Anderson?

1 A. I'd say when Andrew's had it. I
2 would say the 80s.

3 Q. I'm sorry, I'm asking --

4 A. Oh, the last time I was at the
5 property, that would be this year about two weeks
6 ago.

7 Q. Were you in the rear of the property?

8 A. No.

9 Q. At any point in the last few years
10 have you been at the property and that you saw at
11 the outdoor bar that was constructed in the rear
12 to the property on the left-hand side of the
13 property?

14 A. Recently, yes.

15 Q. Do you recall when that outdoor bar
16 was constructed?

17 A. Not exactly. Again, it would be a
18 guess. And I don't want to give you a guess,
19 because I don't want to make a mountain out a
20 molehill, so...

21 Q. Do you agree that that outdoor bar
22 that's currently in the rear on the left-hand side
23 of the property was not there back in the 1960s
24 and 70s?

25 A. There was a tent serving beer and

1 alcohol where that bar is now.

2 Q. Would you describe the tent that was
3 there in the 1960s and 70s?

4 A. Well, it was a basic frigging tent.

5 MR. MONDELLO: That I haven't heard
6 in 25 years.

7 A. It was a tent, you know.

8 Q. Was it a permanent structure?

9 A. I believe it was removable. It was
10 removable.

11 Q. Now, at the beginning of your
12 testimony, you said that Mr. Ryan fixed up the
13 outside, installed picnic tables. You described
14 it as being nice and neat.

15 A. Yes.

16 Q. Mr. Ryan fixing up the outside area,
17 can you approximate for us when that work was done
18 at the property?

19 A. Well, it's -- the outdoor was not --
20 let me see. He started on it about three years
21 ago.

22 Q. So approximately 2013?

23 A. Yes.

24 Q. And would you describe the work that
25 was done in 2013 in the outdoor area?

1 A. He put sod in, he levelled the, what
2 do you call it, cleaned up all the debris, put sod
3 in. As I said, he installed the tables, outdoor
4 tables with umbrellas.

5 Q. Any fire pits?

6 A. Yes, there was a fire pit. And I'm
7 not too sure if that was part of the bar or part
8 of the residence, though. That could have been
9 part of his residence, because it's enclosed in an
10 area.

11 MR. FERNICOLA: I have no further
12 questions for Mr. Anderson.

13 MR. RUBIN: You have to wait until
14 the board has questions. They may have some.

15 THE WITNESS: Oh, I'm sorry about
16 that.

17 REDIRECT EXAMINATION BY MR. RUBIN:

18 Q. But I wanted to ask you, from your
19 observations at the present time, and the present
20 time means, you know, now and in the last couple
21 of week and whatever, does it appear to you that
22 the size of the back area where food and drink are
23 being consumed is about the same size as it was
24 way back in the 1970s?

25 MR. FERNICOLA: I object, it's

1 ambiguous, the size of what?

2 MR. RUBIN: The area.

3 MR. FERNICOLA: I'm going to object
4 to it.

5 Q. My question was, the area in which
6 food and liquor and soda and whatever else was
7 consumed in the back area is the same approximate
8 size? I know you're not a surveyor and you can't
9 be sure.

10 A. Right, but approximately.

11 MR. FERNICOLA: Same objection.

12 MR. MONDELLO: Noted, Mr. Fernicola.

13 A. Yes, not being a surveyor, yes.

14 MR. RUBIN: Well, Wait until Mr.
15 Fernicola is finished.

16 MR. FERNICOLA: I'm seeking opinion
17 testimony from a lay witness who hasn't been
18 qualified as an expert.

19 MR. RUBIN: He is not an expert.
20 He's just saying what he says.

21 MR. MONDELLO: I don't want to just
22 flush down the 25 years that I've been doing this,
23 but I always thought that the rules of evidence
24 were somewhat relaxed. We're not throwing them
25 out the window, but they're certainly relaxed.

1 But your objection is noted.

2 If you could answer the question,
3 please answer the question.

4 A. Yes, it is approximately the same
5 area as it was in the 60s.

6 MR. MONDELLO: Anything else, Mr.
7 Rubin?

8 MR. RUBIN: I have nothing further,
9 thank you.

10 VICE-CHAIRMAN GRYGUS: I just have
11 one question for Mr. Anderson.

12 To the best of your recollection,
13 prior to 1979, when would you say was the last
14 year that you were at the site? I think you
15 said --

16 THE WITNESS: Well, I was drafted and
17 I was in the service. And so, you know, when I
18 first got back out of the service, which was '71.
19 I was there for like '72, right, and then I wasn't
20 in the area. I had moved out of the area for
21 several years. But, you know, I was back and
22 forth and I had stopped there a couple times. But
23 the most that I know about, which is exactly what
24 I testified to, was the '60s and early '70s.

25 VICE-CHAIRMAN GRYGUS: Okay.

1 MR. MONDELLO: Any other questions
2 from the Board? Okay.

3 MR. RUBIN: Thank you.

4 MR. MONDELLO: Next witness, Maurice
5 Houckes.

6 (Witness sworn)

7 MR. MONDELLO: Please state your
8 name.

9 MR. HOUCKES: Maurice Houckes,
10 H-o-u-c-k-e-s, Jr. 10 Lyons Avenue, Wanaque, New
11 Jersey.

12 MR. MONDELLO: Thank you. Mr. Rubin.

13 DIRECT EXAMINATION BY MR. RUBIN:

14 Q. Mr. Houckes, do you know of the Tree
15 Tavern Restaurant?

16 A. Yes.

17 Q. And could you advise the Board,
18 you've now heard the other witnesses, tell us what
19 you know about the Tree Tavern, when have you been
20 there, how long have you been there, what's going
21 on there?

22 A. I stopped there last week. I've been
23 going there for about the last, I guess, three
24 years. I've had some health issues the last
25 couple of years and that kind of stopped me from

1 going. Maybe I stopped there once every two
2 months, you know, as far as the Tree Tavern.

3 Q. Are you familiar with the outside
4 area?

5 A. Yes, I am.

6 Q. And you know it's been closed now?

7 A. Right.

8 Q. But you know that it was open at one
9 time?

10 A. Yeah, it was a beautiful. It was a
11 nice place, like Glenn said. It was a nice place
12 to stop at. You could see your friends. Nice
13 night out. You could stay out there, you know,
14 but I have to say that, you know, come around
15 10:00, 10:30, 11:00, Mike calls last call and
16 that's it, everybody's got to be out of there.
17 They're very strict that way.

18 Q. Calling your attention to the past,
19 and the past, we're talking about prior to 1979,
20 because that's the year that zoning occurred, and
21 that we've all agreed to. Were you ever at the
22 Tree Tavern Restaurant or whatever it was called
23 back then, Polly's or whatever other name, prior
24 to 1979?

25 A. Yes, and when I came home from the

1 service, 1970, I joined the VFW in town because I
2 knew a lots of the guys there. And I was at
3 Polly's with some of the veterans, that was one of
4 their hangouts. It was mostly World War II guys.
5 It was a quiet place in the early '70s. You know,
6 you'd sit there, have a drink and, you know, they
7 didn't have a big food order there. You're not
8 going to get a lot of food at Polly's. But I
9 belonged to this club. I was invited by these
10 guys to join this club called The Wanaque Good
11 Times Social Club and it went on for about, all
12 the way to about the end of the 70s, the beginning
13 of the 70s to the end of the 70s. We had had a
14 meeting once a month and it was on a Sunday
15 afternoon. It usually lasted maybe an hour and
16 then the guys would go outside, like you said,
17 they would place horseshoes, Bocce Ball. Their
18 picnic, the club picnic and functions were always
19 in the backyard of Polly's, barrels of beer, hot
20 dogs, clams and all had to home from the outside.
21 He didn't have clams and corn and stuff like that.

22 Q. Based upon your recollection, does it
23 appear that the outside area, from your
24 observation, from what you recall, looks like the
25 same size today as it was in the 70s?

1 A. It looks a little larger to me, to be
2 honest with you, but you know, there was a lot of
3 wood and junk in the back and he cleaned it, you
4 know, it's a lot cleaner. When you drove in the
5 driveway back in the '70s, there was all ruts in
6 the road. I mean, you know, it was like a covered
7 wagon trail. And you could park your car in
8 between trees if you had to.

9 Q. So there was debris?

10 A. They cleaned it up, let's put it that
11 way. He did a great job cleaning it up.

12 Q. So one Polly's had it, it was a
13 little rough around the edges?

14 A. Yeah, very rough. You parked the
15 cars wherever you could. If there was a lot of
16 people there, like I said, in between trees if you
17 had to.

18 Q. So as the years went on and Mr. Ryan
19 bought the property, it was cleaned up?

20 A. Oh, yeah, cleaned up a lot. I didn't
21 go there much in the 80s and 90s. At the time,
22 like I said, back in the 70s, 80s, you had like 18
23 businesses in town where you could get a drink, so
24 I would try to go to all of them, you know. I
25 could tell you about 90 percent of them, but I

1 don't know about all of them. You didn't go there
2 to eat, you went there to drink.

3 Q. But there was food?

4 A. Oh, yeah. You know, there wasn't a
5 lot of food. I mean, a chicken dinner was a hard
6 boiled egg. And then a hot dog, they had a
7 machine in the corner that went around in circles
8 and you don't know if it was there for two hours
9 or two days. It had a lamp over the top of it.
10 I'm just telling you what was going on. I didn't
11 go there to eat.

