

REGULAR MEETING

Salute to Flag: 8:00pm

OPENING STATEMENT:

This is the Regular Meeting of the Wanaque Board of Adjustment and adequate notice has been given and it has been duly advertised by the placement of a notice in the Herald News and the Suburban Trends on February 14, 2016 and February 17, 2016 respectively, and a notice thereof has been posted on the bulletin board in the Municipal Building in the Borough of Wanaque and a copy thereof has been on file with the Borough Clerk

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

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

APPLICANT’S EXHIBITS

- A-1 May 12, 2016 Order Signed By Hon. Ernest M. Caposela, A.J.S.C. (2 Pages)
- A-2 Stationery of Polly’s, 17 Park Street, Wanaque, NJ
- A-3 May 31, 1974 Liquor License Application for Renewal for Polly’s Bar & Grill, Inc.
(4 Pages)
- A-4 June 10, 2013 Resolution #90-0-13 of the Borough of Wanaque

OPPONENTS EXHIBITS

- O-1 April 11, 2005 Variance Plan for MKR Enterprises (3 Sheets)
- O-2 November 20, 1979 Liquor License Renewal (3 Pages)
* Board Doesn't Have a Copy of this Exhibit
- O-3 May 20, 1985 Liquor License Renewal (2 Pages)
- O-4 February 2, 2002 Memorandum of Jeff Brusco to Kathy Falone
- O-5 April 20, 2010 Memorandum of Jeffrey A. Brusco to Katherine J. Falone
- O-6 April 15, 2004 Letter of Anthony Fiorello, Esq. to Kathy Falone
- O-7 June 2, 2010 Memorandum of Sergeant Angelo Calabro to Chief John Reno
- O-8 October 5, 2005 Board of Adjustment Resolution on Application #15-04,
MKR Enterprises, LLC (5 Pages)
- O-9 March 2, 2005 Minutes of the Regular Meeting of the Board of Adjustment
(5 Pages)
- O-10 May 4, 2005 Minutes of the Regular Meeting of the Board of Adjustment
(8 Pages)
- O-11 June 1, 2005 Minutes of the Regular Meeting of the Board of Adjustment
(7 Pages)

Welcome, Mr. Rubin.

Mr. Rubin: Members of the Board, Mr. Chairman. It's been a while since I've been here. In fact, it is the first time in this building. For the record, I am Michael Rubin. I have an office at 1330 Hamburg Turnpike in Wayne Township. We represent MKR Enterprises, LLC, trading as the Tree Tavern Restaurant. We filed an application before this board for various forms of relief. The way that I structured this application before you is that there are two distinct pieces of it. One is what I call the application for the board to consider a pre-existing nonconforming use, which pre-existed the existence of the ordinance in question, which from all intents and purposes, from all the information that we have garnered would be 1979. That seems to be the magic year when the zoning ordinance was adopted as to this property.

The issue before the board as to that would be was there a pre-existing, nonconforming use, that is in accord with what has happened over the years and presently today. What I have done is I have asked our client to find those patrons and neighbors and such who have lived in the area and bring them in this evening to testify as to there being a pre-existing, nonconforming use. These kinds of cases are fact sensitive, and I readily admit that I have had a number of these through the years. In fact, I'm just finishing up one in Lincoln Park, which went on for at least three years with many, many witnesses. And they're all fact sensitive. You have to hear the witness and decide yourself whether or not they're believable and then you take all of that information and make the decision. If you find that, in fact, this restaurant use with indoor and outdoor dining and whatever one does in a restaurant as we all know what a restaurant does, existed prior to 1979, and it's of the same size and shape and quality and caliber as it was through the years and you find that and you vote for that, that's the end of the case. Then you have found, in my view, a pre-existing, nonconforming use. And that is then the law of the case and Mr. Ryan, who is the owner, can then move forward and not have this hanging over him any longer.

If in fact this board decides, after hearing all of the witnesses, that there is not a pre-existing nonconforming use, that he hasn't proven his case in that he wasn't there on the site or a restaurant wasn't on the site serving food and drink outdoors prior to 1979 and continuously to the present time, then, if you find that to be so, then we go to a second phase, what we call pleading in the alternative. And the alternative would be a use variance to allow him to continue in his restaurant use. And I am not prepared this evening to go forward with the use variance because I have to bring in a whole other set of witnesses. However, the first witnesses for the first part of the case are all ready, they're here, and you'll hear a great deal from Mr. Ryan. There are a lot of facts for the board to digest.

So, the way I have structured this is in two parts. It's kind of a bifurcated application in that there are two pieces to it. This is a tried and true methodology that many boards have gone through. I don't know if this board has had this exact kind of thing. I've done it myself a number of times for this kind of case. This is the best way, in my view, of conserving the board's time so that we don't waste a lot of the board's efforts in professional services. So we can tackle one piece of it and if that works, that's the end of the case, fine. If it doesn't and the board finds otherwise, then we go through the use variance. So that's generally how I feel we could move forward with the application this evening. And I do have my first witness to call, which is Mr. Ryan.

Mr. Dunning: Mr. Rubin, if you will, Mr. Fernicola is patiently standing over your left shoulder. You could enter your appearance, Mr. Fernicola.

Mr. Fernicola: Thank you, council, Mr. Chairman, and members of the Board of Adjustment. My name is Paul Fernicola. I'm an attorney. I represent the adjacent property owners, Marc and Lisa Bellante. This is not as straight forward as it seems. This matter was before the Superior Court in Passaic County from December 2015. There was an injunction imposed on Mr. Ryan preventing the outdoor service of food and alcohol based on the record. He had come before this board in 2005. His variance plan is very clear. There's no reference to any outdoor use. And

there was an agreement when the Court was ready to make its finding decision that they would come back from the board. So, with regard to the interpretation, I've sent a letter.

Mr. Rubin: Before we go into this, I must object to counsel speaking at this time. There is a time for public comment. This is not the time for public comment.

Mr. Fernicola: My issues go to the jurisdictional court. I was interrupted by council.

Board Member: Hold on one second. This is obviously an application that's been going on for quite some time. There's some contention between various parties, but it's going to be orderly. There's going to be a record, so when it eventually winds up back in Superior Court the Judge will understand what took place here. Now Mr. Rubin, let Mr. Fernicola finish because I don't know if you had an opportunity to read his September 7th letter that I got about three hours ago.

Mr. Rubin: I did too.

Board Member: Mr. Fernicola raises several jurisdictional issues and, in my opinion, they have some merit. So I don't think we can go forward until we allow him to address the jurisdictional issues. And if the board finds that we do have jurisdiction, we'll continue. If we find that we don't have jurisdiction, we schedule it for another day.

Mr. Rubin: I have of course a rebuttal argument.

Board Member: Of course.

Mr. Rubin: Not only does this board have jurisdiction, but there's a court order that says you do. Board Member: I understand. And for those in the audience I apologize. This is going to be like watching paint drop. But we've got to get through it and, Mr. Fernicola, the floor is yours at to the three points that you raised in your September 7th, 2016 letter with, obviously, a rebuttal from Mr. Rubin. And I've read the cases that you've cited and I've got some questions. Go ahead.

Mr. Fernicola: So with regard to the jurisdiction, in 2002, before Mr. Ryan bought the property, he sought an opinion from your zoning officer at the time. And he received a written memorandum that was directed to your clerk dated February 4th, 2002, in which they indicated that the service of food or alcohol outside of the establishment is prohibited. Mr. Ryan elected to close. In 2010, he renewed his application to the zoning officer that he wanted to begin to serve food an alcohol outside.

The zoning officer wrote a second memorandum dated April 20th, 2010, which says, "I would ask that you refer to my letter dated February 4, 2002, any outdoor serving of food or alcohol would require a use variance from the board of adjustment. If Mr. Ryan does not agree with my zoning determination, he could either file a zoning interpretation or file the appropriate appeal. Mr. Ryan chose to do none of those things. Instead, he built structures outside without any approvals. But the issue is that the law is very clear. You have 20 days. When a zoning officer issues a decision that you are dissatisfied with or an adjacent property owner is dissatisfied with, and the case law that I've provided to council, the fact that Mr. Rubin deemed his application tonight is an interpretation the case law from the Appellate Court is very clear. Whether you call

it an appeal or whether you call it an interpretation, if you were dissatisfied with the zoning officer's determination because he is the municipal official, vested with that authority under the municipal land use law and, specifically, Section 72, you have 20 days to initiate an action. We're not within anywhere close to having taken one back in 2002 or back here in 2010. Now the second part of the jurisdiction goes to the use variance.

Board Member: What you're saying is that Mr. Rubin or Mr. Rubin's client has submitted this application asking for an interpretation, and you're saying based on the Sakowski (phonetic) case that it's not an interpretation; in fact, it is an appeal under 72A. And under 72A, you had 20 days to file an appeal of the determination from the zoning official.

Mr. Fernicola: Right, because it's undisputed that he received both of the letters in 2002 and 2010.

Board Member: I understand that. My first question is, and I'll read from the case, the 20-day limit was clearly designed to insulate the recipient of a building permit or other favorable disposition from the threat of unrestrained future challenge. In other words, the building official gives me a permit, I start to build my house, I don't want somebody coming in 65 days later, that was the old time restriction, and I have to tear up my house now. So that's not the case here. It was intended to provide a degree of assurance that the recipient could rely on the decision of the administrative officer. That is perhaps best evidenced by the action of our legislature amending that statute, 72A and 79, to require that an appeal be filed within 20 days rather than 65 days. That's not the case here.

Mr. Fernicola: Because, counsel, you're correct that in that case a permit was granted, but when you look at the statute it doesn't make any distinction whether a permit was granted or denied because it says specifically appeals to the board of adjustment may be taken by any interested party affected by any decision of an administrative officer. You're reading the statute in a way that's not written. It's very clear, any decision. You're reading it as solely limited to a decision to grant a permit. In this case he was given a decision denying the outdoor service of food and alcohol and he had 20 days because it's a decision of the zoning officer. So in that particular case, the fact pattern was that there was a building permit granted and there wasn't an appeal by the adjacent property owner within the 20 days. But the jurisdictional issue is not limited to solely where a building permit or any other permit is granted.

Board Member: I understand. Mr. Rubin, you will of course eviscerate (phonetic) Mr. Fernicola's argument if you can give us a denial that is fairly recent from the zoning official here in Wanaque. Do you have that?

Mr. Rubin: No. We have a totally different argument.

Board Member: Let's deal with one at a time, so, go ahead.

Mr. Rubin: I received the document one hour before I left the office. I didn't have a chance to even read any of the cases cited, but there is a very important issue which hasn't been spoken by counsel and I, obviously, know why. If I can give my answer?

Mr. Rubin: For reasons that I don't know but only Mr. and Mrs. Bellante, the objectors, would know, they started a lawsuit. They started a lawsuit in the end of 2015 against the Borough of Wanaque, the zoning officer, the Borough, MKR Enterprises, The Tree Tavern, and Mike Ryan; all of them. They're all named. And that started to go through the courts at the beginning of 2016. There was a change of counsel for the plaintiffs and there was a change of counsel for the defendant and I wound up representing Mr. Ryan and the Tree Tavern and saw which direction things were going in. I appeared before the Court, Judge Caposela, the assignment Judge of Superior Court, and explained what this lawsuit was which was complaining about exactly what counsel has alluded to, that there was, prior to them, not a nonconforming use, that the time had gone by, that all of the various ills that the neighbors thought was visited upon by the Tree Tavern restaurant. The use was not appropriate, it was against the zoning ordinance, and they weren't there for the appropriate time. And I said to the Court and the Court adopted this that this is not a matter for the Court to delve into. This is a matter for the Municipal Board of Adjustment because that's what Boards of Adjustments do. They look at zoning issues, they hear witnesses, and they decide based upon what they hear because they are the ones that know the community the best, and that's what all the cases say, that it should belong in the Board of Adjustment. And the Judge felt that way because the Judge just by coincidence used to represent the Board of Adjustment in his days of practicing law. There is a court order, and I don't know if counsel has that court order, but I will present it as an exhibit in this matter.

Mr. Fernicola: Mr. Rubin does it address your first prong?

Mr. Rubin: It says on this 12th day of May 2016, it is ordered that the above captioned matter be and hereby is referred to proceed before the Board of Adjustment of the Borough of Wanaque for a determination as to the nature of the pre-existing use prior to 1979 of the property currently known as Tree Tavern located at 17 Park Street, Wanaque, New Jersey. And it is further ordered that the proceedings before this court shall be stayed through the conclusion of the proceedings before the Board of Adjustment of the Borough of Wanaque. And it goes on about the injunction and such. This court order, which is dated May 12, 2016, is the reason that I'm here. I wouldn't have come here and prepared the application for Mr. Ryan and his company and gone through all the machinations of spending the client's money and being before a Board of Adjustment unless we had a reason and the reason is this order and I would think that the order should be made part of the board's records.

Board Member: I think you're absolutely right. The question that I have for you, although you couched the first prong in an interpretation, and quite frankly I'm struggling to see where the board is going to interpret a zoning map or an ordinance or a special question, and I have an opinion as to what a special question is, I do see where that order would vest jurisdiction in the board to hear a 72A appeal of the zoning official's determination. Now they're both the same proofs, they just have different clothes or different costumes.

