

BOROUGH OF WANAQUE
BOARD OF ADJUSTMENT MEETING

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

_____X

DATE: March 1st 2017
TIME: 8:01 p.m.

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

LOCATION: WANAQUE MUNICIPAL BUILDING
579 Ringwood Avenue
Wanaque, New Jersey 07465

PURSUANT TO: The Rules of Civil Practice
and Procedure of the State
of New Jersey

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1 WANAQUE BOARD OF ADJUSTMENT THERE BEING PRESENT:
2 CHAIRMAN JACK DUNNING
3 VICE-CHAIRMAN BRUCE GRYGUS
4 MEMBER DON LUDWIG
5 MEMBER FRANK COVELLI
6 MEMBER PETER HOFFMAN
7 MEMBER MICHAEL LEVINE
8 MEMBER BARRY HAIN
9 MEMBER SUZANNE HENDERSON
10 RONALD P. MONDELLO, Esq., Board Attorney
11 CHRISTOPHER NASH, Board Engineer
12 JENNIFER FIORITO, Board Secretary

8
9 A P P E A R A N C E S

10 LAW OFFICES OF A. MICHAEL RUBIN
11 BY: A. MICHAEL RUBIN, ESQ.
12 1330 Hamburg Turnpike
13 Wayne, New Jersey 07470
14 Attorney for the Applicant, Tree Tavern Wine Bar

15 PAUL V. FERNICOLA & ASSOCIATES, LLC
16 BY: PAUL V. FERNICOLA, ESQ.
17 219 Broad Street
18 Red Bank, New Jersey 07701
19 Attorney for Mark and Lisa Bellante

20
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ADC 13:43-5.9 ***

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
LISA BELLANTE				
By Mr. Rubin:		5		
KATHY ASSIDIO				
By Mr. Rubin:	21			

E X H I B I T S

EXHIBIT NO.	DESCRIPTION	IDENT.
O-25	Ordinance from 1979	17
(Exhibit retained by counsel)		

1 (On Record at 8:01 p.m.)

2 CHAIRMAN DUNNING: Please rise for
3 the salute to our flag.

4 (Pledge of Allegiance)

5 CHAIRMAN DUNNING: Thank you.

6 This is the regular meeting of the
7 Wanaque Board of Adjustment. Adequate notice of
8 this meeting was posted in the Herald News on
9 January 11th, 2017. Notice thereof is posted on
10 the bulletin board in the municipal building and a
11 copy is filed with the borough clerk.

12 Roll call, please.

13 MS. FIORITO: Chairman Dunning?

14 CHAIRMAN DUNNING: Here.

15 MS. FIORITO: Vice-Chairman Grygus?

16 VICE-CHAIRMAN GRYGUS: Here.

17 MS. FIORITO: Member Covelli?

18 MR. COVELLI: Here.

19 MS. FIORITO: Member Hain?

20 MR. HAIN: Here.

21 MS. FIORITO: Member Hoffman?

22 MR. HOFFMAN: Here.

23 MS. FIORITO: Member Ludwig?

24 MR. LUDWIG: Here.

25 MS. FIORITO: Member Levine?

1 MR. LEVINE: Here.

2 MS. FIORITO: Member Henderson?

3 MS. HENDERSON: Here.

4 MS. FIORITO: Member Karp is absent.
5 Attorney Mondello?

6 MR. MONDELLO: Here.

7 MS. FIORITO: Engineer Nash?

8 MR. NASH: Here.

9 MR. MONDELLO: The continuation of
10 this application, if I'm not mistaken, Mr.
11 Fernicola, you are still putting on your case and
12 chief?

13 MR. FERNICOLA: Counsel was going to
14 start his cross-examination of Ms. Bellante.

15 MR. MONDELLO: Sorry. Thank you.

16 MR. FERNICOLA: Good evening, Paul
17 Fernicola on behalf of Mark and Lisa Bellante.

18 MR. MONDELLO: Welcome, Mr. Rubin.

19 Welcome, Mr. Fernicola.

20 Your witness, Mr. Rubin.

21 CROSS EXAMINATION BY MR. RUBIN:

22 Q. If we can start, and you were sworn
23 in last time and continue to be sworn in this
24 evening.

25 A. Okay.

1 Q. You know that?

2 A. Yes.

3 Q. I just want to ask you a few
4 questions about the site. The site, meaning the
5 Tree Tavern Restaurant, and what has been
6 happening there over the years.