12 Q. So things have gotten a little better
13 recently?

14 A. Yes, very good now. I still don't go
15 there to eat.

16 MR. RUBIN: Thank you.

17 MR. MONDELLO: Mr. Fernicola, your
18 witness.

19 MR. FERNICOLA: Thank you.

20 CROSS EXAMINATION BY MR. FERNICOLA:

21 Q. I'm sorry, is it Houckes, is that how
22 you pronounce it?

23 A. Houckes.

24 Q. Houckes, thank you, sir.

25 Mr. Houckes, let me you show you what

1 I'll mark as Exhibit 013. You had submitted a
2 certification to the superior court. Is that
3 correct?

4 A. Yes.

5 Q. And is this a copy of the
6 certification that you submitted in February of
7 2006, which you signed under penalty of perjury?

8 A. Right.

9 Q. Would you read to the board what you
10 stated in --

11 MR. RUBIN: Could I see it? I
12 haven't seen it in a while. Thank you.

13 Q. Sir, would you read for the board
14 what you stated to the superior court, Paragraph
15 Number 2?

16 A. "I don't know a lot about Hacks,
17 which was Andrew's in the 80s, because I did not
18 frequent that place in the 80s. I was there in
19 the early 80s, but me and Andy had a little run in
20 at one point, so I didn't go there anymore."

21 Q. And then the rest of the sentence,
22 you say, "But I am a frequent patron of the Tree
23 Tavern."

24 Did I read that correctly?

25 A. Well, that's more or less -- I don't

1 know what they call frequent. I mean, a regular
2 is a guy who goes there every day and I don't go
3 there ever day. But frequent to me is a person
4 who still goes to a place, yes.

5 Q. And, sir, am I correct that in the
6 certification that you filed with this superior
7 court, that you signed to the superior court, you
8 made no statement concerning the use of the
9 property, particularly the outdoor service of food
10 and alcohol, earlier than 1979, is that correct?
11 Would you take a moment to look at your two-page
12 certification?

13 A. If I'm doing what now?

14 Q. That nowhere in your certification
15 from February of 2006, that you signed under
16 penalties of perjury and submitted to the superior
17 court, did you make any statement that prior to
18 1979, that there was the outdoor service of food
19 and alcohol at this property?

20 MR. RUBIN: I would object to reading
21 the certification as to what the testimony is
22 today. In the first instance, the case was not
23 about what is happening here. This is a land use
24 matter before the court. As we know, the court
25 ordered us to be here, and you have that as part

1 of record in this case. But what he signed might
2 not have been anything to do with land use. I
3 don't know that. I wasn't there. I wasn't
4 counsel involved at that time. But to bring up
5 things of that litigation is just not fair to this
6 witness.

7 MR. MONDELLO: I understand the
8 argument, Mr. Rubin, it's overruled and it will go
9 to the weight of the evidence.

10 BY MR. FERNICOLA:

11 Q. So sir, my question is, just to
12 refresh your recollection, do you agree that
13 nowhere in your certification from February --

14 MR. MONDELLO: Asked and answered.

15 MR. FERNICOLA: I don't think he
16 answered the question. There was an objection, he
17 didn't answer it.

18 MR. MONDELLO: All right. Go ahead.

19 Q. Nowhere in your certification did you
20 make any statement that, prior to 1979, that there
21 was the service of food and alcohol at what is now
22 known as the Tree Tavern property?

23 A. I only answered the questions the way
24 they were brought to me. So you know, when you
25 bring me a question, I try to answer it the way --

1 if they didn't ask me that question, I had no
2 reason --

3 MR. MONDELLO: So the answer is, it's
4 not in there?

5 THE WITNESS: Right.

6 MR. MONDELLO: Okay, fair enough.
7 Mr. Fernicola, what are you looking
8 for?

9 MR. FERNICOLA: 12.

10 Q. Do you agree that the four
11 photographs contained in Exhibit-012 accurately
12 depict the condition of the property in the late
13 1970s?

14 A. I played horseshoes more in the back
15 at times. The people would make pegs wherever
16 they wanted. If you had more than one team,
17 people put pegs somewhere else. When you go into
18 the road, I remember straight back, you go
19 straight in the back of the property, they play
20 Bocce Ball and horseshoes straight in the back.

21 Q. Do you feel that those four
22 photographs accurately depict the condition of the
23 property back in the late 1970s?

24 A. No, I don't remember it that much
25 right there.

1 MR. MONDELLO: All right. So the
2 answer is, no, I don't remember that much?

3 THE WITNESS: No.

4 MR. FERNICOLA: No further questions.

5 MR. MONDELLO: Thank you, Mr.

6 Fernicola.

7 Does anybody from the Board --

8 MR. RUBIN: If I can before --

9 MR. MONDELLO: Oh, I'm sorry.

10 MR. RUBIN: Since counsel opened the
11 door, if he could have that 013, the certification
12 that was signed --

13 MR. FERNICOLA: Would you like --

14 MR. MONDELLO: We never saw it, so
15 where's 013?

16 MR. FERNICOLA: It's right there.

17 MR. RUBIN: It's right there, if you
18 could give it to the witness.

19 REDIRECT EXAMINATION BY MR. RUBIN:

20 Q. Would you read Number 6, Paragraph 6?

21 A. "At times at Polly's I'd take some
22 beer outdoors for the patrons, especially more on
23 the weekends when there were picnics and outdoor
24 activities going on."

25 Q. So somebody must have asked you to

1 put that in your certification then?

2 A. Yes.

3 Q. So there was drinking and eating in
4 the early days?

5 A. Yes.

6 MR. MONDELLO: So that was prior to
7 '79 Polly's. Is that correct?

8 THE WITNESS: Right.

9 Q. And just so there is no question
10 about what we're talking about, that back area is
11 approximately, from your vision and to the best of
12 your knowledge, is about the same size or is it
13 the same or different from what it was back then?

14 A. Well, I think it's a little
15 different, because it's cleaned up, you know.
16 There was woods and the Bocce Ball and the
17 horseshoes and, you know. Like I said, he had
18 some old barrels laying around that they used to
19 cook stuff on at times, you know. We didn't have
20 these fancy grills, so you know.

21 MR. RUBIN: Okay, thank you.

22 MR. MONDELLO: Board members, any
23 questions?

24 MS. HENDERSON: So you talked about
25 how they had some drinking and picnicking at

1 Polly's, but that was more as sporadic use, not an
2 every day, daily --

3 THE WITNESS: Well, no, not every
4 weekend either. But the club, like I said, the
5 club was an in-bar place. Like Glenn said before,
6 a lot of the bars in town had their own clubs.
7 And if they didn't have a club, they sponsored a
8 ball team. And the ball team people were patrons
9 of that bar. That's normally what happened, you
10 know, but when there was activities going on, you
11 know, if the VFW didn't have no property for a
12 picnic, they maybe used it one year over there.
13 The club used it as many times as they could, have
14 more than one picnic a year a year, say.

15 MS. HENDERSON: Right, it's not like
16 an every day thing they that will service food
17 every single day?

18 THE WITNESS: No, the only difference
19 nowadays with the bars though, see, you've got to
20 remember, back in the 70s, the bars stayed open
21 until 3:00 at night, okay. Nowadays, the bars
22 closed when the last person is there, but you
23 know, everything used to stay open. Polly's used
24 to stay open. You could leave Flip's (sic) and go
25 over to Polly's at 2:00, 3:00 in the morning. And

1 it was opened on Sundays all day too.

2 MS. HENDERSON: Were the outside
3 activities during the day or at night?

4 THE WITNESS: Most of the time during
5 daytime. It was an older crowd, so they weren't

6 --

7 MS. HENDERSON: So they weren't
8 having all these functions at nighttime?

9 THE WITNESS: Right, until the late
10 70s, then kids took over and then it turned really
11 nuts.

12 MR. MONDELLO: Any other questions
13 from board members? Thank you.

14 MR. RUBIN: Mr. Gil Foulon.

15 (Witness sworn)

16 MR. MONDELLO: Please state your
17 name, spell your full name and give us your
18 address.

19 MR. FOULON: Gilbert Foulon,
20 F-o-u-l-o-n, 14 Bean Court, Wanaque, New Jersey.

21 MR. FERNICOLA: I'm sorry, could I
22 have the spelling again?

23 MR. FOULON: F-o-u-l-o-n.

24 MR. MONDELLO: Your witness.

25

1 DIRECT EXAMINATION BY MR. RUBIN:

2 Q. Mr. Foulon, in the spirit of full
3 transparency, could you advise the board of your
4 connection with the municipally?

5 A. I am a former mayor and also
6 presently chairman of the planning board.

7 MR. MONDELLO: Welcome.

8 Q. Tell us about the Tree Tavern.

9 A. All I can tell you is that I moved
10 into town in 1974. Unfortunately, I got involved
11 in politics about a year later and attended many
12 political events, some of which were held at
13 Polly's and later on subsequently held at
14 Andrew's. There were quite a few things held at
15 Andrew's.

16 Q. And Andrew's is a new name for us.
17 Is that also the name of this site? Was that part
18 of this place or a different place?

19 A. No, it's the same place. As a matter
20 of fact, I believe even Sheriff Englehart
21 (phonetic), had one of his picnics there.

22 Q. Calling your attention to the Tree
23 Tavern today, have you been there recently?

24 A. Yes.

25 Q. And have you noticed what was going

1 on, if anything, in the outdoor area?

2 A. I haven't seen anything going on in
3 the outdoor area. Although I can say it has been
4 cleaned up tremendously and it's an asset to the
5 neighborhood, something that I, as a member of the
6 community and a member of official community would
7 like to thank person for cleaning up the way he
8 did.

9 Q. Calling your attention to the time
10 before 1979, which is a key year as to when the
11 zoning occurred in this area, could you advise the
12 board as to what you observed prior to 1979 on
13 site?

14 A. Just some parties as the place. And
15 they were outdoor parties in what we would call
16 the picnic grove.

17 Q. Were people eating and drinking?

18 A. Yes.

19 Q. Was it on a regular or semi-regular
20 basis, from what you could observe?

21 A. That I couldn't answer, because I
22 only went there, like I said, to attend for local
23 functions, and they were sporadic at best.