Board Member: Mr. Mondello, the last issue in this, if Counsel was dissatisfied with this order, which is dated May 12, 2016, he could appeal, do something, write a letter to the Judge ask for reconsideration, file an appeal to the Appellate Division, do something. Write the kind of letter that he just wrote at three o'clock this afternoon in last May, but counsel didn't do that. Counsel relied on whatever. Predecessor counsel filed this lawsuit asking for the same relief, the relief

doesn't change. Tree Tavern, you can't be involved in any food or drink outside, which is the relief here, and the Judge said go to the Board of Adjustment which is the proper place for this kind of matter to be heard.

Board Member: I don't disagree with you. I'm struggling with you suggesting that the board have an interpretation. The status of a nonconforming use is not a question of interpretation of a zoning map or of a zoning ordinance. I can understand the appeal and I think the Judge has required and waived any time requirements under 72A, but I cannot see how you go forward and ask this board for an interpretation.

Board Member: Judge said you can't say Judge Caposela you said the wrong thing. It says determination as to the nature of the pre-existing use prior to 1979 and that's the magic year that the ordinance was adopted. And that's what the lawsuit says. I didn't write the law. The lawsuit came from the objectors.

Mr. Mondello: I think what I'm trying to say is don't we get to the same conclusion or get through the same process whether you call this a 72A appeal of the zoning officer's determination that this is not a nonconforming use versus a 70B. I'm struggling with what zoning code we interpret.

Board Member: Because the proofs are different and the vote is different. The proofs in a use variance are different.

Mr. Mondello: I'm not talking about a use variance. I'm talking about overturning the zoning official's determination in the two letters that Mr. Fernicola referred to using the appeal process, 72A, not the D2 variance that we will maybe get to or maybe not get to.

Board Member: Mr. Mondello, in the words of the street, counsel for the plaintiffs shot themselves in a foot because as soon as they filed this complaint saying the same exact things and they were sitting in the same courtroom to have this Judge sign this order that ended the argument. They shot themselves in the foot on that argument.

Mr. Mondello: Tell me what ordinance or zoning map you want this board to interpret.

Board Member: It's not a zoning map. It is an ordinance whether or not the use existed prior to 1979 when the ordinance was put into play impacting this site. It's a very simple question and I have a roomful of witnesses on that point.

Board Member: Why didn't your applicant take that road in 2005 when he chose to come in here requesting an expansion of a nonconforming use for a use variance?

Mr. Fernicola: I don't know if it was on the table at that time. I wasn't here. I don't know. I just wasn't here. It maybe wasn't an issue at that time. I don't know. Today it's an issue because the neighbors filed a lawsuit. If they didn't file a lawsuit we wouldn't have been here. They filed a lawsuit, the Judge signs an order saying come here, and we're here.

Board Member: Mr. Fernicola, this is Mr. Rubin's application. If he wants to go forward on an interpretation it is what it is. But based on that Judge's order, I see that your argument with respect to the 20-day time frame is waived.

Mr. Fernicola: Well, let me say one thing. First of all, it's a gross misrepresentation what happened at court. The reason they withdrew their defense to the lawsuit so they could come back to the board. There was no waiver because what had happened and the evidence before the Court as this case continued, as you know, counsel, one of the prongs to get an injunction is that the Court has to consider that to grant an injunction to the Bellante's that they had a reasonable likelihood of success on the merits, so when he ruled in January he made a specific ruling that he found that there was an expansion of a nonconforming use to the outdoor service of liquor. What we found after we requested the municipal records in Opra request and it's now undisputed, they built structures after 2005 for which they received no planning board, board of adjustment, or construction permits. They built an outdoor bar, they built an outdoor shed. So when Mr. Rubin says we're here because of the lawsuit, no, you're here because you built things without any approval. Secondly, and I say this with some reservation because I'm a mayor myself. The other issue that was before now the Court in May when they pulled up and said we surrender, we wave the red flag is, unfortunately, your governing body had initially put restrictions on the outdoor service on the liquor license renewal in 2010. And when we got the injunction, the first argument was that the Judge is a former board of adjustment attorney. The governing body doesn't have the authority to grant a use variance. You would have to get a use variance, which he agreed. What was extremely disturbing is that in subsequent years we found, first of all, there was a memo from your Sergeant Calabro to the Chief of Police in June of 2010 because there was a meeting with the mayor, the town attorney and Mr. Ryan where it was then determined that he would be permitted to serve food and alcohol outdoor and your Sergeant Calabro we have that in the record June 2, 2010, wrote a memo to his chief saying there has never been outdoor food and alcohol service. Then, subsequent years they removed the time limit; there could be no outdoor music and they had to shut down at a certain time.

Board Member: Mr. Fernicola?

Mr. Fernicola: I'm giving you the record.

Board Member: Mr. Fernicola, you're testifying. How does this relate to your argument which I thought was very clever that the 20 days has expired? The Judge has said that this board whether you want to call it an interpretation or whether you want to call it an appeal of the zoning official's determination must go on.

Mr. Fernicola: He did not.

Board Member: That's what he just read.

Mr. Fernicola: Then I'm more than happy if you're going to rely on a court order to say that when it doesn't expressly say that that I'm very confident to let Mr. Rubin and I return to the Judge on the issue of whether he was waiving the 20 days because what's the basis that Mr. Rubin has that a court of law can waive and can effect an amendment to a legislation. We have

separation of powers. He doesn't have the jurisdiction to amend a statute. There was no waiver of the 20 days. What they were avoiding in May we were coming up for the trial on a final ruling. They didn't want that because of the record. They said we'll go back to the board of adjustment. They didn't say we're going to go back for an interpretation. They were going to go back for a use variance. If there's any issue as to there was a waiver of 20 days, I'm more than content to go back and put this before this Judge and he'll tell you exactly what he was doing. Because the record was overwhelming the abuses by this property owner and what they had done. Where in that language does it say that he waives Section 72. And I ask you again, counsel, how does a Judge have the authority to effectuate an amendment to state legislation. He does not. That lies with the legislature and there's no such exception within this law.

Board Member: Mr. Rubin, I know I could quote one of the cases, the 20-day time constraint is to be strictly construed.

Board Member: I've been a board attorney myself so I understand, but Mr. Fernicola missed the boat on this one. He should have done something not to have his letter signed. He should have objected. He should have done something or he should have appealed. He should have written his five-page letter instead of getting it at three o'clock this afternoon, should have done it last May 12, 2016, but he didn't. He missed the boat. The plaintiffs in that case, Bellante and the objectors today should have done something. They sat on their rights if they had any rights, and they said, Judge, fine, we'll accept it and I take the words of the order and came here. And I think we're appropriately here before this board.

Board Members: As an officer of the court, I listen to Judges unless there's an appeal.

Board Member: Well there could be an appeal because it's interlocutory.

Board Member: Well, if it wants to take that route, you're welcomed to do that. Hold on one second.

Board Member: The Judge says it. "Go back to the board for a determination as to the nature of the pre-existing use of the property." Basically, for an appeal of what the zoning official had already decided. So, how do I tell this Judge, you know what, I decided to throw your order in the garbage?

Board Member: You don't have to. We'll go back to the Judge then. If this is counsel's argument, where does it reference 72?

Board Member: Mr. Fernicola, your objection is noted. Let's talk about your second point in your letter.

Mr. Fernicola: Could we mark that as A-1 or whatever. However you would want it.

Board Member: I'm going to mark this as A-1, it's the Superior Court order filed and dated May 12, 2016. A-1. Mr. Fernicola.

Mr. Fernicola: The second argument is counsel says we missed the boat, we should have done this, and we should have done that. This applicant should have applied to this board in 2005. This applicant should have gotten construction permits before they expanded a nonconforming use and built structures. The applicant should have had construction officials inspecting plumbing and electric and structural and framing matters. They didn't do that. That's why we're here. Now this board was very clear in 2005. Mr. Ryan, we have all the minutes and it's incorporated in the resolution of approval. He literally told this board not one seat more, not one bar stool more, there's 50 seats, there's 16 bar stools. Their use is not going to be expanded. It's used occasionally for private parties. That was the representation. We have his zoning plan from 2005. It does not depict anything outside. The structures, we have the area photograph showing that they were constructed in 2010 without the requisite approvals. This board, and his attorney agreed, that the restrictions on the use of the property would be recorded in a deed. That there would be a deed restriction so they would run with the land. His attorney and Mr. Ryan himself readily agreed to that condition. So reading from this board's resolution of 2005, Paragraph 7, "during the hearings, the applicant testified that presently there are 50 chairs in the restaurant and 16 bar stools, that the facility is used primarily for private parties and that if the application were to be approved, not one seat or stool would be added to the establishment nor would the present use be expanded. Mr. Ryan indicated that the primary reason for this application is to expand the second dwelling unit to provide sufficient housing for his intended expanded family. Mr. Ryan also testified that the offices that are located in the restaurant and bar will be solely used for the restaurant and bar and to allow space for his son. The same would never be rented out."

Condition Number 3 of the resolution specifically says that the applicant record an appropriate deed with the county recording officer setting forth restrictions as set forth on the record specifying the present extent to the nonconforming uses currently existing and providing for periodic inspections by the borough officials of both the interior and exterior of the premise which restrictions are to run with the land. The languages of said deed restrictions are to be approved by the board's attorney and the board prior to their filing and prior to the issuance of any building permit applied for in accordance with this resolution.

Board Member: Counselor, could I just interrupt you for one minute?

Mr. Fernicola: Yes, sir.

Board Member: I agree with everything you just read, I sat through that hearing. And I could see where everything you're saying would have merits if this went to a variance request.

Mr. Fernicola: Which it has.

Board Member: I'm a little unclear how that relates to the first part where we're being asked to make an interpretation on what existed prior to 1979.

Mr. Fernicola: It doesn't. I had two separate arguments. The first one I've already addressed the interpretation. When it came to the deed variance application, what I've argued based upon these conditions is that a Board of Adjustment does not have any authority to lift a deed

restriction filed with the county clerk. The case law that I cited to the counsel that requires a quiet title action to be filed in the Chancery Division. In other words, the Superior Court of New Jersey, Passaic County Chancery Division is the only entity that has the jurisdiction to lift deed restrictions. So when it comes to the deed variance, this board doesn't have jurisdiction to hear the deed variance because what they're specifically requesting by virtue of the deed variance is the lifting of the restrictions that were imposed as Condition Number 3 in 2005. And so I had argued the first part under the 20-day rule that the interpretation was time barred and then with addressing their second prong of their application, the deed variance, that this board respectfully doesn't have jurisdiction because of the deed restriction that was imposed back in 2005.

Board Member: So what color paint are you watching dry here; pink, red? I've read SOSA VS. DENVILLE, (phonetic) and here are my questions. I think it is inapposite to this case for a number of reasons and maybe you can correct me, but first and foremost, that was the planning board, correct?

Mr. Fernicola: Yes, it was.

Board Member: Second, it was a major subdivision, correct?

Mr. Fernicola: Yes. It was restrictions on the future use of the property, correct counsel?

Board Member: Third, this is the most important. The board requested that plaintiffs limit construction on the property to one single family residence. Here, we have Mr. Ryan just saying I'm not going to expand. The board never asked him for a restriction. The Board never specifically put that restriction in the deed that you so eloquently cited.

Mr. Fernicola: The board doesn't do deeds. The board does resolutions as you know.

Board Member: Don't use semantics. The board attorney and the attorney for the plaintiff were supposed to review the deed. That's not in the deed anywhere, is it?

Mr. Fernicola: Counsel, did the condition of approval was the recording of a deed restriction, was it not, restricting the future use of the property. Was that what this board did in 2005 or not?

Board Member: It wasn't this restriction.

Mr. Fernicola: Yes, it certainly was, counsel.

Board Member: Show me in the deed where it says that (Indiscernible) increased 50 chairs or 16 bar stools.

Board Member: Let's look at your resolution of approval.

Board Member: I read the resolution.

Board Member: Let's look at the resolution.

Board Member: Show me where it says that specific language that the board is requiring that the applicant no longer increase the restaurant.

Mr. Fernicola: It's in Paragraph Number 7 that I just read that the applicant testified there are 50 chairs.

Board Member: Testified.

Board Member: The board didn't ask him for that restriction and that restriction is not specific.

Mr. Fernicola: I disagree with you. Have you read the minutes?

Board Member: I have.

Mr. Fernicola: The minutes he offered it, the board asked him whether there was going to be expansion. They asked them whether they would agree to the deed restriction and they agreed to it. And it's incorporated in Condition Number 3. That the applicant would record an appropriate deed recording and setting forth the restrictions as set forth on the record specifying the present extent of the nonconforming uses currently existing and providing for periodic inspections. So what else is it referencing, counsel. That's this board's resolution. The present extent of the nonconforming uses currently existing at the property. And when you read it with Paragraph Number 7, I don't know if you read Condition Number 3, before or if you just relied on Paragraph Number 7. It couldn't be clearer. It's talking of restrictions that they're going to set forth what the current nonconforming uses of the property.

Board Member: I'm going to ask you one more time, Mr. Fernicola. Is that specific restriction, that I will not increase my business passed 50 chairs. Is that specifically spelled out in the deed or the resolution?

Mr. Fernicola: It's set forth in the resolution in Paragraph 7 as set forth in the record. Could Paragraph 7 be any clearer that it's 50 chairs, 16 stools, private parties.

Board Member: But that's his testimony. That's not the board saying we require.