7 You testified last time that you'd
8 been living on -- you gave the times, and we'll
9 get into that in a few minutes, but for all the
10 time that you have been living on the site or
11 watching the site, and when I talk about the site,
12 we're talking about the restaurant, the Tree
13 Tavern and all of the restaurants before that, the
14 Andrew's and Polly's and anyone else previously.
15 In all those years, did you ever see anyone
16 playing Bocce behind the restaurant?

17 A. No.

18 Q. And you know what Bocce is, you know
19 the court that's used, you never saw a Bocce
20 court?

21 A. No, I didn't.

22 Q. And your testimony here is, that
23 never existed?

24 A. Yes.

25 Q. And did you ever see picnic tables in

1 back of the restaurant?

2 A. No.

3 Q. And when we say back, you know what I
4 mean?

5 A. (Witness nods).

6 Q. From all the testimony that's been
7 going on, the wooded area in the rear or what used
8 to be the wooded area, today it's, as you know,
9 clear today.

10 A. Yes.

11 Q. And you never saw picnic tables?

12 A. No.

13 Q. And did you ever see lawn chairs back
14 there?

15 A. No.

16 Q. Did you ever see any folding chairs?

17 A. No.

18 Q. Did you ever see any small tables,
19 tables for twos or fours, that people could sit
20 there?

21 A. No.

22 Q. Did you ever see a shuffleboard
23 court?

24 A. Now there is.

25 Q. And when did the shuffleboard court

1 appear, to the best of your knowledge?

2 A. I don't know. Maybe 2013, maybe.

3 Q. And there was never any shuffleboard
4 court before that?

5 A. No.

6 Q. And you know that, you've seen it? I
7 mean, you saw what's been going on there?

8 A. Right.

9 Q. And during all the years that you've
10 lived next door, did you ever see any folks eating
11 in the back of the restaurant in that area?

12 A. No.

13 Q. Did you ever see anyone drinking in
14 that back area?

15 A. No.

16 Q. Did you ever see a beer truck back
17 there dispensing beer to people having picnics or
18 parties or whatever back there?

19 A. No.

20 Q. So that never happened from your
21 view?

22 A. Right.

23 Q. Is it possible that all these things
24 could have happened, but you weren't there at that
25 time?

1 MR. FERNICOLA: I object, calls for
2 speculation.

3 MR. MONDELLO: Go ahead, if you can
4 answer.

5 A. No.

6 Q. So it couldn't have happened?

7 A. Not in my lifetime, no.

8 Q. The last time you were here we talked
9 about when you were, in fact, living at the
10 property next door, and what was that address?

11 A. 19 Park Street.

12 Q. And there was also an apartment
13 attached?

14 A. 19-A.

15 Q. And you lived in both places?

16 A. Yes.

17 Q. At some point?

18 A. Yes.

19 Q. And you testified last time, if you
20 recall, that from an early age, you lived there to
21 a certain year. Do you recall what year that was?

22 A. I think 2000.

23 Q. And so you lived there continuously
24 from an early age to about 2000?

25 A. Yes.

1 Q. And did there come a period after
2 2000 that you lived somewhere else?

3 A. Yes.

4 Q. And how long ago was that? Or how
5 long did you live somewhere else?

6 A. It was about, maybe three years.

7 Q. So if I refresh your recollection as
8 to the minutes of the last meeting where you said
9 you came back in 2003 and lived in the
10 apartment --

11 A. Yes.

12 Q. -- does that sound about right?

13 A. Yes, um-hmm.

14 Q. And then after 2003, where did you
15 live?

16 A. I was still in Wanaque, but not on
17 Park Street.

18 Q. So you were living somewhere else?

19 A. Yes.

20 Q. And did there come a time when you
21 came back to Park Street?

22 A. Yes.

23 Q. When was that?

24 A. I think 2006.

25 Q. And from 2006 onward, were you there?

1 A. Yes.

2 Q. And from those times that you have
3 now testified, does that meet the testimony that
4 you originally gave as to what you saw regarding
5 the property next door?

6 A. Right. Yes.

7 Q. Now, do you recall starting a lawsuit
8 against the municipality, Borough of Wanaque, and
9 the Tree Tavern restaurant, last year or so,
10 regarding the same matter?

11 A. Yes.

12 Q. And do you recall having your
13 testimony taken by way of a deposition?

14 A. I do.

15 Q. And you recall being deposed by the
16 attorneys for both the town, for the borough, and
17 for the Tree Tavern restaurant?

18 A. Yes.

19 Q. They were all there?

20 A. Yep.

21 Q. And everyone asked you questions.
22 And when you were asked a question about 19 Park
23 Street, do you recall what your answer was in the
24 deposition?