24 Q. So the times you were there, there
25 was food and drink?

1 A. Yes.

2 Q. And from the best of your observation
3 and present time, as against what it was in the
4 1970s, could you tell whether the area in the back
5 where food and drink was serviced, was it around
6 the same size, bigger, smaller? Could you give
7 your observations, if you recall?

8 A. No, I don't recall. You know, you're
9 talking 35 years ago. A lot of things have gotten
10 smaller in the past 35 years.

11 Q. But there's no question there was
12 food and drink in the 70s, early 70s?

13 A. Yes, there's no question about that
14 at all because I did participate in those
15 activities.

16 MR. RUBIN: Mr. Fernicola, your
17 witness.

18 CROSS EXAMINATION BY MR. FERNICOLA:

19 Q. Was there an outdoor bar which was a
20 permanent structure back in the late 1970s at this
21 property?

22 A. Not that I recall.

23 Q. When did you serve as the mayor?

24 A. 1981 to '83.

25 Q. In part of your capacity as the mayor

1 and being on the council, did you have to review,
2 annual renewal of the liquor license?

3 A. Yes, we did. I don't think it was
4 annual. I think it was every two years, and I'm
5 not even sure about that. It was 35 years ago.

6 Q. Let me show you what I've marked as
7 --

8 A. It wasn't an event that would stand
9 out in my mind.

10 Q. -- as 014, which is the 1982 liquor
11 license renewal, for the record, we obtained from
12 the municipality record, pursuant to written
13 request. Let me show you the page of the
14 document.

15 Are you familiar with name Andrew
16 Hack?

17 A. Yes.

18 Q. And do you know what his association,
19 if any, was with the subject property back in the
20 late 1980s?

21 A. I believe he was the owner.

22 Q. Do you see the date on it, sir,
23 June 4th, that he signed it, 1982?

24 A. Yeah.

25 Q. Now, on the second page, "Adjacent

1 ground not licensed."

2 Did I read that correctly?

3 A. That's what it says.

4 Q. When you -- you said there was
5 outdoor food and drink. What hours of the day
6 were they serving food and drink outdoors?

7 A. The afternoon into the evening.

8 Q. Do you know, prior to purchasing the
9 building in 2002, whether or not Mr. Ryan made any
10 inquiry of the municipality, as to whether or not
11 he was permitted to serve food and alcohol
12 outdoors at the property?

13 A. No, I have no knowledge.

14 Q. Let me show you what's previously
15 marked in this matter as 04, a memorandum from the
16 borough zoning officer dated February 4th, 2012
17 with regard -- or 2002, excuse me, with regard to
18 the subject property.

19 Last sentence of the first paragraph,
20 "The serving of food and alcohol outside of this
21 establishment is prohibited."

22 Have you ever seen this document
23 before?

24 A. No.

25 Q. Have you done any review of the

1 municipal records to determine whether or not
2 there were any documentation showing that it was
3 permitted to serve food and alcohol outdoors at
4 this property?

5 A. Why in God's name would I do that? I
6 have no interest in it. You know, I mean, that's
7 a stupid question.

8 MR. MONDELLO: Mr. Mayor, a simple
9 yes or no would suffice.

10 A. No.

11 MR. MONDELLO: Thank you.

12 Q. Well, was it stupid for someone to
13 begin to serve food and alcohol outdoors who was
14 told prior to purchasing the property that it was
15 prohibited?

16 A. I have no idea. I have no idea.

17 MR. MONDELLO: Asked and answered.
18 Let's try and keep our tempers cool.

19 Q. Do you know Sergeant Angelo Calabro?

20 A. The name doesn't recall to me.

21 Q. You don't recognize the name as being
22 a police officer here in the borough?

23 A. No. When was he a police officer?

24 Q. Let me show you and ask if you've
25 ever seen 07, which is a memorandum from the

1 sergeant chief of police?

2 A. No, I wasn't involved in 07.

3 Q. No, I said the exhibit number is 07.
4 It's dated June 2nd, 2010.

5 A. I wasn't involved in 2010.

6 Q. Were you a planning board member in
7 2010?

8 A. Yes, I was.

9 Q. So you were in the municipally?

10 A. Um-hmm.

11 Q. Do you know who the alcohol beverage
12 control officer was for the borough in 2010?

13 A. No, I do not.

14 Q. Do you know if it was Sergeant
15 Calabro?

16 A. I believe I just answered that
17 question, no.

18 Q. Well, let me show you 07, second
19 paragraph, last sentence, "And to the officer's
20 knowledge --

21 MR. RUBIN: I object to this line of
22 questioning.

23 Q. -- that service of alcohol outside
24 was permitted or performed?"

25 MR. RUBIN: I would object to this

1 line of questioning. Hold on, don't answer it
2 please until we've finished.

3 He's already testified that he didn't
4 know the officer.

5 MR. MONDELLO: I agree.

6 MR. RUBIN: He didn't know the
7 memorandum. This is not something he's involved
8 with. You can't pursue that.

9 MR. MONDELLO: Objection sustained.
10 Move on, Mr. Fernicola.

11 BY MR. FERNICOLA:

12 Q. Do you agree that the municipal
13 officials who had the authority to determine
14 whether it was legally permissible to serve food
15 and alcohol outside of the subject premises was
16 the zoning officer and that alcohol beverage
17 control inspection officer?

18 A. What was the question?

19 MR. MONDELLO: I didn't understand it
20 either. I mean, that was quadruple compound.

21 Q. Do you agree that the municipal
22 officials who are vested with the legal authority
23 to determine whether it was legally permissible to
24 serve food and alcohol outside at the subject
25 property was the zoning officer and the alcohol

1 beverage control inspections officer?

2 MR. RUBIN: I would objection to the
3 question. Mr. Foulon is here as a fact witness.
4 He is not here as an expert witness. He is not
5 here in his capacity as planning board chairman or
6 as an ex-mayor. He is a fact witness as to a very
7 narrow part of this application. Asking him a
8 question about the legality of what someone's duty
9 it is beyond the scope of the examination.

10 MR. FERNICOLA: He chose to identify
11 himself as the former mayor of this municipality
12 and a current chairman of the planning board, so
13 once he --

14 MR. RUBIN: No.

15 MR. FERNICOLA: Wait a second.
16 Whether he was asked or volunteered, once he
17 proffered the testimony to this board that he
18 served in those capacities as a municipal
19 official, it's fair game to then to ask him on
20 cross-examination in the broad scope of cross
21 examination, that based upon his experience, are
22 the two municipal officials who have the authority
23 to determine the legal permissibility are one, the
24 zoning officer, and two, the alcohol beverage
25 inspection officer, otherwise they shouldn't have

1 offered the testimony to this board.

2 MR. MONDELLO: The objection is
3 sustained. And with respect to that issue, there
4 are alcohol forms that say he's allowed to do it
5 in one year. He's not allowed to do it in another
6 year and vice versa. So I think the question's
7 irrelevant. Move on, Mr. Fernicola.

8 MR. FERNICOLA: Thank you, sir, I
9 have no further questions.

10 MR. MONDELLO: Board members?

11 CHAIRMAN DUNNING: Board members have
12 any questions? Seeing and hearing none.

13 MR. MONDELLO: Thank you. Next
14 witness, Mr. Rubin.

15 MR. RUBIN: Jimmy Herrick.

16 MR. MONDELLO: Mr. Herrick, welcome.

17 (Witness sworn)

18 MR. MONDELLO: Please state your
19 name, spell your last name slowly, so we can all
20 get it.

21 MR. HERRICK: James Herrick,
22 H-e-r-r-i-c-k, 21 Eastside Avenue, Wanaque.

23 MR. MONDELLO: Your witness, Mr.
24 Rubin.

25

1 DIRECT EXAMINATION BY MR. RUBIN:

2 Q. Mr. Herrick, are you familiar with
3 the Tree Tavern restaurant?

4 A. I certainly am.

5 Q. And can you tell us, have you been
6 there over the last short while?

7 A. Yes, I was there last week.

8 Q. And have you been there over the last
9 number of years?

10 A. Yes, I have.

11 Q. Calling your attention to the inquiry
12 that the board is making this evening, the
13 activities at the restaurant prior to 1979, which
14 is the issue this evening.

15 A. I'll go back further than
16 Mr. Anderson and Mr. Houckes did, I'll go back to
17 the 50s. My father took me there on a regular
18 basis for outdoor picnics at Polly's. And then
19 subsequently, after getting out of the service in
20 1967, I frequented the tavern, which was called
21 Andrew's hideaway in the woods. And then
22 subsequent to that, Mr. Ryan has the Tree Tavern
23 and I've been frequenting that since it opened.

24 Q. So you're familiar with the rear of
25 the place?

1 A. I am.

2 Q. And during the years prior to 1979,
3 because that's the important thing that we're
4 doing this evening, could you describe in anymore
5 detail what was doing on back there?

6 A. Generally, as Mr. Houckes said, a lot
7 of the clubs, and I can recall one, which is the
8 one my father belonged to, the teams would meet at
9 least once a week there, the baseball, softball,
10 football, and they would have their outdoor
11 picnics, clam bake.

12 Joe Herrick, my father, Jim Herrick,
13 and many others, the old timers in town would have
14 their weekly or even more frequently, have
15 meetings there outdoors with the picnic area.

16 Q. And did things go in the daytime or
17 in the evening or both?

18 A. Generally, in the daytime on the
19 weekends. Once in a while, they would extend it
20 to the evening, but at the time it did not have
21 outdoor lighting, so it was difficult to continue
22 very late in the evening.

23 Q. You know what the place in the back
24 looks like today?

25 A. I certainly do.

1 Q. Can you, from your own estimation of
2 what's there today, from what was there in the
3 past, in the pre-1979, can you advise the board
4 whether the back area is around the same size,
5 different, bigger, smaller?