Mr. Fernicola: What does Paragraph 3 say? "Setting forth the restrictions as set forth on the record." Well, what is the record? They're giving in Paragraph Number 7, the draft of the resolution was very clear that not one seat more, not one stool is in your resolution of approval. Now the fact that the deed doesn't get recorded until May of this year because we bring it up as part of the lawsuit, the fact that the building permits were issued despite a resolution that says no building permit shall be issued to instruct the 2005 approval is not the fault of the Bellante's. That was the responsibility of the applicant and, quite frankly, the municipality because that's what the resolution says. You don't get a building permit until you first record the deed restrictions.

Board Member: I'm going to read one other thing to you, Mr. Fernicola, and then we'll move on. The deed specifically and this is from the case you cited, SOSA. Deed specifically recited

that the restriction was imposed in reliance on the resolution of the planning board, which resolution in turn recited that the restriction was required so that there be adequate protection afforded the township and the general public. The Public of Denville was thus the intended third party beneficiary of that (Indiscernible).

Mr. Fernicola: Clearly the general public; that you can't expand a nonconforming use. That the Board as a condition of the approval and is incorporated in its resolution required the restrictions be recorded so it would run for the land counsel. Why do things run with the land? That means they're not unique to Mr. Ryan. That if he sells the property down the road that they're recorded so that a potential buyer of the property does their title search and sees what restrictions are on the land. And that's exactly what the benefit to the public is is to make sure that there was documented.

Board Member: It's just to make sure it's in the deed.

Mr. Fernicola: And whose responsibility was it to make sure that the deed was proper? It was the Board of Adjustment attorney and the attorney for the applicant because what does it say in Condition Number 3? That the deed is going to be reviewed by the Board of Adjustment attorney. So, counsel, to say that this is not a restriction that was imposed, it couldn't be any clearer, "the present extent of the nonconforming use, the language of said deed restrictions are to be approved by the board's attorney and the board prior to the filing and prior to the issuance of any building permits to be applied in accordance with the resolution."

Board Member: And therein, the difference is that board here specifically said to the applicant, you're going to do this, and they said yes.

Mr. Fernicola: And that's what this board said.

Board Member: They never told Mr. Ryan you're going to do this, so have a seat Mr. Fernicola. Please. Mr. Rubin, do you have any response to Mr. Fernicola?

Mr. Rubin said only that the notice that we sent to all of the neighbors and the publication and in the application said very specifically that we are seeking a modification of the Board of Adjustment resolution dated October 5, 2005, to conform with the present current application and testimony. So what I wanted to do in using those words is to make sure that anything that was done in 2005 was the same as whatever comes out of this application this evening or whenever it is finished. I thought that it was appropriate that I ask for notice and I make the notice to everyone by the statute so that everyone would know that in the event that any of the conditions were changed from 2005, that I have appropriately done the right thing by advising everyone that that's what we're doing and that any change in the resolution would be appropriated and legally binding upon the applicant. That is all I have because that's what it is.

Board Member: Mr. Rubin, Mr. Fernicola has raised the issue a bit late in his memo, but he cited this SOSA VS. DENVILLE case for the proposition that if a restriction is in the deed, this body is no longer vested with the authority to change any of those conditions in the deed.

Mr. Rubin: The conditions just weren't in the deed. You reviewed it yourself. It was done by prior counsel. I was not the scrivener (sic) of it. Prior counsel prepared the deed, but all of the things that happened in that board of adjustment and some of the members were on in 2005 and they remember everything that went on there, it just isn't in there. It just isn't in the deed. So if something isn't there, he can't be held to it.

Board Member: Mr. Fernicola's argument is that there is this catch hole or that friction, that anything in the record is now a restriction.

Mr. Rubin: Well, we know that that doesn't work. It would have to be specific. If we want to give notice to the world, the world has to know what it's about. You can't go and say, oh, it's in a record, it's in minutes, for somebody to go delving into the minutes from 2005. Life just doesn't work that way and I don't think the law does either.

Board Member: In fact it may require more than the minutes.

Mr. Rubin: The minutes.

Board Member: We're lucky we have a secretary who transcribes verbatim.

Mr. Rubin: Yes.

Board Member: And we have the minutes and we know it addressed, and I will want to address your prior question because it was the attorney --

Board Member: Are you finished, Mr. Rubin?

Mr. Rubin said, yes, sir.

Board Member: If I could just asked Mr. Fernicola a question first. This last argument that you just made, was that raised during the court hearing?

Mr. Fernicola: No. Because what the court hearing was about was that he expanded the bar to serve food and alcohol without getting board of adjustment approval.

Board Member: Okay. So you never argued with the Judge that if it did come to a deed variance that this board didn't have the jurisdiction to hear it?

Mr. Fernicola: We didn't get that far because they rose the red flag when it was time for the Judge, now that he was be able to make the decision. Because as we got more and more documents now confirming that they had built structures without any municipal approval, they said to the Judge, we'll go back, we'll go to the board. You don't need to make a decision. That's what occurred in May. And what I was starting to say before what was most troubling in the record is that the governing body lifted the initial restrictions for the outdoor service of the liquor, they expanded it, and they removed the restriction for the time that Sergeant Calabro had suggested in May 2010. When that was done in 2013, it wasn't listed in the agenda. We then

got the audio tape of the June meeting of this Borough's commissioner and not only was it not on the agenda, there was no discussion at the public meeting and there was no vote, but somehow the council approved the resolution even though they didn't vote on it.

Board Member: Mr. Fernicola, speaking negatively about the Mayor and Council, and you're a mayor, what does that have to do with this?

Mr. Fernicola: Because counsel had given you his reasons as to why in May they decided to come to the board. And I'm entitled to give the record so it's clear. So what had happened is that there was an order over the Borough's objection to compel the deposition of your mayor and your municipal attorney, and they went in on the day and asked for reconsideration and the Judge said, no, the depositions are going forward. And that's the day they said, guess what, you know, Judge, we don't have to continue with the lawsuit, we'll go back to the board of adjustment. That's the full picture I wanted this for, not that this Judge ordered it to go back that Mr. Rubin said, oh, this case doesn't belong in front of me. That's not what happened. That's a misrepresentation of what happened and that's why I want the picture I want the board to know what happened in May.

And I'm not trying to cast dispersions on you, Mayor, and I said it and I said it to the Judge, look, I'm a mayor myself, I don't like to do it anymore. I'm the last person that wants to do it. But the fact is the fact. Here's the audio recording. Not only was it not on the agenda, it wasn't discussed. So that's the record that's here. So what I wanted to give you directly to your point before we had the minutes from July 6, 2005, and it was the board attorney who asked Mr. Bartell (phonetic), Attorney Bartell, who was the applicant's attorney, if there would be a problem according to restrictions in the deed. And it goes earlier about this 16 stools and the 15 bar seats.

Board Member: I'm familiar with it.

Mr. Covelli: May I ask a part of parliamentary order?

Mr. Mondello: Yes.

Mr. Covelli: I'm listening to the attorneys and I'm not quite sure why this debate is going on here. It actually sounds like Mr. Fernicola is still back in the court room. The fact that the applicant is here and we're here to hear a variance seems to me what we should be doing. It is now 8:47 p.m., given the fact that we opened the meeting at 8 p.m., we did a little parliamentary business and went to the application, that leaves 45 minutes that attorneys have been arguing. I'm not sure if Mr. Fernicola is trying to say that we shouldn't even be hearing a variance because if his argument is is that under this he doesn't belong here it would seem to me, again, as a non-attorney that's not a question for us to decide. I guess I get paid overtime once we get to nine o'clock, but I'm just wondering when it is when we get to the part that we service as the board of adjustment in The Borough of Wanaque based on, I believe, we have an application or not.

Mr. Mondello: I told you we're going to have to watch the paint dry and some spackle.

Mr. Covelli said, we've all been here for 45 minutes. Are we hearing an application at some point or are we not? If you guys are going to argue this, we can all go home.

Mr. Mondello: We're winding down, Mr. Covelli, but the points raised by Mr. Fernicola are jurisdictional. Much like if an applicant came before the board and forget the notice, we wouldn't have jurisdiction to hear the case. Those are the points that he is raising. And I've already decided that his first point, I completely disagree with respect to the time because we have this order, and the Judge is basically saying I want you guys to have a determination as to whether or not the zoning official was right or wrong in his decision. With respect to the second and the third arguments that Mr. Fernicola has raised and I sort of think they're bootstrapped to each other, I disagree with him and I do believe that the zoning board does have jurisdiction to move forward for the reasons that I stated on the record. And I basically pointed out how this case is inapposite to the case that he cited, the SOSA VS. DENVILLE PLANNING BOARD. So we are ready to move forward and Mr. Rubin whether you want to classify it as an interpretation or an appeal, your first witness.

M I C H A E L R Y A N, WITNESS, SWORN

Mr. Mondello: Please state your name, spell your last name, and give us your address?

Mr. Ryan: Michael Ryan, R-Y-A-N, 17 Park Street, in Wanaque, New Jersey.

Mr. Mondello: Your witness, Mr. Rubin.

DIRECT EXAMINATION BY MR. RUBIN:

Mr. Rubin: Mr. Ryan, tell us what's been happening in your life from 1992 when you purchased this property. What happened? When did you buy it?

Mr. Ryan: I bought it in 2002.

Mr. Rubin: 2002?

Mr. Ryan: Right.

Mr. Rubin: And what was there when you bought it?

Mr. Ryan: There was an establishment called Andrew's Hide A Way. It was a restaurant that had been there for about 25 years.

Mr. Rubin: And could you describe what the restaurant did? What was going on in there?

Mr. Ryan: Yeah. It was a quiet place. It was not doing very good business wise, but it was open every day, except Monday, and fully operational until I bought it from them.

Mr. Rubin: And was it in good shape?

Mr. Ryan: Well, it needed a lot of work when I bought it. It was in really run-down shape actually.

Mr. Rubin: And was it your intention to do something about the shape of the building, as in the shape of the place?

Mr. Ryan: Right. Yes. I did. I started cosmetic stuff initially and I just did carpeting and painting and fixing the ceiling tiles and all that.

Mr. Rubin: When you first purchased the property, were you on the property prior to the time that you actually bought?

Mr. Ryan: I was, yes. I was working with Andrea Young and Andrew Hack the owner for about seven months prior to purchasing it.

Mr. Rubin: And did you take any notice of where there was food and beverage service?

Mr. Ryan: The nights that I went there; I use to go there as a patron just to try to figure out if I want to get involved with buying this place, so there was not much food going on at all when I was there.

Mr. Rubin: Was there outdoor dining and drinking at all when you were there?

Mr. Ryan: The outdoor dining was not active at the time. Andrew had gotten throat cancer and lost his vitality, so he had slowed down a little bit.

Mr. Rubin: And was it all set up. Was it set up for that?

Mr. Ryan: Yeah. There were picnic tables set up back there. There were the remnants of bocce courts and horseshoe pits. It was all a mess, I mean, it was really run down, but it was all still there; the picnic tables.

Mr. Rubin: And so was there any intent by anyone to stop that use?

Mr. Ryan: No. When I bought it I wanted to keep it going.

Mr. Rubin: And after you bought it, did you refurbish it?

Mr. Ryan: Yeah. It took me quite a while but, yes, I started digging in and tearing out all the old concrete and all the old pebbles that were back there. You know, clearing out the brush that had grown there. So I did start working on it right away. It took me a long time, though; a couple of years.

Mr. Rubin: And during the time that you owned it, did you serve outside the premises food and beverages?

Mr. Ryan: Well we usually do a lot of private parties and we used to allow people to go out there and bring their drinks out there and eat out there as well.

Mr. Rubin: And was that from the first time that you were able to --

Mr. Ryan: Well, like I said, there was quite a bit of renovation that went on, so once the renovations were done, I started doing it.

Mr. Rubin: And have you owned it continuously from that time to the present day?

Mr. Ryan: Yes, I have.

Mr. Rubin: And until the Judge said not to have outdoor dining and drinking until the Judge said don't do that until this matter is concluded, has there been outdoor dining?

Mr. Ryan: No. We actually put a sign up prohibiting it and just haven't done it.

Mr. Rubin: So that was when the Judge said not to?

Mr. Ryan: Right.

Mr. Rubin: But up to that time, had there been drinking and eating outdoors?

Mr. Ryan: Yes. We're quite active out there.

Mr. Rubin: Now when you bought the place, did you find on the premises some old paperwork back from the 1950's as to a lease of the premises?

Mr. Ryan: Yeah. From 1951 there was a lease between the owners at the time, then it was called Polly's, and it was the Pollivicini (phonetic) Family who owned it. And they had a lease agreement between them and a gentleman named of Flabio Villa (phonetic) and they were leasing the property at 19 Park Street for the purposes of picnic or overnight parking.

Mr. Rubin: And is this the lease that you found on the premises?

Mr. Ryan: No. This is the document that was given to me by Andrew Hack's wife.

Mr. Rubin: And that was the one that was given by the then owner?

Mr. Ryan: The then owner, correct.

Mr. Rubin: And this purports to lease the picnic area?

Mr. Ryan: Right. It was the least attractive land and it was specifically said that it was to be used for picnic grounds and parking and for no other use whatsoever.

Mr. Rubin: And is that part of the property today?

Mr. Ryan: No. That's 19 Park Street now. That lease was part of -- by leasing 19 Park Street right next door to 17.