25 A. No.

1 Q. Well, if I read the deposition --

2 MR. RUBIN: And I am reading,
3 Mr. Chairman, Members of the Board, from a
4 deposition taken on April 28th, 2016, of Lisa
5 Bellante.

6 Q. The question was, "You were away from
7 19 Park Street --

8 MR. FERNICOLA: I'm sorry, counsel,
9 can you give a page, please?

10 MR. RUBIN: 120.

11 MR. FERNICOLA: Thank you.

12 Q. "You were away from 19 Park Street
13 from 1999 through 2007. Correct?"

14 And your answer was, "Approximately,
15 yes."

16 The question was, "During that
17 timeframe, how often did you come back?"

18 The answer, "I never did."

19 Question, "So you didn't step foot in
20 Wanaque once during that timeframe?"

21 Answer, "I was in Wanaque, yes, but
22 not in the house."

23 Question, "Not in the house?"

24 Answer, "Or on the street, nope."

25 "In the vicinity?"

1 Answer, "No."

2 "During that timeframe, you would
3 have no knowledge of what actually happened during
4 that timeframe?"

5 Answer, "Right."

6 So tell us, Ms. Bellante, which
7 answer is correct, the one you gave at the
8 deposition or the one that you've answered before
9 this board?

10 MR. FERNICOLA: The question, as
11 phrased, is argumentative.

12 MR. MONDELLO: No. No. It's
13 overruled. That's a reasonable question, is your
14 memory better back then or is your memory better
15 now.

16 MR. FERNICOLA: Well, first of all,
17 just for the record, her testimony with the dates
18 were approximately, was the response she gave.

19 MR. MONDELLO: Yes, right.

20 MR. RUBIN: Whatever it is, the way
21 she gave it under oath.

22 MR. MONDELLO: If you could answer
23 the question.

24 MS. BELLANTE: Yes.

25 MR. MONDELLO: Yes, what?

1 MS. BELLANTE: So in 2003, my little
2 sister had graduated from college and she moved
3 back to New Jersey and needed a roommate. And we
4 lived in the apartment for about maybe seven
5 months and I just forgot that we were there, it
6 was such a short period of time.

7 BY MR. RUBIN:

8 Q. Well, were you actually in the house
9 or let us say -- strike that, in the house.

10 Were you away from Wanaque, as you
11 said in a deposition, from 1999 through 2007. Is
12 that the correct answer?

13 A. No, either '99 or 2000, that's when I
14 left Wanaque. I came back in 2003, and then I was
15 in Wanaque for maybe two years and then in
16 Ringwood.

17 Q. But you didn't testify to that in
18 your deposition. Answer?

19 A. I would have to see exactly what I
20 said.

21 Q. I just read it.

22 MR. MONDELLO: He just read it.

23 Q. I just read it.

24 "During that timeframe, how often did
25 you come back?"

1 Answer, "I never did."

2 So you're saying that, between 1999
3 and 2007, you never came back to the site in
4 Wanaque. You didn't go in the vicinity. You were
5 never on the street. You testified you weren't
6 there.

7 A. Yeah, just in 2003.

8 Q. So I am asking you, which is correct,
9 what you're saying today or what you said in your
10 deposition?

11 A. Today.

12 MR. FERNICOLA: Excuse me, it's asked
13 and answered. She gave a response. He asked the
14 question previously.

15 MR. RUBIN: Okay. Good enough.

16 Q. And in those times when you were
17 there, whatever those times may be, and it will be
18 up to board to decide which times you were there,
19 your answer to the deposition or your answer
20 today. But you're saying that, in those times you
21 were there, you never saw eating, drinking,
22 tables, recreational equipment?

23 A. No.

24 Q. Didn't happen?

25 A. No.

1 MR. RUBIN: Thank you. That's all I
2 would have. Thank you.

3 MR. MONDELLO: Any redirect?

4 MR. FERNICOLA: No.

5 MR. MONDELLO: All right, then. Next
6 witness, Mr. Fernicola.

7 MR. FERNICOLA: That concludes our
8 case.

9 MR. MONDELLO: All right. Fine job
10 by both attorneys.

11 All right. Let's open it up for
12 questions.

13 MR. FERNICOLA: You know, I did want
14 to mark one thing. I don't know if I need to mark
15 the ordinance. Do I need to mark the ordinance as
16 an exhibit, counsel?