6 A. Well, for the property line --

7 MR. FERNICOLA: Same objection as
8 earlier. Same size as the area?

9 THE WITNESS: Well, that's what I'm
10 going to address right now.

11 MR. FERNICOLA: Okay.

12 A. The property lines --

13 MR. MONDELLO: Hold on one second.
14 The objection is overruled. He's a lay witness
15 and most lay witnesses can give opinions. I can
16 give an opinion if you're intoxicated as a
17 layperson. I can give an opinion if you're
18 speeding as a layperson. So it's overruled. If
19 you can answer it, please answer it.

20 THE WITNESS: Yes, sir.

21 A. Since I just stated, the property
22 lines didn't change, so it didn't get bigger or
23 smaller. What it did, it got cleaner. When
24 Polly's had it, it was relatively clean. There
25 was quite a wide, a long picnic area. When

1 Andrew's got it, he let it go. Shrubs grew, trees
2 grew. When Mr. Ryan subsequently bought the
3 property, he cleaned it up tremendously. It's a
4 beautiful site back there. But as far as prior to
5 '79, I would say when Polly's had it, it was
6 probably the same usable area.

7 Q. And you had been there now since
8 Mr. Ryan has owned it and there's food and drink,
9 until of course, the subsequent court actions and
10 these actions before the board, so you know it
11 isn't used at the present time?

12 A. Correct.

13 Q. But when it was used, it was food and
14 drink consumed?

15 A. Food and drink and a very subdued
16 crowd, no noise and --

17 MR. FERNICOLA: What timeframe are we
18 talking about?

19 THE WITNESS: This is from the time
20 the yard was open until it was forced to be
21 closed, I don't recall the dates that would be.

22 MR. FERNICOLA: So you're talking
23 under Ryan's ownership now?

24 THE WITNESS: Yes. Yes, absolutely.

25 MR. FERNICOLA: Again, with the

1 relevancy of this based on what they're here for.

2 MR. RUBIN: Yes.

3 A. And it's a very, like I said, a very
4 subdued crowd. They closed the outside at 10:00.
5 They closed the bar at 11:00, much to my dismay.

6 MR. MONDELLO: And disappointment.

7 A. And disappointment, but it's a good
8 crowd and very quiet.

9 MR. RUBIN: Thank you. Your witness,
10 Mr. Fernicola.

11 CROSS EXAMINATION BY MR. FERNICOLA:

12 Q. You testified, I tried to write it
13 down exact. You said, the same usable area as
14 Polly's?

15 A. Approximately. I mean, I was a young
16 fellow. I was in my early teens.

17 Q. My question is. When you're talking
18 about "usable area," are you referring to the size
19 of the outdoor land area?

20 A. Well, as I stated, the property line
21 didn't change, so the land area is the same as it
22 always has been.

23 Q. Okay. So is that what you were
24 referring to, sir, when you said it's the same
25 usable area as Polly's, you're referring to the

1 land area?

2 A. Yes, the clean area available to
3 picnic at, there's woods, there's bushes and
4 things like that.

5 Q. So you're not testifying as to, for
6 example, the number of chairs or barstools located
7 in the outdoor area prior to 1979. Correct?

8 A. No, I am not. I am not testifying to
9 that.

10 Q. And you're not testifying as to the
11 number of picnic tables or benches, if any, prior
12 to 1979?

13 A. I am not.

14 Q. Are you familiar with the outdoor bar
15 in the rear left side of the property that was
16 constructed in the last few years by Mr. Ryan?

17 A. I am familiar with it, um-hmm.

18 Q. And a similar outdoor permanent
19 structure, bar structure, you agree was not
20 present at the property prior to 1979?

21 A. I agree it was not there.

22 MR. MONDELLO: It's hard to take two
23 voices down at the same time.

24 THE WITNESS: I understand.

25 MR. MONDELLO: She's got the toughest

1 job in the room.

2 THE WITNESS: I'm hyper, what can I
3 tell you.

4 BY MR. FERNICOLA:

5 Q. Currently, when the outdoor area was
6 being used during Mr. Ryan's ownership, were there
7 periods of time that there was outdoor music being
8 played?

9 A. I don't recall, at the time I was
10 there, any music being played, no.

11 MR. FERNICOLA: Thank you. I have no
12 further questions.

13 MR. MONDELLO: Board members?
14 Hearing none, seeing none, thank you.
15 Next witness, Mr. Rubin.

16 MR. RUBIN: Mr. Berkemyer.

17 MR. MONDELLO: Good evening, Mr.
18 Berkemyer.

19 MR. BERKEMYER: Good evening.

20 (Witness sworn)

21 MR. MONDELLO: Please state your
22 name, spell your last name slowly and give us your
23 address.

24 MR. BERKEMYER: Joseph Berkemyer,
25 B-e-r-k-e-m-y-e-r, 302 Maple Road, West Milford,

1 New Jersey.

2 MR. MONDELLO: Your witness.

3 DIRECT EXAMINATION BY MR. RUBIN:

4 Q. Mr. Berkemyer, are you familiar with
5 the Tree Tavern Restaurant?

6 A. Yes, I am, sir.

7 Q. And could you advise the board when
8 you were there over the last short while?

9 A. I was there about a month ago.

10 Q. And have you been there prior
11 thereto?

12 A. No. Prior to that, 1974 was the last
13 time I was in the door.

14 Q. So you went from 1974 all the way to
15 this?

16 A. Well, I got married.

17 MR. FERNICOLA: You obviously didn't
18 marry a drinker.

19 THE WITNESS: Well, she doesn't
20 drink, no.

21 Q. Mr. Berkemyer, tell us what was going
22 on in 1974, if you can recall.

23 A. Well, the place was kind of rowdy.
24 The place was kind of rowdy when Phil White owned
25 it, it was a hang out. Let's see, I got out of

1 the Navy in 1972 and I started hanging around
2 there. I met my wife around '74, so I stopped
3 hanging around there, but it was quite rowdy.

4 Q. Well, we're talking about the outdoor
5 area in this application.

6 A. Okay.

7 Q. That's what's important to the board,
8 as to the activities, eating and drinking, in the
9 outdoor site.

10 A. I grew up in that neighborhood right
11 down the street. I do remember the Bocce Ball
12 courts. I remember sitting on the wall as a boy
13 in the 1950s. There's a concrete wall that runs
14 the perimeter of Mr. Bellante's property, we used
15 to sit on that wall and watch the old men play
16 Bocce Ball court. Play Bocce, I'm sorry. I
17 remember picnics there, political picnics.

18 Q. Was food and alcohol and soda and
19 drink, whatever?

20 A. During the picnics they were.

21 Q. And that was in the 70s?

22 A. No. No, sir.

23 Q. When was that?

24 A. That was probably in the early to
25 late 50s, early 60s, mid 60s.

1 Q. Would you say that that kind of use
2 was ongoing right through the years, right to the
3 last time you were there in '74?

4 A. Well, I can't say for sure. As a
5 boy, I remember almost every weekend there was
6 something going on there, there was a political
7 party. I remember the Ballantine's truck used to
8 come and the taps -- as a boy, it stuck in my
9 mind, the taps out the side. But in the 70s, I
10 can't -- I was in the Navy from the '69 to '72.

11 Q. How about after you got back, from
12 that short period between then and when you got
13 married?

14 A. No, I don't remember anything outside
15 after that.

16 Q. From your recollection, if you could
17 advise the board, because it's important that the
18 board knows, does it appear to you that the
19 outdoor area where people are eating and drinking
20 is approximately the same, is bigger or smaller or
21 whatever it might be from those early days to
22 today?

23 MR. MONDELLO: Same objection,
24 Mr. Fericola?

25 MR. FERNICOLA: Yes.

1 MR. MONDELLO: Okay. Answer the
2 question.

3 A. It's about the same size. It's much
4 cleaner. It used to be more wooded.

5 Q. So the present owner has done some
6 cleaning up?

7 A. Oh, yeah, cleaned up beautifully.

8 Q. But, in your opinion, from
9 observation, it appears to be around the same
10 size?

11 A. Yes.

12 MR. RUBIN: Thank you. That's all I
13 have.

14 MR. MONDELLO: Mr. Fernicola, your
15 witness.

16 CROSS EXAMINATION BY MR. FERNICOLA:

17 Q. When you said more wooded, do you
18 mean that he took down trees in the outdoor area?

19 A. Well, I can't answer -- it's cleaned
20 up, that's all I can answer it. I don't know if
21 he took down trees or not.

22 Q. Well, what did you mean when you said
23 it was more wooded?

24 A. Well, there was bramble and there was
25 just brush and small bushes and trees and small

1 trees and stuff like that.

2 Q. So the area has been cleared?

3 A. Yeah, it looks like it's been cleared
4 up, cleaned up.

5 Q. And you said, if I understood you
6 correctly, that you don't remember the outdoor
7 food and alcohol when you got back from the Navy
8 in 1972?

9 A. No, I don't.

10 Q. So you don't recall outdoor food and
11 alcohol from 1972, when you were discharged from
12 the Navy, until you stopped going in 1974?

13 A. I don't recall that, no.

14 Q. And we were talking about the size of
15 the outdoor area, are you referring to the land
16 size?

17 A. Repeat that.

18 Q. When you said that, you said -- you
19 were asked about the outdoor area, and you
20 testified it's, "About the same size." Were you
21 referring to --

22 A. Physically the property hasn't
23 changed. It's a little bit different, but it
24 hasn't changed.

25 Q. So my question is, are you referring

1 to the outdoor land area when you testified
2 earlier, it's about the same size?