Mr. Rubin: So that is not part of it?

Mr. Ryan: No. No. That was an extension of the picnic -- well, I guess I wasn't around then, obviously, but they obviously needed more space for parking in the picnic area.

Mr. Rubin: Calling your attention to Polly's and that was at 17 Park Street?

Mr. Ryan: Yes.

Mr. Rubin: Can you identify this piece of paper for me?

Mr. Ryan: Yeah. Again, this came from Lauren Hack now Lauren Burns who was the owner at the time with Andrew Hack, but this was from Polly's. This was the Polly's original letterhead with the names of the owners, Albert Pollivicini and Philip White, and it describes the elements that were there including catering, private dining room, parties

Mr. Fernicola: Jack, that's clearly hearsay, it's not a document he was involved in. Polly's predates him.

Mr. Ryan: And it says outdoor picnic.

Board Member: So noted, but the rules of evidence are fairly relaxed in these proceedings.

Mr. Fernicola: It's not that relaxed, though.

Mr. Rubin: From whatever weight, I agree with counsel. But for whatever weight the board would put on it, when was Polly's in existence?

Mr. Ryan: Well Andrew bought it from them in 1979, so it's prior to 1979.

Mr. Rubin: I would ask that the stationary of Polly's be allowed into evidence for whatever weight the board would think appropriate.

Board Member: A-2 marked into evidence.

Board Member: Can I see it after you've seen it, Mr. Fernicola. We are going to mark it as A-2 however, Mr. Fernicola has no opportunity to cross examine the people that submitted this letter.

Mr. Rubin: We understand that. It's for whatever weight the Board thinks. And the lease from Flabio.

Board Member: Now this is an original. I don't want to write on this. Did you make a copy?

Mr. Ryan: I have copies.

Board Member: You have copies?

Mr. Ryan: I have copies, I will give it to you.

Board Member: Well, let's just leave it here and we'll get us a copy and we'll put A-2 on it at some point. Go ahead, Counsel.

Mr. Rubin: The lease from Flabio Villa and Mary Villa to Anthony Polivicini. I would ask that they, again, be allowed into evidence for whatever weight the board feels is appropriate.

Board Member: Didn't we just establish that that wasn't even the subject property?

Mr. Fernicola: Thank you. That was going to be my objection.

Board Member: So there's no relevance to this adjoining property. I mean, I haven't heard the application.

Board Member: What's the address on it?

Mr. Fernicola: It's my client's property; it's 19. It's the adjacent property.

Board Member: So what relevance is that, Mr. Rubin, if that property was used for outdoor use?

Mr. Ryan: I gave it to Mr. Rubin thinking it was relevant because it showed the restaurant needed the picnic grove space.

Board Member: But it's not his property anymore.

Mr. Fernicola: Right, it's not.

Mr. Ryan: Okay.

Mr. Rubin: Calling your attention to, again, records that you found on the premises or were given to you by the prior owner, I show you this document for a retail liquor license. Can you identify it?

Mr. Ryan: Yeah. This is a 1974 liquor license renewal by Polly's Bar and Grill and the reason I held on to it, I found it on the property or it was given to me by Andrew Hack, there's a check-off box that says that the grounds are to be licensed.

Mr. Rubin: And for only that reason you felt that that was important to show that the outside was part of the licensed premises?

Mr. Ryan: That's correct.

Board Member: In other words, I think the chairman has a question. That says the exterior is licensed to serve liquor?

Mr. Ryan: Right. This was the standard application for many years. When I first bought the property, it was the same application and it says here in 6C, are any grounds adjacent to any such building to be licensed, and it was checked off yes.

Board Member: This says grounds, does that refer to the property next door?

Mr. Ryan: No. It was referring to 17 Park Street.

Board Member: Is your license today license to serve anywhere on the property?

Mr. Ryan: It does show that the check off box for the grounds to be licensed has been checked off since I bought the property.

Board Member: It is. Do you have a copy of that?

Mr. Ryan: I have them in my bag here. I can bring them to you.

Board Member: That's what your governing body did in 2010?

Board Member: I'm not so sure that that may be relevant, Mr. Chairman.

Mr. Ryan: Yeah. I have all the liquor license renewal showing that the grounds were checked off where service will be held.

Mr. Rubin: Well that would legalize the outside bar.

Board Member: It wouldn't.

Board Member: It would.

Board Member: Mr. Fernicola has mentioned or argued that the governing body has no jurisdiction to allow an expansion of a nonconforming use into the backyard to serve liquor.

Board Member: The ABC liquor authority for the Borough of Wanaque they issued a license.

Board Member: They did. Nobody is denying that.

Board Member: So, if they want to expand it.

Mr. Covelli: Frank: Mr. Mondello, I said I wasn't going to ask you another point of parliamentary, but I should have said I reserve my right.

Mr. Mondello: Go ahead, Frank.

Mr. Covelli: My question is that this is an atypical situation where we're getting testimony and each time the applicant speaks we have another attorney that's refuting it. Isn't the normal process where he gives his testimony and then there's an opportunity for that to happen?

Mr. Mondello: No. Because the objectives are represented by counsel and Mr. Fernicola is entitled to cross examine any witnesses, cross examine any documents that may be admitted into evidence. It is his client's right to have that type of representation.

Mr. Rubin: Most respectfully, for whatever weight the board feels is appropriate can we put the 1974 application into evidence? This is the site.

Mr. Mondello: Jennifer, are we A-3 now?

Mrs. Fiorito: Yes.

Mr. Mondello: This is a copy so I can write on this?

Mr. Ryan: You can write on that one.

Mr. Fernicola: Same objection.

Mr. Mondello: Thank you, Mr. Fernicola. This is a form of application for renewal, new or transferred of municipal retail licenses except club license and it's dated May 31, 1974, signed by Municipal Clerk or Secretary, Municipal Board of ABC. Continue, Mr. Rubin.

Mr. Rubin: Mr. Ryan, I'm going to show you this resolution. Can you tell us what it is?

Mr. Ryan: Yes. This is when the Mayor and Council were meeting to renew liquor licenses. It puts some restrictions on the use on the outside. So this is the resolution depicting the fact that I'm permitted to serve outside and there's some time restrictions by day and some entertainment restrictions showing that it has to be within the town's noise ordinances.

Mr. Rubin: And you understand that only this Board of Adjustment can grant variances? You know that because we've explained that to you?

Mr. Ryan: Right.

Mr. Rubin: But the Mayor & Council apparently gave you a resolution allowing this to happen?

Mr. Ryan: They felt there was a pre-existing use.

Mr. Fernicola: Objection as to what the Board, Mayor & Council felt.

Mr. Rubin: Well, the document would speak for itself.

Mr. Mondello: All right.

Mr. Rubin: Again, we whatever weight the board feels it has, we would ask that it be allowed into evidence and I think that's A-4.

Board Member: It is.

Board Member: Thank you.

Board Member: Can I see A-4?

Board Member: Sure.

Mr. Rubin: Mr. Ryan, there's been some testimony about some improvements to the property as to the last several years; an outdoor bar, other things that went on at the property. Was there an expansion of the use since the time you bought it to today?

Mr. Ryan: I wouldn't call it an expansion. I renovated. I took out all the old junk and all the old plumbing and all the old weeds that were there and put sod in. I did put a car port like a Sears carport as a shelter over our bar area.

Mr. Rubin: Do you know what an expansion is?

Mr. Ryan: Yes.

Mr. Rubin: We have discussed an expansion that the use if bigger, that's more expansive. In your view, and you are the one who is testifying before this board, is this the same size as it was?

Mr. Ryan: Well the front before the picnic area was actually a lit bit bigger. I shrunk it down a little bit. It used to go back further into the woods. It was all white pebbles and, like I said, there were two bocce courts and two horseshoe pits and quite a bit of sports kind of places in addition to the picnic area. So I actually shrunk it a little bit in terms of space.

Mr. Rubin: And is it your testimony that it hasn't grown over the years?

Mr. Ryan: No.

Mr. Rubin: When I say it, I meaning the use, the outdoor dining and drinking of beverages or service, whatever happens outside, has it gotten bigger?

Mr. Ryan: No. I mean the place is getting customers, but it's not any bigger.

Mr. Rubin: Same size?

Mr. Ryan: Yes.

Ms. Henderson: So you said there was an outside garage in the back, correct?

Mr. Ryan: There was an old building that we knocked down as part of the last time we were in here to build the second story.

Ms. Henderson: There wasn't any outside bar?

Mr. Ryan: It was not an outside bar.

Ms. Henderson: Now there's an outside bar?

Mr. Ryan: Yes.

Ms. Henderson: And then you say there were picnic tables. Were there less than five picnic tables?

Mr. Ryan: There was not that many. I think it was five or six. They were decrepit so I just threw them out.

Ms. Henderson: And now you have more tables with seating around with a built out patio and is there a gazebo or anything?

Mr. Ryan: There's a sheltered area with a table under it. Yes.

Ms. Henderson: So that's new?

Mr. Ryan: Yes.

Ms. Henderson: And you have fire pits?

Mr. Ryan: There's some chimeneas.

Ms. Henderson: And those are new?

Mr. Ryan: Those I put in but they used to have 55 gallon drums for those and then I put chimeneas in.

Board Member: I didn't know that one.

Mr. Rubin: Mr. Ryan, the question obviously before the board in which the board has to make a decision is that is this use that predated 1979. Now you weren't here?

Mr. Ryan answered, no, I was not.

Mr. Rubin: So you can only testify from 2002.

Mr. Ryan: That's correct.

Mr. Rubin: And you can testify only as to what happened thereafter. Now in 1995, you did come to this Board of Adjustment?

Mr. Ryan: 2005.

Mr. Rubin: 2005. You came to the Board of Adjustment?

Mr. Ryan: Yes.

Mr. Rubin: And what was the plan then. What were you trying to seek?

Mr. Ryan: What I was trying to do then was I was getting remarried and it was an expanding family and I just wanted to get some additional space on the property for my family to live there. That's really what it was about at the time. I wasn't addressing the outside because I felt the outside was from the very beginning a pre-existing use, so I just asked for the expansion of the building.

Mr. Rubin: Which was strictly residential?

Mr. Ryan: The expansion was a residential expansion. That's correct.

Mr. Rubin: Now at that time was there any testimony, did you ask the board about the restaurant, the liquor license, anything about the use of the premises for commercial purposes?

Mr. Ryan: If you're asking about the outside, I didn't even consider it because, like I said, I thought it was part of a pre-existing use that everyone had told me about including the former owner. The representations about the bar and the restaurant, they were renovated too. The whole building was renovated, so there was a brand new look.

Mr. Rubin: But it wasn't expanded?

Mr. Ryan: No. The restaurant footprint was the same.

Board Member: Mr. Rubin, before we go too far. I just have one quick question on A-3, which was the 1974.

Mr. Rubin: Yes.

Board Member: I'm sorry to interrupt but just before I lose this. It says how many buildings in part are to be licensed, which is one. And then it also says describe in detail the premises in such building or buildings which applicant wishes to be licensed? And then with respect to the, "are any grounds to be," it also says that "with the submission of this application should be a specific diagram showing the location of such grounds with dimensions in feet must be submitted with the application." Do you have that?

Mr. Ryan: I went to the township offices last week to see if they had it and they don't seem to have it either. They don't have anything prior to '75 I think. There was obviously the proof that the license was renewed, but they didn't have those old files for some reason.

Board Member: I'm sorry, counsel.

Mr. Rubin: They just weren't available.

Board Member: Yeah, right. It would have been good if we had that planning in a sketch.

Board Member: Well, because outside could have many different meanings.

Board Member: You are absolutely correct.

Mr. Rubin: But we just haven't been able to find it in the borough records. So if it did exist, who knows what happened over the last 20 plus years. I think those are the questions I would have at this moment.

Board Member: Mr. Ryan, when you appeared before the board in 2005, you presented plans from Rotundo (phonetic) Engineering?

Mr. Ryan: Yes.

Board Member: On those plans it shows nothing of what you're describing in the backyard.

Mr. Ryan: Right, like I said before, the whole application process or the whole purpose of me coming before this board back then was to strictly the expansion of my personal space upstairs.

Board Member: Right. But you agreed to and presented plans showing what you wanted. Nothing was shown outside.

Mr. Ryan: Right.

Board Member: Some of the items on the plan are not there that you testified you were doing. Either they're not completed or they've been removed.

Board Member: Did you ever request a final inspection based upon that approval?

Mr. Ryan: Yes. Jeff Brusco came over and did that.

Board Member: He gave you a final CO?

Mr. Ryan: Yes.

Board Member: What does the CO say anything with respect to outside?

Mr. Ryan: No. It was really all about the plumbing and the carpentry and the electric.

Board Member: But what about the site improvements?

Mr. Ryan: I don't recall.

Board Member: You submitted a plan which was part of your application and you agreed to abide by the plan.

Mr. Ryan: Sure.

Board Member: What's represented is on this plan has never been completed and if it was, you removed it.

Mr. Ryan: I'm not sure what those are, sir.

Board Member: You had screening on the left side of your property, called the east side, facing east. There was a series of some kind of shrubs that were supposed to be planted. From the front of your building you were supposed to leave a buffer zone to shield your parking from your neighbor's property. Now you got a fence and you're parking right against the fence.

Mr. Ryan: During the meeting we talked about either a fence or shrubberies and I elected to put the fence up instead of shrubberies.