17 MR. MONDELLO: Which ordinance are
18 you referring to?

19 MR. FERNICOLA: The 1979 ordinance.

20 MR. RUBIN: I think we stipulated to
21 that, didn't we?

22 MR. FERNICOLA: I just think, for the
23 record to be complete --

24 MR. MONDELLO: That's fine, whatever
25 you're comfortable with.

1 MR. RUBIN: Well, we do agree that
2 1979 was the cutoff date as to why we're here.

3 MR. MONDELLO: Fair enough.

4 Jennifer, do we know what we're up
5 to? I'm sorry.

6 MS. FIORITO: No, I do, I have it
7 all.

8 MR. MONDELLO: So we'll figure out
9 what that is.

10 In the meantime, I think, at this
11 point, Mr. Chairman, we open it up from comments
12 from the public, if that's okay with the board,
13 unless the board members have questions.

14 MR. FERNICOLA: Excuse me, counsel,
15 it would be 25. Thank you, counsel.

16 (O-25, Ordnance From 1979, marked for
17 identification)

18 VICE CHAIRMAN GRYGUS: Questions
19 first or comments?

20 MR. MONDELLO: I think -- well,
21 first, if there are any questions from the last
22 witness from the board members, why don't we deal
23 with that?

24 Hearing none, seeing none, why don't
25 we just open it up to questions and comments from

1 residents within 200 feet and then expand it.

2 VICE-CHAIRMAN GRYGUS: Actually, I
3 would just like to ask the last witness a
4 question.

5 MR. MONDELLO: Sure.

6 VICE-CHAIRMAN GRYGUS: I just want to
7 clarify that there's been, not conflict with
8 testimony, but testimony that, at one point in
9 time, there was a lease that was presented for the
10 adjacent property for Polly's or whoever, I don't
11 know who owned it at the time. There seemed be
12 some testimony that, at some point in time,
13 activities did take place there, which really is
14 not the area that was expanded last year or the
15 year before.

16 So when you testified that you didn't
17 see anything there, were you specifically saying
18 in the area directly behind Tree Tavern or also
19 the area which would be behind the adjacent
20 property, which at one time, was leased.

21 MS. BELLANTE: Either.

22 MR. MONDELLO: Any other questions
23 for this witness?

24 Hearing none, seeing none, you can
25 have a seat. Thank you.

1 CHAIRMAN DUNNING: Let's open it up
2 to the public.

3 MR. MONDELLO: I'm sorry, Mr.
4 Chairman.

5 CHAIRMAN DUNNING: Anyone in the
6 public have any questions on this application so
7 far?

8 Seeing and hearing none, we'll close
9 the public portion.

10 MR. RUBIN: Mr. Chairman, I think the
11 way --

12 MR. MONDELLO: I'm sorry. I'm sorry.

13 Mr. Chairman, I think what we need to
14 do is, are there any residents within 200 feet
15 that have questions or comments with respect to
16 this application?

17 Hearing none, seeing none, any
18 residents, period, that have any questions or
19 comments with respect to this application?

20 MS. ASSIDIO: I have a --

21 MR. MONDELLO: All right, come on up.
22 Just come on up to the microphone and please state
23 your name.

24 MS. ASSIDIO: Kathy Assidio.

25 MR. MONDELLO: And I'm guessing

1 you're going to have comments, so I'm going to
2 swear you in. Okay?

3 MS. ASSIDIO: Okay.

4 (Witness sworn)

5 MR. MONDELLO: Your name and address?

6 MS. ASSIDIO: Kathy Assidio,

7 A-s-s-i-d-i-o, 7 Park Street.

8 MR. MONDELLO: Your comment, for the
9 board?

10 MS. ASSIDIO: Okay. My comment for
11 the board is this, this has been going on for a
12 while and you have to realize that the residents
13 of the block is being affected. You have to
14 consider, if you allow this to happen, you are
15 allowing children not to be able to play in the
16 street because of the traffic. People are not
17 going to be able to take their walks because of
18 the traffic. You have to consider the residents
19 before you consider the business that you're
20 trying to make -- have this entertainment outside
21 go on.

22 Right now, with the few cars that are
23 back there, it's not inconveniencing the residents
24 at all. We need to consider, even if it's going
25 to affect one resident, this can't go on. This is

1 the only block in the whole town that is affected
2 by a bar being in this area. Okay, thank you.