3 A. Yes.

4 Q. Do you agree that there were no
5 permanent bar structures located in the property?

6 A. Outside?

7 Q. Outside.

8 A. No.

9 Q. No, you don't agree or --

10 A. I do agree there was no bar, that
11 goes back to the Ballantine's truck that used to
12 come.

13 Q. That they had the, let's see, you
14 used the word, the taps were connected to the
15 truck and the kegs were inside the truck?

16 A. Yes, sir. Yes, sir.

17 Q. Do you know the number of outdoor
18 chairs, if any, that were located in the property
19 back in the 1950s or '60s?

20 A. No, sir.

21 Q. Do you know the number of outdoor
22 stools located on the property?

23 A. No, sir.

24 MR. MONDELLO: Just wait until he
25 finishes the question completely. It's tough on

1 her.

2 THE WITNESS: Oh, I'm sorry.

3 Q. And would that be your same response,
4 that you don't know the number of -- whether the
5 number of outdoor picnic tables or benches?

6 A. No, I don't recall.

7 Q. And the outdoor picnics that you
8 refer to, the political parties, I think that you
9 said?

10 A. Yeah.

11 Q. Were they generally during daylight
12 hours?

13 A. Yes, sir, usually on a weekend.

14 Q. Do you recall back in the 50s and 60s
15 how many days a week that the establishment was
16 open to the public?

17 A. I think it was open every day. My
18 father didn't drink, so I wasn't frequent there.
19 I mean, I knew the Polly's scene very well. I've
20 been in the bar as a small boy and George used to
21 give us soda all the time. But as far as being
22 open, I know it opened at 12:00 on Sunday, that's
23 the only thing I remember.

24 Q. When these political picnics were
25 there, do you know, did they rent out the place

1 for these --

2 A. I wouldn't know, sir.

3 Q. Were those picnics open to the public
4 or were they private parties that were being --

5 A. They were open to the public.

6 Q. The Bocce Ball courts that you refer
7 to, do you know whether or not those courts were
8 located on Mr. and Mrs. Ballante's property to the
9 right of the property currently owned by Mr. Ryan?

10 A. If you were facing from their house
11 back, it would be on your right. And I think it
12 was two, a long one and a short one.

13 MR. FERNICOLA: Thank you. I have no
14 further questions.

15 MR. MONDELLO: Board members,
16 questions of Mr. Berkemyer? Hearing none, seeing
17 none, thank you.

18 THE WITNESS: You're welcome, sir.

19 MR. RUBIN: Mr. Redner.

20 MR. MONDELLO: Welcome, Mr. Redner.

21 (Witness sworn)

22 MR. MONDELLO: Please state your
23 name, spell your last name slowly and give us your
24 address.

25 MR. REDNER: My name is Roger Redner,

1 R-e-d-n-e-r. I reside at 8 Greenwood Lake
2 Turnpike in Ringwood.

3 DIRECT EXAMINATION BY MR. RUBIN:

4 Q. Mr. Redner, are you familiar with the
5 Tree Tavern Restaurant?

6 A. I am.

7 Q. And could you advise the board when
8 you've been there recently?

9 A. Most recent, probably about a month
10 ago or so for dinner.

11 Q. And you are familiar with the outdoor
12 area, you've seen the outdoor area?

13 A. Yes, sir.

14 Q. And you know it's not open at the
15 present time or in nice weather, of course, it's
16 been closed, but you have seen it open?

17 A. Sure.

18 Q. Calling your attention to the time
19 that the board is interested, and that's prior to
20 1979, which is when the zoning ordinance became
21 effective to the area, can you advise the board as
22 to what observations you saw as to the restaurant
23 prior to 1979?

24 A. Yeah, absolutely. As far back as I
25 can remember, we've been there. There was a lot

1 of clubs there, 39 Boys in Gates in the tent yard,
2 I remember that because I was a member. And we
3 used to go there all the time for picnics and
4 parties, you know, functions with the club. But
5 there was a lot of us and we'd go. It would
6 always be on a weekend, and of course there was
7 beer and hamburgers and clams or nobody would go.
8 I mean, that's what we did. It was a good time
9 and we all went there.

10 I don't recall there being any
11 outside structures that I remember, a like bar or
12 something. We pretty much got there, everybody
13 picked up a lawn chair, we'd sit down and we'd
14 have some beers, but that always went on. I can
15 give you a date, but you'd have to help me
16 remember, because remember when the Giants played
17 at the Yale Bowl in Connecticut? We were having a
18 party there then, as a matter of fact, I think the
19 club rented a bus and a whole load of us took the
20 bus to Connecticut and we came back and we had
21 drinks and hamburgers and stuff at Polly's.

22 Q. And it was Polly's during that time
23 in the 60s and 70s?

24 A. Yeah, you'd just have to Google when
25 the Giants played at the Yale Bowl and I'll give

1 you the exact date.

2 MR. FOULON: 1975.

3 Q. Well, we're told '75.

4 A. Probably right.

5 Q. So in '75 or anytime prior up to
6 1979, which is the key date you observed food and
7 drink in the back of the restaurant?

8 A. Oh, sure.

9 MR. RUBIN: No questions.

10 MR. FERNICOLA: Are we talking about
11 the restaurant now or are we talking about the
12 outdoor area?

13 MR. RUBIN: The rear, that's what I
14 said, the rear of the restaurant, the outdoor
15 area.

16 Q. And you're been there through the
17 years, I assume?

18 A. Yeah, absolutely.

19 Q. And you've been there and utilized
20 the back area also?

21 A. No, not too much recently. I've been
22 there for wine tasting parties and that was always
23 outside in the back. And like everybody said,
24 what a difference. I mean, it's incredible. The
25 whole place is like transformed.

1 Q. To the better, I would assume?

2 A. Oh, of course, yeah.

3 Q. And could you just add a little bit
4 to that, what do you mean by transformed, what
5 does it look like?

6 A. Well, it's all nice and neat and it's
7 a place you wouldn't be ashamed of to go to. It's
8 like a pretty classy place. It's nice.

9 Q. And are you able to testify before
10 the board as to whether the size of the area in
11 the back where food and drink were served in the
12 60s and 70s was approximately the same today as it
13 was then?

14 A. Yeah, that hasn't changed any.

15 Q. Same area?

16 A. Same, yeah.

17 Q. Except it's cleaner?

18 A. Much cleaner, yup.

19 MR. RUBIN: Thank you.

20 MR. MONDELLO: Mr. Fernicola.

21 MR. FERNICOLA: Thank you.

22 CROSS EXAMINATION BY MR. FERNICOLA:

23 Q. Mr. Redner, can you tell me the name
24 of the club that you belong to, what was it, the
25 39 one?

1 A. 39 Boys and Gates. I don't know why
2 it was named that.

3 Q. Was it a men's only club or was it
4 only open to women?

5 A. I never seen no women there.

6 Q. What was the purpose of the club?

7 A. Mainly we used to just drink. I
8 believe we did other stuff like for the town
9 functions. I wish he was still here.

10 Q. Did you have like officers of the
11 club, a president and a vice president?

12 A. We did.

13 Q. Did you pay dues to be a member of
14 the club?

15 A. You know, that's a good question. I
16 don't remember shelling out any money for it. We
17 just went.

18 Q. Would you describe the 39 Boys and
19 Gates as a private club?

20 A. Yeah, I would. I think anybody could
21 join if they wanted to. Like I don't ever
22 remember anybody taking a vote and saying, I don't
23 like this guy, don't let him in.

24 Q. And you testified on direct from
25 Mr. Rubin's question, you said there were a lot of

1 clubs at the property and that you went there for
2 picnics and functions of your club. Is that
3 correct?

4 A. That's correct.

5 Q. And then you testified that you don't
6 recall any outdoor structures like a bar being
7 located in the rear of the property?

8 A. I do not, but you know, there was
9 nothing ever built there that I recall. But if
10 anybody wanted to go drink in the back, they just
11 got a lawn chair and bring it back there.

12 Q. So when you when you say a lawn
13 chair, you're referring to a folding chair?

14 A. Yeah.

15 Q. Would people bring their own chairs
16 or were they located within the restaurant?

17 A. You know, there was always a chair
18 there. If you looked, you'd find one to sit down.

19 Q. You said a moment ago that there was
20 nothing built, you were referring to there was no
21 permanent structures built?

22 A. I don't remember seeing one.

23 Q. Prior to 1979, can you identify the
24 number of outdoor chairs?

25 A. I never particularly counted them.

1 Like I said, I looked around and you'd find one to
2 sit on.

3 Q. Any barstools located outside?

4 A. No.

5 Q. What about picnic tables?

6 A. Yeah, of course there was.

7 Q. Do you know the number?

8 A. No, I really don't.

9 Q. Do you know whether or not your club
10 paid a fee to rent out the facilities when you had
11 your picnic?

12 A. You know, I'm not really sure. We
13 were there quite regularly. There was a lot of
14 different, I don't know if they're clubs or, you
15 know, like the Republican Club, stuff like that.
16 Everybody would hang out. They'd always have a
17 party there, but always on the weekend.

18 Q. You're saying different organizations
19 within the town would have a private party at the
20 premises?

21 A. Well, I don't know if it was private.
22 There was always a lot of people there.

23 Q. Do they have outdoor amplification
24 systems for music back prior to 1979?

25 A. Yeah, I remember listening to music,

1 sure.

2 Q. Do they have live bands?

3 A. I don't remember any bands being in
4 there, no, but, you know, I was a lot younger
5 then. Everybody just cranked up the radio or
6 something and we'd all have fun.

7 Q. And you said the back area has
8 opinion been, "transformed." It's a nice, neat
9 place. You described it as a classy place.

10 A. Um-hmm.

11 Q. Would you agree that the usable area
12 in that outdoor today has been increased, based
13 upon it being cleaned up and you found a usable
14 space back in the 1970s?

15 A. Well, it might look different because
16 it's so much cleaner. Everything looks more
17 attractive and usable. It seems like it grows
18 when you clean it up.