Board Member: Right. But what happened to the buffer zone?

Mr. Ryan: I'm not sure what that is. I'd have to look.

Board Member: Well in other words, you're parking alignment was probably 20, 25 feet from the property line. Now you're parking within inches of the property line. In the rear of the property, we talked about storm water management. You were going to put cross block cement type, we'll call them pavers, perforated, put grass inside to absorb the storm water.

Mr. Ryan: Right.

Board Member: You're whole lot is paved.

Mr. Ryan: Well the board wanted me to pave.

Board Member: No. No. No. We followed your plan. We agreed to your plan.

Mr. Ryan: Right.

Board Member: You showed graveled areas. You were going to put those cross blocks in to absorb the run of the water.

Mr. Ryan: Right.

Board Member: None of that is there.

Mr. Ryan: No.

Board Member: Have you ever submitted a revised storm water management plan?

Mr. Ryan: Well, I actually did submit something way after that to the township engineer and he said I couldn't do it. I was putting more drainage underneath the parking lot, but that was not permitted.

Board Member: I mean, we got a set of plans we agreed to.

Mr. Ryan: Right.

Board Member: You agreed to it. We agreed to it.

Mr. Ryan: Yes.

Board Member: You never followed it.

Mr. Ryan: I really thought there was an option there because Mr. Grenier (phonetic) insisting on the pavement. I didn't want to do anything. I wanted to leave it with the white pebbles.

Board Member: You're supposed to have enclosures for your garbage.

Mr. Ryan: Yeah. I put that wall up the fence up to block it.

Board Member: Where?

Mr. Ryan: There's a fence blocking between the building where the garbage cans are and the neighbor's line. There's a 30-foot.

Board Member: You're saying on your property?

Mr. Ryan: Yes, on my property.

Board Member: There's supposed to be an enclosure to hide the cans on your property. Not from your neighbor. You got cans behind your building.

Mr. Ryan: Right.

Board Member: When was the second floor deck put on on the back of the property?

Mr. Ryan: That's prior to the whole renovation.

Board Member: It's not part of your architect, which his name is Essy (phonetic), I believe, his plans.

Mr. Ryan: His name is Essy. But then we changed them right away.

Board Member: And it's not even shown on this plan that you just submitted.

Mr. Ryan: I don't know why that is. I mean the architectural drawings that were submitted to the building --

Board Member: These drawings don't match what's there.

Mr. Ryan: Right.

Board Member: These drawings don't match what we approved.

Board Member: Which I think the chairman's point is it says site plan of existing condition.

Mr. Ryan: The building plans that were submitted for purposes of permitting included all that decking and all of that.

Board Member: Here are the plans from 2005.

Mr. Ryan: Right.

Board Member: The architect's sealed plans. This is what we based our approval on. What happened? You didn't file that. I mean, what's there doesn't match these plans.

Mr. Ryan: Right.

Board Member: Was there another set of plan presented to somebody else somewhere?

Mr. Ryan: No. That was the architectural drawing and when I went to see what happened to the actual plan for purposes of building it --

Board Member: The site plan.

Mr. Ryan: Right.

Board Member: The site plan. Nothing matching the site plan that we approved. Your new site plan that was submitted doesn't match up with your current property now.

Board Member: Jen, five minutes?

Board Member: Actually, I want to ask one question.

Board Member: Okay. You can take the time now.

Board Member: When you purchased the property --

Mr. Ryan: Yes.

Board Member: -- there was an appraisal done.

Mr. Ryan: Yes.

Board Member: Do you have pictures?

Mr. Ryan: Sure.

Board Member: Does it show the back?

Mr. Ryan: No. I have to go back and look. I have a thick appraisal book from the bank. I'll have to go check.

Board Member: Just wondering.

Board Member: And I have one quick final question if I may, before I forget. Mr. Ryan, I know you testified that the 2005 expansion was for personal use, right?

Mr. Ryan: Right.

Board Member: Residential so to speak?

Mr. Ryan: Right.

Board Member: But isn't it true that you expanded the restaurant?

Mr. Ryan: No. The physical space for the restaurant did not expand at all.

Board Member: You raised the ceiling.

Mr. Ryan: I'm sorry. The ceilings went from 8 to 10.

Chairman: Five-minute recess.

(Recess)

(Reconvene – everyone is present)

Mr. Rubin: We're continuing with cross examination of Mr. Ryan.

Board Member: Did any of the board members have any other questions for Mr. Ryan before Mr. Fernicola has an opportunity to cross examine.

Board Member: The questions you had on the approved site plan -- so you do say that you do have a final issued CO?

Mr. Ryan: Yes. I have to look it up. I'm sure it's on file with the town as well.

Board Member: And you did request to have a final sign off?

Mr. Ryan: Sure.

Board Member: One other question. There was one question that was omitted or should be clarified. Mr. Ryan, you testified that there was a change in the ceiling.

Mr. Ryan: Right.

Board Member: Can you describe to the board what was there before and what were the changes?

Mr. Ryan: Basically, there was a drop ceiling, which was at about 7 1/2 feet and when you pull it out, it was at the full 9 1/2, 10 feet.

Board Member: So you didn't increase it?

Mr. Ryan: No. I got rid of the drop ceiling and, obviously, we rebuilt the whole place, but the original ceiling height, not the drop ceiling, but the original ceiling was the same.

Board Member: Right. You didn't change the height of the ceiling to create more space?

Mr. Ryan: No.

Board Member: I just wanted to clarify that that drop ceiling was removed.

Mr. Dunning: According to our notes, your architect, in order to reconstruct the second level wanted to raise the ceiling to make the, we'll call it the frame work or beam work, work better and that's why we issued a volume increase on the building itself, which is part of the use variance.

Mr. Ryan: Right.

Mr. Dunning: Okay. The other question is this. In 2010, when the building inspector denied you the expansion of this use, why did you proceed without any approval?

Mr. Ryan: That's not true, Mr. Dunning. I asked Jeff when he said that to me, who else I could I talk, to because I believed that you weren't in town as long as other people have been coming to

the place. All the people are going to testify tonight telling me there was a pre-existing use outside, so I asked whom else I could talk with and then I went and met with the Mayor.

Mr. Dunning: Right. But, normally, when you get a letter of denial from the building inspector, which you did, you have to appeal that decision. That seems to have been lost in the shuffle here.

Mr. Ryan: Right. Well, I didn't know I had to do that. Like I said, I thought that so many people, including the people I bought it from, told me that it was a pre-existing use outside. I didn't feel that a variance was needed because it was pre-existing. So I went and asked Jeff personally, I said what else can I do and he said talk to the Mayor.

Board Member: Mr. Fernicola raised the point that it was twice you got the denial in 2002 and nobody did anything with it, and then in 2010.

Mr. Ryan: Right.

Board Member: Okay. Any other questions, board Members?

Board Member: Your witness, Mr. Fernicola.

Mr. Fernicola: Thank you, Mr. Counsel.

Mr. Fernicola: May I have the 2005 variance plan and the site plan I'd like to mark. I know there's been reference like chairman Dunning, but I don't know that they've been marked. I have copies.

Board Member: Yeah. A-5.

Mr. Fernicola: Do you want to make them O1 and O2?

Board Member: Yes O1. I'm sorry.

Mr. Fernicola: Okay. So how about the variance plan one sheet dated 4/11/2005 as O1 and then the site plan the same date as O2.

Board Member: I believe its three pages, Mr. Fernicola.

Mr. Fernicola: And the third sheet is profile, details and lighting?

Board Member: Right.

Board Member: Why don't we just mark the whole thing as O1.

Board Member: Fine. Consists of three sheets, O1, dated 4/11/05.

Mr. Fernicola: Mr. Ryan, do you agree that your 2005 plans do not depict any outdoor areas being utilized for the service of food or alcohol?

Mr. Ryan: That's not on the plan. No.

Mr. Fernicola: Now one of the things you gave the board was a 1974 liquor license renewal, correct?

Mr. Ryan: That's correct.

Mr. Fernicola: And that my office we had requested the town's records for all the years concerning the liquor license renewal, correct?

Mr. Ryan: I'm not aware that you did that.

Mr. Fernicola: Have you seen other annual liquor license renewal where that box that you referred to from 1974 box that was checked yes are checked no, specifically Question 3.4.

Mr. Rubin: For his property?

Mr. Ryan: The only one I have prior to me owning it was that one from 1974.

Mr. Fernicola: Okay. Well, let me show you the liquor license renewal filed on November 20, 1979. Andrew Hack you identified was the prior owner of the property that you operate.

Mr. Ryan: He was.

Mr. Fernicola: Turn to the last page, Page 12. And that has Mr. Hack's signature and notary?

Mr. Ryan: Yes.

Mr. Fernicola: Page 3. Are any grounds adjacent to this building to be licensed? And the box no is checked off in the 1979 renewal, correct?

Mr. Ryan: Okay. I see that.

Mr. Fernicola: I'd like to have this marked as O2.

Board Member: Can we take a look at it?

Mr. Fernicola: And then let me show you the 1985 renewal?

Board Member: Let's take this one at a time.

Board Member: Mr. Fernicola, you can correct me if I'm mistaken, weren't we not focused on what occurred out there prior to January 31, 1979? That's when the R15 zone was adopted.

Mr. Fernicola: There's two things. Number one, in somewhat I disagree based on what took place in 2005 because they came before this board and they made representations as to what the use is and it seems like what this board did was establish what was the pre-existing use at that time. Now this applicant is coming and saying, well, despite what was said and done in 2005, there really is something different.

Board Member: Is that an abandonment argument you're making?

Mr. Fernicola: Well, it's more than abandonment. There was an acknowledgement that there wasn't a pre-existing use in 2005 of the outdoor use.

Board Member: By the applicant?

Mr. Fernicola: By the applicant. He identified very clearly and I'm going to go through the minutes with him. Now he's coming in that his variance plans didn't depict, his site plans didn't depict, that he was using any of the outdoor. He testified and the minutes incorporate what the use was; 15 chairs, 16 bar stools.

Board Member: Your witness.

Mr. Fernicola: Another thing is that I want to counter directly that he offers one from 1974 that there's other ones that dispute that and indicate that the grounds aren't being used.

Board Member: An abandoned use.

Mr. Fernicola: Right. And it's his burden of proof to show and that this goes to the weight of evidence that the weight of evidence is inconsistent at best.

Board Member: Counsel?

Mr. Fernicola: So I'm going to show you the one from 1985 and Mr. Hack has also checked off Question Number 3, any grounds adjacent to this building to be licensed and he checked off no, correct?

Mr. Ryan: I see that. Yes.

Mr. Fernicola: I'd ask to have this marked as O3. Going back to your question earlier, counsel, that O2 is the 1979 renewal. Now, one of the things that I didn't see depicted in your current application for this board is that you currently have a wholesale internet wine business that you operate at this property?

Mr. Ryan: I don't anymore.

Mr. Fernicola: When were you operating it?

Mr. Ryan: I had it for a year back six years ago.

Mr. Fernicola: Did you get any approval to operate that?

Mr. Ryan: We didn't need one. The license is a broad state license.

Mr. Fernicola: Did you get any approval from the municipality to operate that use on the subject property?

Mr. Ryan: No. It's a retail wine business. The license is a retail license.

Board Member: Mr. Chairman, it's a residential zone.

Board Member: Well, I don't know that. That's another question.

Mr. Fernicola: When was the last time you advertised on the internet the sale of wine from the subject premises?

Mr. Ryan: The sale of wine on the internet?

Mr. Fernicola: Yes. When was the last time that you advertised the sale of wine via the internet from the subject property?

Mr. Ryan: Well, from the High Point Wine, which is what it was called, there was really no advertisement. It was just a website that people would find and order from.

Mr. Fernicola: Is that website still up?

Mr. Ryan: No.

Mr. Fernicola: Are there any internet advertising for the sale of wine from the subject property currently?

Mr. Ryan: No. We have a Facebook page that we advertise the menu and things like that.

Mr. Fernicola: Now you testified that you purchased the property in 2002, correct?

Mr. Ryan: Correct.

Mr. Fernicola: And let me show you what I'm going to have marked as O4, the February 4, 2002 memorandum from the zoning officer Jeff Brusco. Did you obtain a copy of this memorandum dated February 4, 2002 that the serving of food or alcohol outside is prohibited prior to purchasing the subject property?

Mr. Ryan: Yes. I got the copy of the memo, but when you look at the second paragraph it talks about how it's prohibited but it says, "The use, however, is a nonconforming use and falls under the ordinance," so he said it was not permitted, however, the second paragraph clearly says, "the use, however, is a nonconforming use."

Mr. Fernicola: So the sentence that serving food or alcohol outside this establishment is prohibited, it was your understanding from reading the letter that it was permissible?

Mr. Ryan: The paragraph two.

Mr. Fernicola: Let me just finish my question.

Mr. Ryan: Go ahead.

Mr. Fernicola: Is it your testimony that despite that sentence that it was your understanding that it was permissible for you to serve food or alcohol outside of the subject property?

Mr. Ryan: Yes. That's correct based on the second paragraph.

Mr. Fernicola: What did you think the word prohibited meant when you read the memo in 2002?

Mr. Ryan: You're talking about the fact that an R15 zone and those kinds of things are not normally done. And, yet, the second paragraph says that that use, however, is a nonconforming use.