3 MR. MONDELLO: Thank you.

4 MR. RUBIN: Could I ask a question?

5 MR. MONDELLO: Oh, I'm sorry,
6 Mr. Rubin.

7 DIRECT EXAMINATION BY MR. RUBIN:

8 Q. Is there a bar right next door to
9 this site called Berta's?

10 A. That is an upscale restaurant.

11 Q. But it has a bar, doesn't it?

12 A. It has four-and-a-half acres of
13 property, not three-and-a-quarter acres.

14 MR. MONDELLO: Ms. Assidio, is there
15 a bar, yes or no?

16 MS. ASSIDIO: There's a bar in the
17 establishment.

18 MR. MONDELLO: Okay.

19 MS. ASSIDIO: Is it used as a bar?
20 No. It's used as a restaurant, where Polly's or
21 the Tree Tavern is mostly a bar type of
22 atmosphere. What he wants to do in the back is
23 expand his bar area. He does not want to expand
24 the restaurant part of it, that's just going to be
25 a small portion of it.

1 Where you're dealing with Berta's,
2 you're dealing with a piece of property that's
3 four-and-a-half acres that is away from all the
4 residents and it's not impacting the residential
5 area at all.

6 MR. MONDELLO: Okay.

7 MS. ASSIDIO: Polly's, when it
8 existed years ago, what was back there? Ten
9 houses, five houses, now you don't have that.
10 You're putting condos back there. You have
11 traffic because of the condos. You have built
12 back there houses that are two-family houses.
13 This is what you're dealing with now. If he was
14 all by himself in a secluded area like Berta's,
15 that would be a different story and then we
16 probably wouldn't even be here. But you're
17 impacting -- this place is impacting the
18 residents. There are people that it's impacting
19 that aren't even out here, because they don't want
20 to get involved. Well, why? If it's bothering
21 even one or two people on the block, it should be
22 considered. You know, you have kids that like to
23 ride their bicycles on the street. It was nice
24 this summer, to see the kids outside playing on
25 their bikes, people walking the street. The year

1 before when we were having all the parking
2 problems back there and all the garbage of calling
3 the cops all the time, people weren't even able to
4 walk on the street. The kids couldn't even play
5 outside. It was just, it was impacting and
6 ruining -- I mean, we're paying taxes. The taxes
7 that you're getting from the residents back there
8 is a hell of a lot more than what you're getting
9 from that business back there.

10 MR. LEVINE: Doesn't Berta's have a
11 large, self-contained parking lot?

12 MS. ASSIDIO: Yes, and they have
13 four-and-a-half acres on a hill that you didn't
14 even know they exist back there.

15 BY MR. RUBIN:

16 Q. Ms. Assidio, would you agree, then,
17 that your answer that you gave the first go
18 around, that there are no other bars, was
19 incorrect?

20 A. I never considered Berta's a bar. I
21 consider Berta's a five-star restaurant.

22 Q. But they have a bar?

23 A. They have a bar, but how many people
24 go to the bar and sit there and just drink? You
25 tell me, because when you go to Berta's, you're

1 not going there to drink, you're going there for
2 their food or you're going there for their three,
3 four hour dinner that they are serving over there.

4 Q. When was the last time you were
5 there?

6 A. About two weeks ago.

7 Q. And you saw people at the bar or
8 didn't see people at the bar?

9 A. I didn't see people at the bar. When
10 they go in there, they actually sit at the table
11 and they are served. Are they served liquor up
12 there? Yes. Are they sitting at the bar, no,
13 because Peter doesn't even have a bartender
14 anymore up there.

15 Q. But you would agree that your answer
16 should be somewhat changed, that there is a bar
17 next door to the Tree Tavern restaurant?

18 A. Because you're trying to tell me
19 there's a bar there.

20 Q. There certainly is, I've seen it.

21 A. There's a bar inside the restaurant.
22 We're not taking a restaurant and turning it into
23 a bar.

24 MR. MONDELLO: Ms. Assidio, we get
25 it. Let's not get argumentative.

1 Any other questions, Mr. Rubin, for
2 Ms. Assidio?

3 MR. RUBIN: No, I think it's clear.

4 MR. MONDELLO: Any other residents
5 that have questions or comments?

6 Okay. Please raise your right hand.

7 MR. HOUCKES: I was sworn in. I
8 testified a couple months ago.

9 MR. MONDELLO: Okay. You remain
10 sworn. Please state your name and your address.

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

13 My thing that didn't sit in good with
14 me, I was here last month to listen to the Assidio
15 woman testify. I don't know if she's a relation
16 of hers, I would say that she is.

17 MR. MONDELLO: Ms. Assidio?

18 MR. HOUCKES: Right. But you guys
19 asked her, you heard the guys testify last time,
20 what do you think? She said, they were all liars.

21 MR. FERNICOLA: Well, I don't think
22 this is appropriate.

23 MR. MONDELLO: Overruled.

24 MR. HOUCKES: This bothers me a lot,
25 okay, because some of these guys are combat

1 veterans and they don't deserve that. I don't
2 care who it is, whether I meet you on the street
3 corner or what. Now, you know, you've got a
4 decision to make, you do what you've got to do.