19 Q. Would you agree that there's more
20 usable, outdoor space, the fact that it's been
21 cleaned up than compared to the 70s.

22 A. No, I don't think so. It's hard to
23 tell, you know, it's been a long time.

24 Q. You've seen that outdoor bar located
25 to the left side of the property. Correct?

1 A. Yeah, it's nice.

2 Q. So you would agree that nice outdoor
3 bar is an expansion than what was present back in
4 the 1970s. Correct?

5 A. Yeah, well, it wasn't there then in
6 the 70s, so of course it looks nicer now.

7 MR. FERNICOLA: Thank you. I have no
8 further questions, sir.

9 MR. MONDELLO: Board members, any
10 questions from Mr. Redner? Hearing none, seeing
11 none. Let the record reflect that it is 9:46 and
12 we're going to take a five-minute break.

13

14 (Brief recess held)

15

16 CHAIRMAN DUNNING: Let the record
17 reflect we're back on. Mr. Rubin, next witness.
18 Everybody is present.

19 MR. MONDELLO: Next witness.

20 MR. RUBIN: We're back on the record?

21 CHAIRMAN DUNNING: We are.

22 MR. RUBIN: I'm calling Mr. Ryan for
23 redirect.

24 MR. MONDELLO: Let the record reflect
25 will end at 10:30 promptly.

1 Mr. Ryan, welcome. You'll remain
2 previously sworn. Your witness.

3 REDIRECT EXAMINATION BY MR. RUBIN:

4 Q. Mr. Ryan, to continue along with some
5 of the questions that were asked last time and
6 some areas that require some further development,
7 if we can.

8 Going back to when you were here
9 before the board of adjustment in this
10 municipality in order to obtain an expansion of
11 the residential portion of the property, did you,
12 in fact, have two architects at that time?
13 Because there were some confusion as to why there
14 were two.

15 A. Right, we started with SE (sic) in
16 the beginning, but then when it came to making an
17 actual, what they're called drawings, the
18 blueprints, NSE was just very, very expensive, so
19 I didn't use him. I used Jim Cutillo.

20 Q. So Mr. Cutillo did your actual
21 building drawings?

22 A. That's correct.

23 Q. And were they presented to the
24 municipality for approval?

25 A. Yeah, I went to Jeff Brusco.

1 Q. And I am showing you a set of plans
2 that are marked with a permit number and appearing
3 with Mr. Cutillo's name and seal on it and his
4 signature?

5 Is this the set of plans that were
6 approved for the work that was to be done?

7 A. This is the one that the permits were
8 drawn on, that's correct.

9 Q. So that is --

10 MR. FERNICOLA: Do we have a date,
11 counsel? Can you identify those for the record?
12 We had the three sheets marked as 01, so these are
13 a different set of plans, Mr. Rubin, or can you
14 identify them?

15 MR. RUBIN: This is the construction
16 plans which have a date of October 21st, 2005.

17 MR. MONDELLO: All right, so that's
18 not listed on any of the exhibits anywhere, so you
19 want to mark that as A-5?

20 MR. RUBIN: So this would be A-5,
21 correct. Can you hand that up to counsel?

22 (A-5, Architectural Drawing from
23 Cutillo & Associates, marked for identification)

24 MR. RUBIN: That will be A-5 and you
25 can put it on the table.

1 MR. MONDELLO: Mr. Chairman, if you
2 could read into the record what this is. Some of
3 the board members may not have heard Mr. Rubin.

4 CHAIRMAN DUNNING: It's an
5 architectural drawing, Cutillo & Associates, dated
6 October 21st, 2005. Sheets here, one, two and
7 three.

8 MR. MONDELLO: And it's of the
9 residence and the restaurant?

10 CHAIRMAN DUNNING: Right, the
11 physical building, the building. And the borough
12 department stamps on here for electric, plumbing
13 and fire.

14 MR. MONDELLO: Fair enough.

15 BY MR. RUBIN:

16 Q. So Mr. Ryan, that's what was utilized
17 for your construction work that was done
18 thereafter, as you might have amended it, from
19 time to time, according to yourself and
20 Mr. Brusco?

21 A. That's correct.

22 Q. Now, I'm going show you a letter
23 dated January 31st, 2006, that you wrote to Jeff
24 Brusco. Can you, rather than reading it into the
25 record, could you just paraphrase it, what were

1 you talking about? What was it all about?

2 MR. FERNICOLA: May I see it,
3 counsel?

4 MR. RUBIN: Yes, here's a copy of it.

5 A. Basically it was just a letter --

6 MR. FERNICOLA: Just give me one
7 second to look at the letter.

8 MR. MONDELLO: Sure.

9 MR. FERNICOLA: Thank you, counsel.

10 A. Basically, it was a letter to Jeff
11 telling him of an issue that developed when we did
12 a test. The original blueprint, not blueprint,
13 whatever it's called, the site plan showed his
14 building over the current structure. And when we
15 did a test digging, I think it was at Jeff's
16 suggestion, actually, of the foundation, the
17 panels were 14 inches deep, so we had to abandon
18 that plan. And I sent a note to the Jeff of what
19 we found and then we had gone to Mr. Cutillo and
20 asked him for a new drawing, which he did, which
21 is what I sent to Jeff. So I actually mentioned I
22 wanted to make sure that it was different from the
23 original plan that was given to the board and I
24 could read it.

25 Q. Sure, go ahead.

1 A. Yeah. "Dear, Jeff, thanks for moving
2 the private process to 17 Park Street. I'm
3 planning the initial demolition next week.

4 I wanted you to clarify something in
5 the plans. As you know, I gave to you the board
6 of adjustment resolution, copies of the site plan,
7 and a new attached goal, as well as the UCC forms
8 and the permit fee. I showed you both the
9 original plans by SE and the revised ones by Jim
10 Cutillo.

11 When I hired Mr. Cutillo, he had me
12 perform the foundation inspection that we
13 discussed and discovered something wrong with 15
14 and 16. This is subsequent to the changes of plan
15 from an appearance point of view. I pointed out
16 in the resolution and referred to the SE plans
17 specifically. I wanted to make sure that I didn't
18 give a wrong impression by getting approval with
19 the SE plan and then changed it to Cutillo. I
20 changed it because SE was so high, I simply
21 couldn't afford it after the construction.

22 I think you read the plan, under
23 which I got the current -- with the original, and
24 in my opinion, even more so.

25 Any questions you might have in this

1 regard, I'm just being a little extra cautious so
2 as not to intervene with the Board and I'm doing
3 anything out of step with their approval. I don't
4 want to have to appear again for the whole
5 process.

6 Please let me know if you have any
7 thoughts."

8 Q. And you signed it?

9 A. I signed it, yeah.

10 Q. And this was sent to Mr. Brusco?

11 A. It was.

12 MR. RUBIN: And if we could have this
13 marked as A-6.

14 (A-6, Letter from Mr. Ryan to Mr.
15 Brusco, marked for identification)

16 Q. And was, eventually, the changes to
17 the plan adopted in accordance with Mr. Brusco's
18 requirements?

19 A. Right.

20 Q. And the changes were made?

21 A. Both the changes to the new plan were
22 made, absolutely, and the house was built
23 according to that plan.

24 Q. And when you were before the board of
25 adjustment, and I do recall, from looking at the

1 names, there were several of the members who were
2 there then and are still on the board today?

3 A. Yes.

4 Q. There was some discussion briefly
5 regarding the restaurant and parking and such, and
6 some of the outdoor matters. But that wasn't the
7 essence of the application, was it?

8 A. No, the application was for expanding
9 the residence.

10 Q. But the board did take note that
11 there was a restaurant on site, that it was there
12 for a number of years and they added some
13 additional protections to the community and to the
14 neighborhood regarding hours and days of outside
15 operation, entertainment outside, and noise and
16 crowd control, which really had nothing to do with
17 the structure of your home?

18 A. No, Mr. Rubin, that was part of a
19 later resolution. The board required several
20 things of me, including allowed access if there
21 was ever a time that they would want to inspect,
22 that the deed be amended to reflect I think that
23 they were given in the original 2005 board of
24 adjustment ruling. Some of those other things are
25 part of the additional resolution from the town

1 council.

2 Q. So some of them were from your liquor
3 license application?

4 A. That's correct.

5 Q. And all of this went into a deed
6 restriction of --

7 MR. FERNICOLA: Well, I'm just going
8 to object.

9 MR. RUBIN: Well, let me --

10 MR. FERNICOLA: Let me finish my
11 statement, because counsel is combining two
12 different things.

13 We have the resolution that this
14 board approved in 2005 that was marked as '08.
15 Counsel has now incorporated certain things that
16 were done in 2010 with regard to the liquor
17 license. So I just want that clear on the record,
18 counsel is combining it. These were not what he's
19 referring to, despite the fact that he referred to
20 it. This board's resolution for 2005 is contained
21 in this board's resolution.

22 MR. MONDELLO: Go ahead, Mr. Rubin.

23 Q. And then, in fact, there was a deed
24 that was prepared only in 2016, in May, 2016,
25 which referred to the resolution of the Board of

1 Adjustment on October 5th, 2005, as well as the
2 resolution of the governing body for the liquor,
3 so it all combined in one specific deed, which is
4 now encumbering your property?

5 A. That's correct.

6 Q. Is this a copy of the recorded deed
7 dated May 13th, 2016?

8 A. Yes.

9 Q. And was this brought to the attention
10 of counsel for the board of adjustment and
11 approved by this board of adjustment before it was
12 recorded?