Mr. Fernicola: And is it true, sir, that you did not serve food and alcohol outdoors from 2002 to 2010?

Mr. Ryan: It was on and off; I did. Yes.

Mr. Fernicola: In 2010, is it true that you went back to the municipality to obtain permission to serve food and alcohol outside?

Mr. Ryan: That's the year that Mr. Dunning asked me about. After Jeff Brusco had sent me another note, I went to the Mayor and asked him for the disposition of a nonconforming use and he and the council agreed to put it into the liquor license renewal that it's okay to do.

Mr. Fernicola: Before you had the meeting with the Mayor, you were told that serving food and alcohol outdoors was not permitted, correct?

Mr. Ryan: Yes.

Board Member: Let the record reflect that the time is 9:39 p.m.

Board Member: When does the Court hear testimony?

Board Member: Mr. Chairman, when does the board quit with respect to testimony?

Mr. Chairman: 10:30.

Mr. Fernicola: Let me show you what I've marked as Exhibit 05, a memorandum from Mr. Brusco dated April 20, 2010. Did you see this memorandum in 2010?

Mr. Ryan: I did.

Mr. Fernicola: And it states that follow up to our conversation, I would ask you to refer to my letter of February 4, 2002, "any outdoor serving of food or alcohol would require a use variance from the Wanaque Zoning Board of Adjustment. If Mr. Ryan does not agree with my zoning determination he could either file a zoning interpretation or file the appropriate appeal." Did I read that correct?

Mr. Ryan: Yes.

Mr. Fernicola: O5. And is it true that you began to serve food and alcohol outside of the subject property without obtaining any use variance?

Mr. Ryan: I did not obtain a use variance because it was a nonconforming use.

Mr. Fernicola: Okay. Do you agree that you did not file any appeal or interpretation in 2010 after your received Mr. Brusco's memorandum?

Mr. Ryan: No. Like I said, I asked Jeff who else I could speak with, he recommended the Mayor and I did and the Mayor and Council picked it up.

Mr. Fernicola: Who was at the meeting with the Mayor?

Mr. Ryan: The two that I recall were Mr. Mahler and the Township attorney, Anthony Fiorello.

Mr. Fernicola: So it was the Mayor?

Mr. Ryan: And Anthony Fiorello. I'm not sure if Kathy Falone was there. I really don't recall. I think Kathy might have been there.

Mr. Fernicola: Mr. Ryan, were you aware that the township attorney had written a letter in April of 2004 indicating that the license did not include the service of alcohol?

Mr. Rubin: I would object. He may not know that kind of information.

Mr. Fernicola: Well, let me know you what's been marked as 06, a letter dated April 15, 2004. Did you receive a copy of this letter in 2004?

Mr. Ryan: I'm not sure. It doesn't look familiar.

Mr. Fernicola: Were you told by the town clerk in 2004 that the township attorney had written a letter indicating that the present licensed premises contains no indication that the license was to be extended to the outdoor area? Were you told that in 2004?

Mr. Ryan: I don't recall.

Board Member: Who's the letter addressed to?

Mr. Ryan: Kathy Falone, the clerk.

Mr. Fernicola: The town clerk. It's from the township attorney.

Mr. Rubin: I would object. You can't do that. It's not authenticated. He hasn't identified it.

Board Member: You can say hearsay. We allowed yours in and we're going to allow Mr. Fernicola's exhibit to enter into discovery and it will go into the weight of the evidence as this quasi-judicial board sees fit.

Mr. Rubin: Understood.

Mr. Fernicola: Let me show you what I've marked as O7, a memorandum from Sergeant Angelo Calabro to Chief Reno dated June 2, 2010. Now were you given a violation in 2010 for the outdoor service of alcohol or food?

Mr. Ryan: No.

Board Member: What number is that, O7?

Secretary: O7.

Board Member: That's going to be O7, counselor?

Mr. Fernicola: Yes.

Board Member: Has Mr. Rubin seen it?

Mr. Rubin: Yes, I did. Same objection.

Board Member: Noted.

Board Member: Thank you.

Board Member: I'm sorry, I didn't hear the answer to did you ever receive a violation --

Mr. Ryan: No. I did not.

Mr. Fernicola: Was there an alcohol inspection done on the premises on or about April 22, 2010?

Mr. Ryan: I'm not sure what time of year, but every year we get an alcohol inspection; every year.

Mr. Fernicola: Okay. And were you advised during that inspection that you were not permitted to serve food and alcohol outdoors?

Mr. Ryan: No. No.

Mr. Fernicola: You weren't advised that by the police sergeant?

Mr. Ryan: No. No.

Board Member: Did the inspection include the outside bar?

Mr. Ryan: It's actually quite simple. The officer would come in, in this case, it was Mr. Calabro, at the time, and he would come in, he would check my bills, he would check that I had my employees listed properly on the sheet, take a look at all the alcohol and make sure it's not fake and no food flies. That's really about the extent of an inspection.

Board Member: Did he go out to the outside bar?

Mr. Ryan: He walked out there. There was no alcohol out there unless we're open. It's all brought in at night.

Mr. Fernicola: Were you advised by the Sergeant the statement that's contained in this memorandum that the zoning code was adopted in 1979 and to this officer's knowledge there was no proof that the service of alcohol outside was permitted or performed?

Mr. Ryan: I don't recall that. I know you just handed it to me, so I don't know.

Mr. Fernicola: No. But I'm saying, did Sergeant Calabro ever make that statement?

Mr. Ryan: No.

Mr. Fernicola: He never made the statement to his knowledge?

Mr. Ryan: No.

Mr. Fernicola: The outdoor service of alcohol at the property was never permitted or performed?

Mr. Ryan: No.

Mr. Fernicola: What was the purpose of sitting down with the Mayor?

Mr. Ryan: When Jeff told me -- back at that note that you entered into evidence, he said that there was no service outside, I disputed that and said, look, every person I've spoken with that was involved with this place from the old days of Polly's to the old days of Andrews they all indicated there was an outside use constantly, bocce tournaments, horseshoe pits, tournaments, picnics, clam bakes, all kinds of activity out there. So when I asked Jeff who else I could speak with, he recommended that.

Mr. Fernicola: Did Jeff tell you that you could file an appeal of his determination?

Mr. Ryan: Well he said that in the letter.

Mr. Fernicola: Did he also tell you you could file a use variance application?

Mr. Ryan: If you're asking verbally, no, he didn't. He sent that note.

Mr. Fernicola: And, instead of doing those things, you chose to have a meeting with the municipal officials?

Mr. Ryan: Correct.

Board Member: At the direction of Mr. Brusco?

Mr. Ryan: Right. I asked him whom else I could speak with and, like I said, the whole notion behind what I was doing was that I knew that there was a pre-existing use, that I had all these people that were telling me all about what they used to do at the old Polly's Place back in the day, and I was going on the fact that that was enough for a nonconforming use.

Board Member: Understood. But he didn't tell you that the Mayor had the authority.

Mr. Ryan: I didn't question that. I really didn't know.

Mr. Fernicola: I'm going to show you what I've marked as O8, the resolution from 2005.

Board Member: Wasn't it marked already?

Mr. Fernicola: Was it marked? Was it marked? I didn't believe that it was marked earlier.

Board Member: Oh, the Board of the Adjustments.

Board Member: No. We didn't mark the resolution.

Board Member: No. You handed me a copy.

Board Member: No. This was the minutes.

Mr. Fernicola: Do you agree that you testified before the Board of Adjustment in 2005 when you sought to expand the apartment located at the subject property?

Mr. Ryan: Yes.

Mr. Fernicola: And did you receive a copy of the resolution after it was adopted by the Board of Adjustment?

Mr. Ryan: Yes.

Mr. Fernicola: Turn to Paragraph Number 7.

Mr. Ryan: Yes. I'm there now.

Mr. Fernicola: Okay. Does Paragraph Number 7 accurately reflect that you had testified that presently there were 50 chairs in the restaurant and 16 bar stools and that the facility is used primarily for private parties and that if the application were to be approved, not one seat or stool would be added for the establishment nor would the present use be expanded?

Mr. Ryan: Yes. That's what's there.

Mr. Fernicola: No. But, Michael, was that your testimony?

Mr. Ryan: Yes. Yes, it was.

Mr. Fernicola: That was your testimony before the Board of Adjustment?

Mr. Ryan: Yes.

Mr. Fernicola: And the 15 chairs in the restaurant were those chairs within the interior of the building?

Mr. Ryan: Yes. That's what this whole application was about and that's what I was talking about the building itself.

Mr. Fernicola: And the 16 bar stools were also located inside the building?

Mr. Ryan: Inside. Yes. That's what this was about. This was about the building.

Mr. Fernicola: And it says that not one seat or stool would be added to the establishment nor would the present use be expanded.

Mr. Ryan: That's correct.

Mr. Fernicola: And then when you obtained a copy of the resolution did you read it?

Mr. Ryan: Yes.

Mr. Fernicola: Were you present on the night that the board approved the application on July 6, 2005?

Mr. Ryan: I'm sure I was.

Mr. Fernicola: Do you recall if you were there?

Mr. Ryan: I don't recall, but I'm sure I was.

Mr. Fernicola: And Condition Number 3, if you turn to -- the page is not numbered.

Mr. Ryan: Yes. I got it.

Mr. Fernicola: The applicant would record an appropriate deed with the county recording officer setting forth restrictions as set forth on the record specifying the present extent of the nonconforming uses currently existing and providing for a periodic inspection by the Borough officials of both the interior and exterior of the premises.

Mr. Ryan: Yes.

Mr. Fernicola: So, were you aware in 2005 that the recording of a deed restriction was a condition of the approval.

Mr. Ryan: Clearly, I knew it. It was oversight on my part that it didn't happen until this year.

Mr. Fernicola: Okay. And it goes on to say the language of the said deed restrictions are to be approved by the board's attorney and the board prior to the filing and prior to the issuance of any building permits to be applied for in accordance with this resolution. Am I correct that no deed restrictions were recorded prior to you undertaking the construction work.

Mr. Ryan: Right. The permit was given and I started the construction.

Board Member: So, just to clarify, it still does not exist in the deed?

Mr. Ryan: It is in the deed now.

Board Member: It is in the deed?

Mr. Ryan: The deed has been redone this year. Again, it was my oversight. It was a stupid mistake on my part.

Board Member: And the deed reflects exactly what was in the resolution?

Mr. Ryan: It reflects all the indications that were asked me (Indiscernible) in terms of the applicant.

Mr. Fernicola: Well, that's not exactly accurate. The deed refers to a letter from a Mr. Bartell that had seven conditions in it and then it does also have some specific language and then it has some broad language, basically, referring to the resolution. If I were to show you the deed you would not see the restriction that he could not increase from 50 chairs to 51 chairs. You would not see that specificity. It's not going to be that specific.

Board Member: Was it referred to the resolution in the deed.

Mr. Rubin: The deed refers to the resolution; absolutely, and a letter from Mr. Bartell.

Board Member: June 14th.

Board Member: But his specific testimony as to the number of chairs, it is not in the deed.

Board Member: And it's being referred to the resolution that includes that.

Board Member: Well, again, my argument was that the resolution recites his testimony. There are several sections to this.

Board Member: But I don't even think he is denying that what he said he said and that's what he meant to put in the deed.

Board Member: Okay. Fair enough.

Mr. Ryan: No. I agree that the restriction on the chairs and the building were specific and I abide by that. It's still the same 50 chairs in the restaurant and 16 bar stools.

Mr. Fernicola: Let me show you what I'm going to mark as O9, the minutes from the March 2, 2005 meeting of the board of adjustment.

Board Member: There were meetings after that.

Board Member: Yeah.

Board Member: O9, is that?

Mr. Fernicola: Yes.

Mr. Fernicola: Do you see at the bottom of Page 2, it refers to your application, Mr. Ryan.

Mr. Ryan: I do.

Mr. Fernicola: 2005.

Mr. Ryan: Yes.

Mr. Fernicola: Let me direct your attention to the third line on the top of Page 3, beginning on the second line. The lower section of the structure will be left as is, which is a restaurant and bar and is used occasionally for our private parties and Mr. Ryan owns the liquor license.

Mr. Ryan: Yes.

Mr. Fernicola: Do the minutes reflect what was described to the board or testified to the board in March of 2005?

Mr. Ryan: I really don't recall. I don't know if this is my testimony or not.

Mr. Fernicola: The next paragraph, Attorney Bartell stated, "as far as the expansion of the commercial use and when the time comes, the applicant is going to make a representation that he will never add a stool or chair or in any way expand the use to the restaurant/bar area.

Mr. Ryan: Right. That's a repeat of what was on the last comment and, yes, I agree with that.

That's the restaurant, the building itself has not been expanded.

Mr. Fernicola: And the next paragraph, third line, Mr. Ryan said he has 50 seats in the restaurant and there's 16 stools around the bar.

Mr. Ryan: That's correct.

Mr. Fernicola: Did you give any testimony at any of the hearings in 2005 for your variance request describing any outdoor service of food or alcohol at the subject property?

Mr. Ryan: No. Again, I mentioned that earlier in my testimony that this was about the building.

Mr. Fernicola: My question is did you testify at all to this board in 2005 if you were serving food or alcohol outside of the premises?

Mr. Ryan: No.

Mr. Fernicola: You gave no testimony and it wasn't depicted on your variance plan, correct?

Mr. Ryan: Right. It wasn't supposed to be there. It was just about a building.