5 MR. MONDELLO: Well, listen, we
6 appreciate the comment. The board listens very
7 carefully to each and every witness and it's up to
8 them to figure out who is credible and who is not
9 credible, but we appreciate your comments.

10 MR. HOUCKES: I understand that. I
11 wish that the woman was here tonight, because
12 that's the one I have to go to with it, because
13 she made the comment, okay.

14 MR. MONDELLO: Okay.

15 MR. HOUCKES: I just wanted to
16 straighten the record out.

17 MR. MONDELLO: Thank you.

18 Anyone else?

19 Hearing none, seeing none, we will
20 close the public portion of this application.

21 And this is your application,
22 Mr. Rubin. I have some speculation as to what
23 should occur, but I'll hear from you.

24 MR. RUBIN: I would think, if the
25 board agrees, of course, that perhaps I would make

1 some brief comments about what I think the
2 application is all about and Mr. Fernicola can, of
3 course, give his account and the board would then
4 deliberate and decide what it wants to do as the
5 first phase of this application, as to the
6 expansion of the preexisting use.

7 MR. MONDELLO: I agree
8 wholeheartedly. And after the summations from
9 both counsel, much like a judge would read a jury
10 some jury instructions, I have some legalese that
11 I would like to give to the board.

12 Who wants to go first?

13 MR. RUBIN: It's up to the board as
14 to how you want to handle it.

15 MR. MONDELLO: Well, it's your
16 application.

17 MR. RUBIN: I'm standing, I will go.
18 I will be brief, because you've sat through a lot
19 of hearings.

20 You heard a number of witnesses that
21 were brought out by the Tree Tavern restaurant and
22 Mike Ryan, and they were all fairly consistent.
23 They weren't prompted. They were here on their
24 own. They were asked to come, no question about
25 it, but they said what was in their minds, in

1 they're hearts and in their memories. And a
2 number of them, as the last gentleman did say,
3 they were here. They came to those premises after
4 their service was concluded, and I would say
5 nearly all of them were veterans at the time, and
6 then came back to Wanaque and used this place as
7 whatever, a meeting place, someplace to talk
8 about, I guess their experiences or whatever it
9 was. In any case, you had a string of them. You
10 didn't have one or two, you had a number of
11 witnesses who came who testified that there was
12 eating, drinking, that there was part of the Tree
13 Tavern restaurant, and some of them before there
14 was, the Polly's, whatever in the past, and they
15 were there for many, many years. One of them, I
16 recall, gave a date in the 1950s. I mean, that's
17 extraordinary that there were people around that
18 actually went to the same restaurant, in the same
19 area, in the same place, in the same municipally
20 and ate and drank and were here to testify. I
21 think that's an extraordinary thing. And they're
22 not related. They're not part of Mr. Ryan's
23 family. They came here on their own.

24 There are a couple of salient points
25 that I wanted to make, which came out over the

1 last number of weeks. For whatever reasons, and I
2 can't tell, because I can't get in people's heads,
3 all we know is the paper. But the mayor and
4 council of this municipality passed resolution,
5 and it wasn't one, it was several, as the record
6 will show, that allowed and talked about these
7 premises and talked about allowing food and drink
8 to continue and outdoor activities to continue at
9 these premises.

10 Now, Mr. Fernicola and the neighbors
11 will say, and they have said already, well, the
12 mayor and council isn't the board of adjustment,
13 and that's true. Boards of adjustment are the
14 ones that decide on inappropriate uses or use
15 variances and interpretation and such. But why
16 did the mayor and council, on several occasions,
17 pass resolutions saying that there was outdoor
18 eating and drinking and had some conditions on and
19 it whatnot, but they had no problem with it, and
20 they are the people that govern the municipality,
21 so they obviously know something. And what they
22 knew is the same thing that those string of
23 neighbors and friends and patrons said when they
24 were here, there was eating and drinking and
25 outdoor use of these premises for many years. And

1 the interesting thing is, several of them said,
2 and Mr. Ryan said, and they were all consistent,
3 that the premises are smaller today in the back
4 than they were in years gone by. So this isn't an
5 expansion, this is a smaller use of premises.