13 A. It was approved by Mr. Mondello.

14 Q. And then it was record after
15 approved?

16 A. It was recorded with the county, yes.

17 MR. RUBIN: Then I would ask that
18 this deed be allowed into evidence as A-7.

19 MR. MONDELLO: Any objection,
20 Mr. Fernicola?

21 MR. FERNICOLA: No, no objection.

22 (A-7, Deed, marked for
23 identification)

24 BY MR. RUBIN:

25 Q. Moving forward into the area that

1 we're having these discussions regarding the
2 interpretation and the expansion of the use, was
3 there a time that you had discussions with either
4 the mayor, the borough administrator and the
5 township attorney, Mr. Anthony Fiorello, regarding
6 the scope of the outdoor use?

7 A. Yeah, I had spoken with the mayor. I
8 had spoken with the town lawyer, I'm sorry, I
9 forget his name, about the preexisting use. So
10 many customers had come in, just like the
11 gentlemen tonight, and talked about all the
12 outdoor use that has been previously there.

13 MR. FERNICOLA: I'm going to object
14 to the last statement, that's hearsay, and ask
15 that the court disregard it.

16 MR. RUBIN: Well, not what they said,
17 but only that there was discussions.

18 MR. FERNICOLA: I --

19 MR. MONDELLO: So noted. Go ahead.

20 BY MR. RUBIN:

21 Q. And after these discussions were
22 held, were you given a letter prepared by Anthony
23 Fiorello, the borough attorney, which was given to
24 you as a result of their review?

25 A. Yes.

1 Q. And is this a copy of Anthony
2 Fiorello, the borough attorney's letter, which was
3 given to you so you knew what was going on, as far
4 as the borough's interpretation as to what was
5 happening on the site?

6 A. Yes, I do.

7 Q. And could you look at the second page
8 of Mr. Fiorello's letter and could you read the
9 second to last paragraph and read that into the
10 record where it starts, it would appear.

11 A. It reads, "It would appear therefore,
12 at least as far back as 1992, the predecessor
13 owner of the subject license for the use of the
14 outdoor services for alcoholic beverages. I do
15 not know whether you have them in your archives of
16 applications or transfers other than that
17 enclosed."

18 MR. FERNICOLA: I'd like to give an
19 instruction by the board attorney at this point to
20 this board that the municipal official that was
21 responsible to determine the preexisting use is
22 the zoning officer, not the township attorney.
23 And this should not be specifically an instruction
24 that the statement by Mr. Fiorello should not be
25 relied upon by this board that the outdoor service

1 of food and alcohol was a legally permissible use
2 as a preexisting nonconforming use of the subject
3 property.

4 MR. MONDELLO: Mr. Fernicola is
5 correct in the fact that, you know, Mr. Fiorello
6 really is not in a position to opine as to whether
7 or not this was an existing nonconforming use, but
8 it goes to the weight of the evidence and --

9 MR. RUBIN: I agree with that too,
10 that the zoning officer is the proper person.
11 However, I present it to the board as persuasive
12 evidence that this community has accepted this for
13 quite some time for some years and that the
14 community in its officialdom has accepted that
15 this is a proper use and that it would bear upon
16 as evidential before this board. It is not
17 absolute in that it didn't come from the zoning
18 officer, but it comes from --

19 MR. FERNICOLA: But we just
20 disregarding the instruction.

21 MR. MONDELLO: Hold on a second.
22 Hold on a second.

23 I don't disagree with you, Mr. Rubin,
24 for purposes that you're using it for. It will go
25 to the weight of the evidence. I think that

1 that's going to be a better piece of ammunition in
2 your arsenal when someday you argue municipal will
3 stop it.

4 MR. RUBIN: Correct.

5 MR. MONDELLO: The fact that there is
6 no variance required, that's a much more
7 persuasive piece of evidence. But it will go to
8 the weight of the evidence and the board will give
9 it whatever weight --

10 MR. FERNICOLA: But it's the same
11 objection. Wait a second. Wait a second, if I
12 may be heard, counsel. I waited and I didn't
13 interrupt you, okay.

14 You made a ruling a moment ago. You
15 just disregarded your ruling to this board and
16 said that this board can give it some weight and
17 you just testifying there is no weight then,
18 because you just instructed the board that the
19 municipal attorney wasn't the municipal official
20 it's the zoning officer. We've already seen the
21 zoning officer's opinion from the same timeframe
22 saying that it was not a legally permissible
23 nonconforming use and required a use variance.
24 And if he's offering it for this weight, he's
25 offering it for some evidence and then

1 Mr. Fiorello needs to come in here to testify.

2 So I'm asking that the board be
3 instructed to specifically disregard this letter
4 for the purpose that counsel said, that they could
5 rely on it and give it any iota of weight that the
6 outdoor service of food and alcohol was a
7 preexisting nonconforming use.

8 MR. MONDELLO: Thank you, Mr.
9 Fernicola. What I instructed the board was that
10 it goes to the weight of the evidence. The board
11 may decide, you know what, that's exactly right.
12 I agree with Mr. Fernicola, this is the borough
13 attorney, what does he know about prior
14 nonconforming existing uses. On the other hand,
15 he has been the board's attorney for several
16 decades and maybe he does have some knowledge.
17 But again, he's not here for you to cross examine.
18 It goes to the weight of the evidence. The board
19 will decide what to do with it. Let's move on.
20 Thank you.

21 BY MR. RUBIN:

22 Q. I'd like it read into the record the
23 last paragraph of the letter.

24 A. "As a consequence of the above, I
25 would opine that the service of alcohol was a

1 preexisting, nonconforming use. The zoning code
2 referred to by Mr. Brusco was adopted in 1979. I
3 do not know whether there are any proofs that the
4 outdoor aspect of the premise were used for
5 alcoholic sale prior to that time. The discussion
6 with borough officials and residence indicates
7 that it was."

8 MR. FERNICOLA: Same objection. So
9 now we're getting --

10 MR. MONDELLO: I understand. The
11 document speaks for itself. It's a public
12 document that anybody could get. The board will
13 assign whatever weight it wants to assign to it.

14 MR. FERNICOLA: But if I could
15 finish.

16 MR. MONDELLO: Go ahead.

17 MR. FERNICOLA: So you have not only
18 the letter itself it hearsay, it's actually double
19 hearsay, because he supposedly's quoting what
20 third parties told other people. We don't even
21 know if the third parties told him. And so in
22 direct conflict with the instruction you now gave,
23 counsel is clearly offering this letter as
24 evidence that this opinion, when you say is
25 deserving of some weight or that it goes to the

1 weight, then the weight means that it's evidential
2 and he's offering it. So in contrary to your
3 instructions, that to rely on this letter that
4 somehow this letter is evidence as to the
5 preexisting nonconforming use with no testimony
6 from Mr. Fiorello that this witness comes in and
7 reads this letter and that this board can give it
8 some weight.

9 Now, you said earlier that the rules
10 of evidence aren't strictly complied, they're not
11 this liberal for a double hearsay and for this
12 type of testimony to come in without calling the
13 attorney to testify, at a minimum, so he could be
14 subject to cross examination. This is not what
15 the board hearing is about. This is improper and
16 they should to disregard it at this point.

17 MR. RUBIN: If I might, this is not a
18 letter from an ordinary citizen. This is a letter
19 written by the borough attorney of this
20 municipality with a copy to the borough
21 administrator, the mayor and the construction code
22 official and given to the property owner as was
23 proper, because he should know about it. He
24 should know what the opinion is of the
25 municipality.

1 Is it totally, is it 100 percent to
2 close the case and say, no, that's the way it is
3 because the borough attorney said so, no. It is
4 up to this Board of Adjustment to make that
5 decision. However, I present it to the board as
6 evidential with whatever weight the board wishes
7 to put to it. Does it have some degree of
8 evidence? Yes, it does have some degree. I
9 cannot tell the board and I cannot speak for
10 Mr. Fiorello, and no one can. We could only say
11 what is on the four corners of the instrument and
12 say that is his opinion. Whether it be right,
13 wrong or indifferent, it is up to the board to
14 analyze the witnesses, who you heard a parade of,
15 those witnesses, who were all there over the
16 years. And apparently, there has been, so far, no
17 contradiction that they made up their stories that
18 they were all there during period of time. It all
19 goes to the totality of the evidence, which this
20 board will decide upon at the appropriate time.

21 MR. MONDELLO: But to Mr. Fernicola's
22 point, how does he get to cross examine him? He's
23 been able to cross examine the other witnesses.

24 MR. RUBIN: It's the same as when he
25 presented Mr. Brusco's memorandum. Mr. Brusco

1 isn't even an employee of the municipality
2 anymore. I'd look at some of the things that here
3 he has a memorandum of Sergeant Angelo Calabro.
4 We don't have Sergeant Angelo Calabro. I don't
5 even know if he's still --

6 MR. MONDELLO: Fair enough. What's
7 good for the goose is good for the gander.

8 MR. FERNICOLA: Can I just say one
9 thing?

10 MR. MONDELLO: Go ahead.

11 MR. FERNICOLA: The point I'm making
12 Mr. Rubin just made for me when he got up and he
13 initially said to this board that this is not a
14 letter by an ordinary citizen, but by the board
15 attorney. So by his own words he's telling you,
16 you should take this with greater credence because
17 this is what the borough attorney said. And
18 that's my exact point why he's offering it despite
19 your instruction that it's evidential as to the
20 legal permissible use, okay. That's why it's
21 clearly improper. He couldn't have said it any
22 better. He's telling the board, look, if the
23 board attorney said this, you should rely upon
24 this. There's no foundation for any of this. He
25 attaches a document from 1992 that no involvement

1 that he prepared this document. You've seen the
2 conflicting liquor license. So for him to get up
3 and say that he's no ordinary citizen, I couldn't
4 make the point any better, counsel. So if you're
5 going to allow the board to consider it, you're
6 allowing them to, despite your instruction, to
7 give it -- I don't care if they give it one tenth
8 of one percent, they should be instructed that
9 this does not serve as credible evidence that they
10 can consider in any fashion in determining whether
11 or not there was a preexisting nonconforming use
12 prior to 1979, because otherwise, then they are
13 giving it evidentiary value. And that's all these
14 statements about it goes to the weight why it's
15 clearly improper. So he's done exactly what I
16 said to you, here it is, to waive a letter around
17 from the attorney to say it should be relied upon
18 from this board.