Board Member: If I can just ask just one quick question. When you got your approval in 2005, what were your hours of operation?

Mr. Ryan: At that time, it was mostly private parties and then we shifted into hours. We started with Thursday, Friday, and Saturday and we expanded it to Tuesday, Wednesday, Thursday, Friday, and Saturday.

Board Member: So when you expanded outside?

Mr. Ryan: No, inside.

Board Member: I thought you said you didn't expand inside?

Board Member: The hours.

Board Member: The hours you expanded?

Mr. Ryan: Yes.

Board Member: So when you first started as private parties in 2005 when you got your approval, you said pretty much as need, I guess, correct?

Mr. Ryan: Yes. People have booked wedding showers, baby showers, things like that.

Board Member: When and what did it go to after that?

Mr. Ryan: It went into being a restaurant and bar that was opened three days a week and then moved on to five days a week.

Board Member: When was that?

Mr. Ryan: I think four or five years ago it went into two, three days.

Board Member: Okay. And then when did it go to the five days?

Mr. Ryan: I think two, two and a half years ago.

Mr. Fernicola: When you provided the board in 2005 with your calculation of the onsite parking spaces that you were providing, did you include in those calculations any outdoor seating?

Mr. Ryan: Are you asking about parking?

Mr. Fernicola: Yes. I'm asking you about parking. Let's go back. 2005 as part of the application, how many onsite parking spaces were you proposing, Mr. Ryan?

Mr. Ryan: I really don't recall what was on the plan.

Mr. Fernicola: Well how many did you have back in 2005?

Mr. Ryan: Probably the same as what I have now, but I think it's about 30.

Mr. Fernicola: You have 30 parking spaces?

Mr. Ryan: I believe. I'm not positive.

Mr. Fernicola: Let me show you O10, which are the minutes from May 4. Specifically, let me direct your attention to Page 3 of the minutes from May 4, 2005. About half way down, Engineer Grenier said the 12 spaces that are on the site include the outdoor and the garage spaces and of those 12 spaces, 4 of them are taken up by the applicants of the two dwelling units. Therefore, it leaves 8 spaces as to be used for the restaurant, bar use, and the employees. Does that refresh your recollection as to the number of onsite parking spaces that you had in 2005?

Mr. Ryan: I don't know if that's accurate, so I'm not sure because the size of the parking lot hasn't changed.

Mr. Fernicola: The 2005 calculations of the number of parking spaces that were needed at the property include any outdoor seating?

Mr. Ryan: I'm not sure what the question is. The parking lot is the same size today as it was back then.

Mr. Fernicola: That's not my question. I'm saying when you came before the board 2005 and you provided them with the calculations of the number of parking spaces that were needed for this property, did you include any outdoor seating in your parking calculations?

Mr. Ryan: I really don't recall.

Mr. Fernicola: Let me show you O11, the minutes from June 1, 2005. Let me direct your attention to Page 3 of the June 1, 2005 resolution, the first paragraph. Do you see it halfway down? Attorney Bartell added that, right along with this application, the applicant wants the board to know whatever uses exist on the property now, they will remain the same. Even if Mr. Ryan sells the property he wants the board to know that whatever happens in the end the applicant wants to bind all future owners from using this property in any way other than what's existing today. Did the minutes accurately reflect the statement that was made by your attorney that I just read?

Mr. Ryan: I believe so.

Mr. Fernicola: So that statement is accurate?

Mr. Ryan: Yes.

Mr. Fernicola: And your current site plan depicts an outdoor bar, correct?

Mr. Ryan: That's correct.

Mr. Fernicola: With 16 seats?

Mr. Ryan: There are 8 seats around the bar.

Mr. Fernicola: Did you review the plan that was submitted?

Mr. Ryan: You're asking me about the bar. There are 8 seats around the bar.

Mr. Fernicola: It says outdoor bar area 16 seats.

Mr. Ryan: Well, the bar itself has got 8 and then there's some high top tables away from the bar.

Board Member: I counted 16 stools there today.

Mr. Ryan: But they're not all around the bar. There's the bar that has 8, and then there's high top tables around the area.

Board Member: But that would still be considered the bar area?

Mr. Ryan: Yeah. But the bar itself has the 8.

Mr. Fernicola: Just look at your site plan, "existing outdoor bar area with 16 stools." Is that correct?

Mr. Ryan: Right.

Mr. Fernicola: Okay. And that outdoor bar is it true that you constructed it in 2010?

Mr. Ryan: Thereabouts. I'm not sure when, but it was somewhere near there.

Mr. Fernicola: Do you agree that it certainly was after your 2005 approval?

Mr. Ryan: Yes.

Mr. Fernicola: That structure has a roof over it, a canopy?

Mr. Ryan: It has a car port.

Mr. Fernicola: Is it true that you did not obtain any construction permits prior to construction of that bar?

Mr. Ryan: I did not.

Mr. Fernicola: Now you also depict -- on your plan, you say it's an existing fire pit enclosure with seating.

Mr. Ryan: That's correct.

Mr. Fernicola: It's a structure, correct?

Mr. Ryan: Yes.

Mr. Fernicola: It's a small building?

Mr. Ryan: That was there before we had the 2005 m -- it was on the site plan in a different spot in the parking lot, same building.

Board Member: It's not on the site plan.

Board Member: It's not on the site plan for 2005.

Mr. Ryan: It's behind the front house. We relocated it.

Board Member: How many seats surround that, that part of it?

Mr. Ryan: There's a few folding chairs, like six or eight.

Board Member: There's eight inside and there's a bench or two out front.

Mr. Ryan: Right.

Board Member: So, 10.

Mr. Fernicola: Now on this plan, on the outdoor seating areas, it depicts or states 64 seats total, correct?

Mr. Ryan: Right.

Mr. Fernicola: Are there additional seating up higher to the rear of the property that exists there today that are not depicted on this site plan?

Mr. Ryan: There's a trail that goes to the back of the property and there's one fire pit up there with some chairs.

Mr. Fernicola: Okay. And those chairs are not depicted as part of the 64, correct?

Mr. Ryan: I'm not sure.

Mr. Fernicola: Well, look at the arrows and tell me do you know the number of the total outdoor seating? What I'm questioning is, is it true, sir, that the 64 is inaccurate that there are more than 64 outdoor seating in the rear of this property?

Mr. Ryan: I don't believe so.

Mr. Fernicola: But you're not certain?

Mr. Ryan: No.

Mr. Fernicola: Are there areas to the rear of the property on this site plan that does not depict any outdoor seating?

Mr. Ryan: Repeat that, I'm sorry.

Mr. Fernicola: Are there areas to the rear of the property that have outdoor seating that the seating is not depicted on this site plan?

Mr. Ryan: I believe they're all there.

Board Member: If I can just ask a question relative to that because I have some questions with that too. To the right of the smoking structure or whatever it's called, there's a stack of six plastic chairs.

Mr. Ryan: Right.

Board Member: There are two foldable picnic tables that are standing against the wall.

Mr. Ryan: Right.

Mr. Grygus: There are a couple benches on the site and there are three picnic tables that each holds six people. If I actually added everything up on the site today, I came up with like 74 seats.

Mr. Ryan: Well those folding picnic tables, I'm trying to find a place to donate them. They're up against the fence. I've had them up there for a year trying to find a place to get rid of them. And the stacking chairs are just old chairs that we use to use before I bought the nice ones that are there.

Mr. Grygus: And the various benches that are on there? There's a bench up towards the back area that can hold two people.

Mr. Ryan: Right. That was just to beautify the property to show a little seating area here and there, little niches around the property.

Mr. Fernicola: I'm sorry, Unknown Board Member, you said you counted 74. Was that the number, I didn't hear you.

Mr. Grygus: I actually came up with 74 counting everything that was stacked or currently set up.

Mr. Ryan: Well, like I said, the stacked chairs are retired and the picnic tables I'm waiting to get rid of them, the ones that are folded.

Board Member: In the fire pit area, are the eight chairs that are there included in the totals? It's not marked in the drawing, but there are eight seats in there?

Mr. Ryan: There are eight seats in there. Yes.

Board Member: And the bench in front.

Mr. Ryan: The intent of the design of the property was just to create various niches for people to sit in.

Board Member: Did you show us on your original site plan where that fire pit enclosure was on your site plan from 2005?

Mr. Ryan: I can show you where it was. Yes.

Board Member: I don't see it on your site plan.

Mr. Ryan: I remember it was part of the minutes that we talked about it. At the time it had a Jacuzzi in it, not a fire pit and it was behind the front house almost in between the two buildings.

Board Member: It's not on the 2005 plan.

Board Member: That's what I'm looking at.

Board Member: Yeah. It's not there.

Board Member: There's a spa shown on the rear of the front house.

Mr. Ryan: Right. That's the same building.

Board Member: That's no longer.

Board Member: No. It's not the same one. The one that we're talking about now is located in the back.

Mr. Ryan: Right. I moved it. It's the same building, I moved it.

Board Member: You moved it. So it wasn't where it was in 2005?

Mr. Ryan: Right. I relocated.

Board Member: The use wasn't the same.

Mr. Ryan: The use was a Jacuzzi.

Board Member: Correct.

Board Member: So the fire pit looks like it's on the site of the old garage foundation?

Board Member: It's in that area.

Mr. Rubin: Right. The old knocked down garage.

Board Member: But you had said the existing fire pit, so that is after this remodeled (Indiscernible)?

Mr. Ryan: Right.

Board Member: Let the record reflect that it's 10:10. You have 20 minutes, Mr. Fernicola.

Mr. Fernicola: Thank you. Now your plan depicts a total of 64 seats outside. Mr. Grygus calculated 74, plus 16 in the outdoor bar area. And then you testified there's another 8 inside the existing fire pit area, correct? So you have somewhere between 88 and 98 outdoor seating, correct?

Mr. Ryan: No. Like I said, all those stacked chairs are retired from use and the picnic tables that Bruce described are waiting to be donated.

Board Member: Well, if you look in his parking calculations, he said for the outdoor bar seating, it's one space per four seats equals 20 spaces. So if I do the math, 20 spaces times four that's 80 that your own engineer depicted, correct?

Mr. Ryan: Yes.

Board Member: But if we look at this then it's actually 88. There's 64 plus 16, plus 8, correct? So, were you ever granted any variance by this board or by planning board for parking requirements before you installed the outdoor seating?

Mr. Ryan: Well, there was outdoor seating there when I bought the place. I just renovated it and fixed it up.

Mr. Fernicola: Okay. But there weren't 88 to 98 outdoor seats when you bought it.

Mr. Ryan: I don't know what it was when it was actually fully functional in the 70's.

Mr. Fernicola: My point is when you were adding outdoor seating to the property, had you obtained a variance from either this board or the planning board from the parking requirements of the subject zoning ordinance?

Mr. Ryan: The parking was addressed in that 2005 variance.

Mr. Fernicola: And you're saying that in 2005, this board granted you a variance for outdoor seating?

Mr. Ryan: No. The parking was short in 2005.

Mr. Fernicola: But they granted you a variance from the parking requirement for the outdoor seating?

Mr. Ryan: They granted a variance for the parking requirements period.

Board Member: Wait a minute. Let's clarify for the record. There were two variance requests with the parking. Number one, in 2005, the designated space of a parking spot in Wanaque was 10 by 20. One of the reliefs was to go to 9 by 20, which helped him increase the parking by maybe two spaces. In the approved plan of 2005, you have 24 approved slots, that's it.

Board Member: Well, that was based on the interior number of chairs.

Board Member: Right.

Board Member: That was the variance we gave you.

Board Member: And I believe part of the mindset behind that was the testimony that it was limited use as needed for private functions.

Mr. Ryan: Right.

Board Member: And that's my point that he wasn't granted a parking variance.

Board Member: In 2005, that's what we dealt with. That's why we have 24 spaces. We dealt with the interior seating arrangement of the existing building.

Mr. Chairman: The fire pit, you put that in for the residential portion?

Mr. Ryan: Well, it is a mixed use property. Myself and my daughter and grandchildren live on the property, so we do use it as well.

Mr. Chairman: So the primary purpose was for the residential?

Mr. Ryan: Well, we enjoy it frequently, but it's one of those things where it does get used by the clientele as well.

Mr. Fericola: In any of your advertisements do you make reference of this smoke shed?

Mr. Ryan: No.

Mr. Fericola: In fact, is it your testimony that that building is not referred to as a smoke shed in either Facebook postings concerning your bar or other forms of internet advertising?

Mr. Ryan: I don't advertise it that way. No.

Mr. Fericola: Do you know if it's referenced on the internet?

Mr. Ryan: I don't track every Facebook post. I mean, if someone mentions it as a post from a consumer, I don't know that.

Mr. Fericola: Does the Tree Tavern have its own Facebook page?

Mr. Ryan: Yes.

Mr. Fericola: And does the Tree Tavern Facebook page make reference to a smoke shed?

Mr. Ryan: No.

Mr. Fericola: Does it make any reference to what's depicted on your plans as being a fire pit?

Mr. Ryan: No. It's got a picture of the whole outside that shows the chimneys out in the picnic grove.

Board Member: Mr. Ryan, question about the fire pit?

Mr. Ryan: Yes.

Board Member: What is the fuel source for the fire pit?

Mr. Ryan: We use sternal logs.

Board Member: Okay. When you built that outdoor bar did you get permits for the electric and plumbing?