6 Then what happened in 2005, that's
7 really kind of interesting. 2005, Mike Ryan came
8 before this board, several of you were on the
9 board then, and asked for the one-family home to
10 be expanded. And for whatever reason, that the
11 zoning offer, Mr. Brusco, wanted it at that time,
12 this application had to come to this Board, so it
13 did. And there was testimony over several nights
14 that, regarding the expansion of the one-family
15 home where Mr. Ryan's family was living and still
16 does, and that happened in 2005. And what
17 happened also in those proceedings is that this
18 board of adjustment, and when I say, "this board,"
19 it may not be the same members, but the board of
20 adjustment said that there were some conditions
21 that they wanted attached to it, and one of the
22 conditions was a deed. And the deed has to be
23 prepared by counsel for the applicant and brought
24 here to this board; it had to be passed upon by
25 your counsel, counsel for the board of adjustment,

1 and approved by the board, that's the way I
2 understood the minutes. And it took a while. I
3 will agree that it wasn't something that happened
4 overnight, but eventually, there was a deed. The
5 deed was prepared by counsel for the applicant by
6 that time. It was approved by your counsel,
7 Mr. Mondello. And I assume the board approved it,
8 because that's what the minutes say.

9 But the question is, and the reason I
10 brought it up -- and the deed, by the way, is in
11 evidence in these proceedings -- is that the
12 board, for whatever reason, took it upon itself to
13 speak about the nonconforming use currently
14 existing on the premises and put in some
15 conditions that they thought were appropriate.

16 This board of adjustment,
17 constituting in 2015 and reaffirming several years
18 later, has affirmed already the existence of the
19 use, or the outdoor use of eating and drinking,
20 and the use of the outdoor area in this
21 application. This is already done, because this
22 is what the board agreed to back in '05. It was
23 done last year. I don't know why it took so long.
24 I wasn't attorney for the applicant at that time,
25 but the deed was done. The deed is in evidence.

1 And the deed speaks about the nonconforming use,
2 the outdoor eating and drinking, allowing it,
3 obviously, and putting some conditions on it as to
4 hours of operation, loud music, that you can't
5 disturb neighbors and such, and what to do.

6 So what I'm saying is, you had the
7 mayor and council, for several years, saying that
8 this is an appropriate use. And I know it may not
9 be binding, and counsel will say it probably is
10 correct that the use variance isn't an
11 interpretation of the sole providence of the board
12 of adjustment, but the mayor and council of this
13 municipality have approved of the outdoor eating
14 and drinking. And this board, in its resolution
15 in 2005 and in the deed, also approved it. So to
16 say today, and I don't know what the board is
17 going to say, but we're here arguing this
18 position. But in my opinion, the board has to be
19 consistent with what happened in 2005 and with the
20 deed that was executed and approved in 2016, which
21 allowed this use to continue.

22 I think those are the main points,
23 Mr. Chairman, that I wanted to make. You heard
24 hours and hours of testimony. But I think those
25 are the most important parts of the applicant's

1 position as to why the board should approve
2 allowing the continuation, as its did before, of
3 the outdoor eating and drinking within the rear of
4 the premises. Thank you.

5 MR. MONDELLO: Thank you, Mr. Rubin.

6 Any of the Board members have
7 questions for Mr. Rubin? I heard some rumbling up
8 here. Are we good?

9 MR. HOFFMAN: I don't remember, in
10 2005, if there was any mention of outside
11 consumption when we approved a nonconforming use.

12 MR. MONDELLO: Well, you'll have to
13 rely on your recollection.

14 CHAIRMAN DUNNING: Well, our
15 resolution says that.

16 MR. HOFFMAN: Did it mention outside
17 consumption?

18 CHAIRMAN DUNNING: If you look at our
19 resolution from 2005.

20 MR. FERNICOLA: I marked it into
21 evidence.

22 CHAIRMAN DUNNING: It doesn't mention
23 outside seating, outside serving of food and
24 beverages.

25 MR. RUBIN: I have the deed.

1 MR. HOFFMAN: I think the deed, the
2 deed was done as a cleanup act, I don't know why.
3 Why did it take eight years to --

4 MR. FERNICOLA: Eleven years.

5 VICE-CHAIRMAN GRYGUS: Nor did the
6 testimony or the site plan.

7 MR. COVELLI: One at a time. Be
8 mindful of the stenographer.

9 MR. RUBIN: I can't answer that
10 question. I wasn't around.

11 VICE-CHAIRMAN GRYGUS: And I can't
12 answer how that deed got changed from what was in
13 this resolution.

14 MR. RUBIN: Because I'm looking at
15 it. I have the deed in my hand and it speaks
16 specifically of the outdoor eating and drinking.