19 MR. MONDELLO: Thank you, Mr.
20 Fernicola. I respectfully disagree. Can we
21 please continue with the testimony?

22 BY MR. RUBIN:

23 Q. Go ahead.

24 A. "Discussions with borough officials
25 and residents indicate that it was.

1 If the latter is the case, then
2 indeed, the sale and the distribution of alcoholic
3 beverages on the grounds in occasion over the law,
4 seeks penances, more than exists prior to the
5 ordinance, and therefore, would not constitute
6 expansion of the use.

7 Should you have any questions with
8 respect to this, please advise."

9 MR. RUBIN: And I believe this would
10 be A-8.

11 MR. MONDELLO: That's right.

12 (A-8, Letter from Mr. Fiorello,
13 marked for identification)

14 MR. FERNICOLA: Same objection.

15 MR. MONDELLO: Thank you,
16 Mr. Fernicola.

17 BY MR. RUBIN:

18 Q. Mr. Ryan, getting to the rear of your
19 property where the food and beverage has been
20 utilized over the years that you've had the Tree
21 Tavern, there came a time when you installed a bar
22 that wasn't there before?

23 A. That's correct.

24 Q. Could you advise the board what was
25 there before, if anything, why did you do it, and

1 is this a permanent improvement to the property?

2 A. Well, there was a patio there and I
3 put a 2X4 construction bar, no foundation, and I
4 put a top on it and then put a carport over it to
5 protect it from rain.

6 Q. Is this a permanent installation or
7 is it a temporary installation?

8 A. I mean, it could be considered -- it
9 could be temporary, because it doesn't have a
10 foundation.

11 Q. So there's no foundation?

12 A. No.

13 Q. So if you wanted to take it down, you
14 could take it down very quickly?

15 A. Right.

16 Q. And if you wanted to keep it, you
17 keep it.

18 Were you there when there was some
19 kind of tent up in the premises, was that in the
20 same area?

21 A. That they were referring to earlier?

22 Q. Yes.

23 A. No, that was before my time.

24 Q. That was before your time?

25 A. Yes.

1 Q. I think it was before everybody's
2 time.

3 A. Yeah.

4 Q. So the bar, though, you did that for
5 the convenience of the patrons or convenience of
6 yourself?

7 A. Well, both.

8 Q. So it was for everyone's convenience?

9 A. Right.

10 Q. But it could be taken down at a
11 moments notice?

12 A. It could be.

13 Q. And as you said before, there are no
14 foundations of the property?

15 A. No, there is not.

16 Q. And I cannot recall if it shows on
17 the site plan, but I don't believe so. In any
18 case, was there anything else that was changed
19 through the years except for what has been
20 discussed by a number of your former patrons as to
21 what is called the cleanup of the site?

22 A. I mean, I started cleaning up the day
23 I bought it. I mean, it was 2002 is when I bought
24 the building. I mean, it's a work in progress.
25 You know, now I have all of it complete and stuff.

1 It's got sod and...

2 Q. So you put sod down where there was

3 --

4 A. Just rough grass and --

5 Q. Rough grass?

6 A. Yeah.

7 Q. And you put some pebbles down as a
8 walkway?

9 A. Right, put some plantings in.

10 Q. And did you put some new picnic
11 tables?

12 A. Yeah, I eventually was going to put
13 everything new.

14 Q. It was rough?

15 A. It was rough. It was decrepit.

16 Q. So you changed it?

17 A. Yeah.

18 Q. In your opinion, obviously you're the
19 witness and I'm not and you're under oath, is it
20 utilized in the same area as it was the day you
21 bought it?

22 A. Yeah, as best I can tell, because
23 when I did the renovation, it had the old Bocce
24 pits, the horseshoe puts. It was even cement fill
25 with the Bocce Ball in the back and I did not

1 utilize all that property. It was actually a
2 larger area being used than what I applied there.

3 Q. So that very back area isn't touched
4 by you?

5 A. I'm not sure of the question, I'm
6 sorry.

7 Q. Well, this is fairly large, but how
8 big is --

9 A. It's an acre. It's short of an acre.

10 Q. And there are two buildings?

11 A. Correct.

12 Q. And the parking area?

13 A. Right.

14 Q. And this area where the folks can eat
15 and drink?

16 A. Yeah.

17 Q. Is there any other areas that aren't
18 used on the site?

19 A. Well, there's the whole back of the
20 property that's still kind of rough. It looks
21 like a meadow with high grass.

22 Q. Was that used earlier in the --

23 A. Yeah, I found old evidence of stuff
24 back there.

25 Q. And you don't use that?

1 A. No.

2 Q. So in your opinion then, is the use
3 smaller or lesser use than it was before?

4 A. Yeah, it was smaller.

5 MR. FERNICOLA: Objection. This is
6 beyond the scope of his opinion testimony.

7 MR. RUBIN: If he can answer.

8 MR. FERNICOLA: He's not an expert.

9 MR. RUBIN: He is not. He's the
10 owner. You're right.

11 MR. MONDELLO: You can answer the
12 question.

13 A. It's a smaller footprint. But again,
14 I found evidence in the back of activity back
15 there, whether it was the volleyball court or
16 horseshoe pits concrete areas that were done. I
17 pulled all that out and just have cement.

18 MR. RUBIN: That's all the questions
19 I would have on redirect.

20 MR. MONDELLO: We have no time left.
21 Mr. Fernicola, let's get through some
22 administrative stuff. It is now 10:29.

23 My understanding is that we will be
24 approving the minutes tonight and this is almost a
25 verbatim as to what occurred on September 7th, so

1 both Mr. Rubin and Mr. Fernicola will have access
2 to this verbatim record.

3 MR. FERNICOLA: I'm sorry, were you
4 just holding the minutes, counsel?

5 MR. MONDELLO: I was.

6 And Mr. Rubin, with respect to the
7 transcript, obviously, the stenographer will
8 supply the board a copy and you and Mr. Fernicola
9 will have to work out who is paying what with
10 respect to a copy.

11 All right. The next meeting is, I'm
12 sorry --

13 BOARD SECRETARY: January 4th.

14 MR. MONDELLO: January 4th. Next
15 year. Happy holidays, all.

16 MR. RUBIN: Thank you.

17 MR. FERNICOLA: Can we just get an
18 outline as far as what additional witnesses, so
19 that we can get a timeframe? Because I mean I
20 don't mind -- well, let me just say one thing,
21 because I think I've said to you later, I'm the
22 mayor of my town and we meet once a month the
23 first Wednesday, so I just want to know, because
24 then obviously I'd have to adjourn our
25 reorganization meeting, which I'll do but I'm just

1 trying to get a timeframe how much longer we'll --

2 MR. MONDELLO: Well, Mr. Rubin may be
3 amenable to a adjournment into February. I mean,
4 nobody should be messing with your reorganization
5 meeting. And I'm sure you're going to give a
6 state of affairs speech so --

7 MR. FERNICOLA: You know, and I'm
8 contented to do it, because like this board, we
9 meet the first Wednesday, so yes, we would have
10 the reorganization and I'll have the same issue.
11 I just want to get an idea, do you think you'll be
12 done on the board? Because I want to advise my
13 council, so we can notice then for something other
14 than the first Wednesday for January and February.

15 MR. RUBIN: Well, this is what I
16 would anticipate, as far as the issue of the
17 preexisting nonconforming use, this is all the
18 witnesses we're having on that segment of this
19 case. So subject to the interested parties
20 presenting their case, that is the totality of
21 that portion of this case. It will then be up to
22 the board to decide what it wants to do as to the
23 preexisting nonconforming use. If the board feels
24 that we have prevailed as to the preexisting
25 nonconforming use, then they will then vote on

1 that, hopefully, and that would be the end of this
2 matter.

3 If the board decides that the proof
4 weren't sufficient to prove that there was a
5 preexisting, nonconforming use, we would then
6 present witnesses as to a use variance and then
7 counsel would have the ability to present whatever
8 the interested parties have as to the use
9 variance. That is the procedure that I believe is
10 appropriate. I've done this many times before. I
11 can't believe how many times I've had this same
12 process. It's been approved. It's been something
13 that we can do. And hopefully, it will work
14 before this board.

15 MR. MONDELLO: So you're certainly
16 going to need at least two meetings then. If in
17 fact the board decides it is not a preexisting
18 nonconforming use, well then, Mr. Rubin, I'm sure
19 will be presenting a planner in some form or some
20 fashion, so you're going to have complete cross
21 examinations, so that certainly --

22 MR. FERNICOLA: We don't object to
23 the use of the process. Mr. Rubin made it very
24 clear on September 7th he wasn't presenting this
25 case based on the use variance. So we would agree

1 that it would be on the best procedural way would
2 be subject to the board's attorney ruling, to
3 allow the board to vote on the preexisting -- the
4 interpretation of it.

5 MR. MONDELLO: So you got your
6 answer. You know how many witnesses and you
7 understand --

8 MR. FERNICOLA: So basically, after I
9 cross Mr. Ryan, then we'll be presenting our case
10 as well.

11 MR. MONDELLO: Do you have any time
12 constraints?

13 MR. RUBIN: Whatever you need. No
14 objection whatsoever.

15 MR. MONDELLO: Thank you.

16
17 (Matter adjourned at 10:33 p.m.)

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C E R T I F I C A T E

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I, PATRICIA A. PUCCIARELLO, a shorthand reporter and Notary Public of the State of New Jersey, do hereby certify the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth, to the best of my ability.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in this action.



Patricia A. Pucciarello

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