Mr. Ryan: No. The plumbing and electric -- when we did the grass and everything in the back, we put in all the water and electric out there, but there was no additional permit besides when we first built the building.

Board Member: So it was never inspected?

Mr. Ryan: The outdoor electric was not inspected.

Board Member: It was never inspected. He never took out a permit.

Mr. Ryan: No.

Board Member: Is that true for the plumbing for the outdoor bar that was never inspected?

Mr. Ryan: The plumbing was for the sprinklers and we added a sink.

Board Member: The drainage of the sink, where does it go?

Mr. Ryan: Right back into the building into the same sewer line that the sinks in the house go to.

Board Member: So you've got an underground line from that bar sink back to that building?

Mr. Ryan: Correct.

Board Member: But none of it was done by permit?

Mr. Ryan: No.

Board Member: Have you filed for an after the fact Permit?

Mr. Ryan: I can. I have not as of yet. I didn't know there was an opportunity to do that?

Board Member: Is there any other exterior lighting in that picnic area?

Mr. Ryan: Yeah. There are lamp posts out there.

Board Member: And they were not permitted also?

Mr. Ryan: It was all part of the same project. Right.

Board Member: No. It wasn't part of the same project.

Mr. Ryan: Not the same, but I mean the --

Board Member: The expansion.

Mr. Ryan: Right.

Board Member: Is the lighting low bolt?

Mr. Ryan: Yes. It's all LED's.

Board Member: So it's 112?

Mr. Ryan: No. It's 110. It's not 12 volt. It's 110.

Board Member: Do you do any cooking outside?

Mr. Ryan: No.

Board Member: The big BBQ grill next to the smoke shack what is it there for?

Mr. Ryan: That's mine for my personal use.

Board Member: It's your personal BBQ.

Mr. Fernicola: Do you ever use it for patrons of the bar?

Mr. Ryan: No.

Mr. Fernicola: Is that depicted on the Facebook page as being used for patrons of the bar?

Mr. Ryan: No.

Board Member: Okay. The shed that you have next to your dwelling --

Mr. Ryan: Yes.

Board Member: -- was that ever done by permit?

Mr. Ryan: No. Honestly, I didn't understand a permit was needed for just a plastic shed.

Board Member: What's missing on this plan is everything you have on the eastside of the building; all the air conditioning units, the generator. In the event of a fire, and you've had one there in the basement recently, wouldn't that be an obstacle for public safety for the fire department to get in there with ladders to take people that are on the second floor?

Mr. Ryan: I'm not sure.

Board Member: It should be depicted on the plan.

Board Member: Were those put in as part of the renovation after the 2005 approval?

Mr. Ryan: Yes.

Board Member: I'm going to just backup to your one-family house. It appears you have children living there.

Mr. Ryan: I do. I have my grandchildren and my daughter and son-in-law there.

Board Member: Where's an active play area for them?

Mr. Ryan: I'm sorry?

Board Member: There are a lot of little bicycles and things there. Isn't that a hazard with the parking you have here?

Mr. Ryan: It has not been.

Board Member: Okay. You have no area for those children to play?

Mr. Ryan: They can play in the backyard and they also go to Addice Park all the time.

Board Member: Well, but there's all little plastic bicycles and things there.

Mr. Ryan: Right. They go around the neighborhood. My daughter brings them around to friend's houses.

Mr. Fernicola: Mr. Ryan, do you ever set up outdoor tents for your patrons for outdoor use?

Mr. Ryan: No.

Mr. Fernicola: No? Do you ever have anything called The Annual Pig Roast, a/k/a Swine and Wine (Indiscernible)?

Mr. Ryan: Yes. We use to. We haven't done it for a couple of years now.

Mr. Fernicola: And when you did the pig roast, did you have an outdoor tent?

Mr. Ryan: It was a 10 x 10 canopy. Yes. We brought in a company to do it. Yes.

Mr. Fernicola: Were you cooking the food outdoor for your pig roast?

Mr. Ryan: Right. The caterer was doing all of that.

Mr. Fernicola: I'm going to show you O12, and ask you do those two pictures accurately depict the outdoor portion of the premises?

Mr. Ryan: Yes, it does.

Mr. Fernicola: And is this one titled correctly, Second Annual Pig Roast, Swine and Wine?

Mr. Ryan: Yes.

Board Member: Is there dates on there?

Mr. Fernicola: That one is dated from September 10, 2011 and the top photograph is from September 6, 2016.

Mr. Ryan: '16 is not the pig roast. '16 is just a general picture of the backyard.

Mr. Fernicola: The pig roast is from 2011.

Mr. Ryan: Right.

Chairman: Let the record reflect it's 10:20. You have 10 minutes, Mr. Fernicola.

Mr. Fernicola: Thank you, Counsel. Thank you, Mr. Chairman, Counsel; I have no further questions for Mr. Ryan.

Board Member: I have a couple very quick things. Mr. Ryan, you've seen what the asbuilt site plan, which has been filed with this application and you see what the area is which you call the outdoor area in the rear of your property. Has this area been the same as, enlarged, different from what it was when you purchased the property?

Mr. Ryan: The footprint as I mentioned earlier is a little bit smaller than what was there, all the remnants of what was there when I first bought the place.

Board Member: So, is this generally the area that is shown where it says outdoor seating area; is that where all the outdoor activities were historically that you know about?

Mr. Ryan: That's correct.

Board Member: You can't testify what you don't know.

Mr. Ryan: Right. Well, I know the bocce pits and the horseshoe pits were there because I had to dig out all the concrete and stuff that was used to pour in those things.

Board Member: So they were in the seating area?

Mr. Ryan: Right.

Board Member: So the seating areas that you've had shown us today is the same size in the years that you have owned the property?

Mr. Ryan: Yes.

Board Member: Now that the site plan has been referred to, generally speaking, is the site plan the same as it is today. Is what has been depicted on the site plan what actually exists on the site?

Mr. Ryan: As mentioned by (Indiscernible) the shed that he was talking about a moment ago seems to be missing from the plan.

Board Member: And where is that just generally, on the side of the house?

Mr. Ryan: Right.

Board Member: As looking at it on the left side. And is that the only change that you can see that is not depicted on the site plan?

Mr. Ryan: Right.

Board Member: But your testimony is that from the days that you have owned it, there has been no increase?

Mr. Ryan: Not that I increased.

Board Member: Thank you. That's all the questions I would ask.

Board Member: I would ask just one quick question. When you constructed the outdoor area did you remove any trees?

Mr. Ryan: There were some shrubs. I didn't take any trees out. The big trees are the same ones that were there.

Board Member: As I look at your site plan from 2005, it designates that whole back area as wooded area.

Mr. Ryan: Yes. There was a double (Indiscernible) oak that had to come down because it was rotten, but that was the only thing that came out that was big.

Board Member: Anymore questions. Okay. Let's open up to the public. Does anyone of public have any questions of the testimony to date?

Board Member: We'll start with residents within 200 feet, questions for Mr. Ryan. And, again, it's 10:23. Questions only for Mr. Ryan on his testimony. Let's start with residents within 200 feet of the property. Hearing none, seeing none. Residents of Wanaque period, any questions for Mr. Ryan with respect to his testimony?

Ms. Assidio: Yeah. I have a question.

Board Member: Come on up. Please state your name and give us your address.

Ms. Assidio: Kathy Assidio.

Board Member: How do you spell that?

Ms. Assidio: A-S-S-I-D-I-O. I own 13 Park Street and I also own 7 Park Street. Okay.

Board Member: What's your question for Mr. Ryan, Ms. Assidio?

Ms. Assidio: My question is when he put the establishment, there was no kitchen area. Now he has a kitchen, an exhaust vent blowing smoke and garlic smell every night of the week. The exhaust fan is loud. I can't sit in my backyard without hearing this. Is he going to correct this problem or was he never supposed to put in a kitchen that could not accommodate this problem.

Mr. Ryan: The kitchen was there. There was an exhaust fan in the past. I was ordered by the town fire marshal to put a liquid ansul system instead of the powder one that was there. But the stove was there, the pizza oven was there, the refrigeration was there. It was all there. All I did was I fixed it up.

Ms. Assidio: But the smoke that's coming out of this --

Board Member: Let me just explain procedurally. There will be a period of time, a comment period. But for now, it's very narrow, it's very focused. It's questions regarding Mr. Ryan's testimony to date. So you have the one question.

Ms. Assidio: Okay. Another question is that he has the fire pits back there. His driveway is narrow. How is he, if there is a fire back there, going to get the fire trucks back there, plus the fact that the fire hydrant is by my house which is at least 75 feet away. How are they going to run the hoses to put out the fire in the back of the woods?

Board Member: Mr. Ryan, I don't know if you could respond to that.

Mr. Rubin: I have a civil engineer who's been sitting here all night to be a next witness, so that would be his testimony.

Board Member: So, procedurally, at some point in time, the board is going to have to decide whether this particular use existed prior to January 31, 1979. If the answer is no, well, then at some point in time, Mr. Rubin is going to come back with Mr. Ryan and a slew of experts to apply for a D2 variance. So that would be a very long procedure. If the board decides that in fact that type of use did exist before January 31, 1979 the case is over. So we've got a long way to go.

Ms. Assidio: Okay. I just want to put down that I've been living there ever since 1952.

Board Member: There will be a period for that.

Ms. Assidio: So I know exactly what has happened from 1952 to the present and what went on when it was Polly's and when it was Andy Hack's and everything.

Board Member: There'll be an opportunity for you.

Ms. Assidio: And we're going to address the problem if parking is on the street then we can't get fire trucks and we can't get emergency vehicles down the road because that was the big problem last year.

Board Member: That's a statement for later.

Board Member: You'll get a chance for that.

Ms. Assidio: Okay.

Board Member: So, questions for Mr. Ryan regarding his testimony. There'll be a large opportunity, a period of time for comments, but questions only for Mr. Ryan on his testimony. Hearing none, seeing none, the matter is adjourned.

Board Member: Close public portion for now.

Board Member: As far as the public is concerned, the next meeting will be November 2nd on this application. There will be no other notices given.

Board Member: Thank you for your patience. Mr. Rubin, Mr. Fernicola, a fine job. Take care. We have to conduct some business, so if you do have any conversations, respectfully, we'd ask that you take it outside.

(Matter adjourned)

Recess 10:31:11

Reconvened 10:38:03

Let the record show that everyone is present that was present before the recess, except for Member Don Ludwig.

PUBLIC DISCUSSION: Let the record show no one came forward.

RESOLUTION: Application #ZBA-2016-02 – New Cingular Wireless PCS (AT&T), Applicant, 4 Susquehanna Avenue, Haskell, NJ, Block 476, Lot 1.01, to construct a 165 foot monopole with cellular communications equipment mounted near the top.

MOTION TO MEMORALIZE THIS RESOLUTION AS PREPARED BY BOARD

ATTORNEY: made by Vice Chairman Grygus, seconded by Member Hain. Voting yes were Chairman Dunning, Vice Chairman Grygus, Members Hoffman, Levine, Henderson and Karp. Motion Carried

RESOLUTION: Application #ZBA-2016-04 – Catalini & Meleghis, Applicants, 136 Greenwood Avenue, Haskell, NJ, Block 460, Lots 14 & 15, to construct a new master bedroom and family room onto their existing house.

MOTION TO MEMORALIZE THIS RESOLUTION AS PREPARED BY BOARD

ATTORNEY: made by Vice Chairman Grygus, seconded by Member Hoffman. Voting yes were Chairman Dunning, Vice Chairman Grygus, Members Hain, Hoffman and Levine. Motion Carried

CORRESPONDENCE: None

VOUCHERS: submitted by Ronald Mondello, Esq. for preparation of the New Cingular/AT&T Resolution in the amount of \$1,125; for review of the MKR Enterprises, LLC Application in the amount of \$675; for preparation of the Catalini/Meleghis Resolution in the amount of \$450; and attendance at the September 7, 2016 Meeting in the amount of \$300.

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

VOUCHERS: submitted by Boswell Engineering on 1049 Ringwood Avenue, LLC Application in the amount of \$291 and \$1,164; on Catalini and Meleghis Application in the amount of \$291 and New Cingular/AT&T Application in the amount of \$97.

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

MOTION TO APPROVE JULY 6, 2016 MINUTES: made by Member Vice Chairman Grygus, seconded by Member Hain. Voting yes were Chairman Dunning, Vice Chairman Grygus, Members Hain, Hoffman, Levine, Henderson and Karp. Member Covelli abstained/not qualified.

ENGINEER'S REPORT: Nothing new to report

DISCUSSION: Vice Chairman Grygus stated he believed it was in the best interest of this Applicant, the Borough and the Board that we request that the Applicant obtain the services of a court stenographer for the duration of this application and that also includes the stenographer transcribing the audio testimony from tonight's meeting also. Attorney Mondello stated tonight's meeting could be problematic because if you take the tape and send it to a stenographer it will cost you a considerable amount more. Chairman Dunning stated future meetings.

Attorney Mondello stated he will contact Attorney Rubin and advise the Board.

CONSENT MOTION: made by Member Covelli, seconded by Vice Chairman Grygus. Motion carried by a unanimous voice vote.

MOTION TO ADJOURN AT 10:50PM: made by Vice Chairman Grygus. Motion carried by a voice vote.

Jennifer A. Fiorito
Board of Adjustment Secretary