17 VICE-CHAIRMAN GRYGUS: That deed
18 includes things that the mayor and council
19 approved, not this board.

20 MR. HOFFMAN: Not this board.

21 MR. RUBIN: But it's in the deed that
22 the board approved, so that's the reason I bring
23 it up.

24 MR. MONDELLO: I'm sorry, Mr. Rubin,
25 if I may, the borough administrator reached out to

1 me and said, there is a deed that was supposed to
2 be filed and there are certain conditions, based
3 on minutes that this board approved, and
4 conditions, back in 2005. Would you please take a
5 look at this file and make sure that the attorney
6 for the applicant has put all of those conditions
7 into that deed? That was my sole function. This
8 board never saw that deed. They never approved
9 this deed, why would they? Some of them didn't
10 sit through that particular application.

11 So it was my sole function to make
12 sure that the applicant's attorney drafted a deed
13 that reflected what was in the minutes, as far as
14 conditions, and they actually missed one. There
15 was a reference to a Mr. Bartel's letter that I
16 made sure got included in the deed.

17 MR. RUBIN: And that's what I have
18 been looking at that's in my hand, the deed which
19 speak of exactly what you're saying, the mayor and
20 council's resolution, because apparently it
21 reflected what the mayor and council said.

22 CHAIRMAN DUNNING: What's the date of
23 the mayor and council's resolution in regard to
24 our approval in 2005?

25 MR. RUBIN: That's in evidence also.

1 I don't have it right here, but I know it's in
2 evidence in these proceedings.

3 MR. LEVINE: This is a written
4 resolution signed by the mayor and the council?

5 MR. RUBIN: Yes, sir, I saw it in the
6 list.

7 MR. LEVINE: Okay.

8 MR. MONDELLO: It is.

9 MR. FERNICOLA: We produced it.

10 MR. RUBIN: So that's our position.
11 I think these are important facts for the board to
12 consider as to this portion of the case. Thank
13 you.

14 MR. MONDELLO: Mr. Fernicola.

15 MR. FERNICOLA: Thank you, counselor.

16 Mr. Chairman, members of the board,
17 before I actually go into the statements I want to
18 make, let me address some of the comments from Mr.
19 Rubin I feel compelled to address with the court.

20 I'm astonished that he is here
21 tonight arguing for you to rely upon anything that
22 the mayor and council did. The fact of the matter
23 is, the reason that this outdoor service was shut
24 down by the Superior Court of New Jersey, was
25 because they made a specific determination as a

1 matter of law that only this board can grant a use
2 variance, and that the resolutions that were
3 adopted by your mayor and council, beginning in
4 2010, and then the expansion of the outdoor
5 service, thus deleting the condition that Sergeant
6 Calabro had put on it. That's why the court
7 granted the injunction, they found it was improper
8 and shut it down, that only this board could have
9 granted the use variance.

10 So for the applicant to rely -- if
11 that's a basis for this board to -- you already
12 have a determination by the top judge in Passaic
13 County, the assignment judge who rendered an order
14 granting injunction that the mayor and council
15 acted improperly. And one of the resolutions that
16 we presented to him, we presented the audio from
17 the meeting, there was no discussion of the
18 resolution. There was no approval that's on the
19 audio tape. And then there was a resolution that
20 was approved when no vote had been taken. And as
21 you know, without any discussion that the audio
22 tape revealed. Then subsequently, there's a
23 resolution, supposedly, that something was done on
24 that meeting, when it wasn't done, because it
25 wasn't on the audio tape. They had no vote on

1 expanding conditions of this outdoor service,
2 that's another factor. But let me get into my
3 remarks.

4 You have an application here tonight
5 that is for a interpretation that there is a
6 nonconforming use of this property, specifically
7 outdoor service of food and liquor, that's the
8 application. That applicant has asked you to give
9 an interpretation that that is a preexisting use.
10 And I think council for the board will agree and
11 instruct you, when we talk about a preexisting
12 use, the foundation of that is that it was that
13 the use, in this case, the outdoor service of food
14 and alcohol existed prior to the adoption of the
15 zoning ordinance. Well, there is a fundamental
16 flaw in this application that requires, as a
17 matter of law, the application to be denied.

18 The ordinance that I marked at the
19 end, ordinance 25, now, when it goes back to
20 shortly after Labor Day, the initial comments in
21 the opening statement is that the applicant's
22 attorney said, 1979, that is the magic year when
23 the zoning ordinance was adopted at this property.
24 And he goes on, and the minutes reflect, I'm
25 referring to, that the issue was whether or not --

1 we all know that a restaurant does, whether it
2 existed in the same size and shape and quality
3 prior to 1979. Well, the fact of the matter is,
4 the fundamental mistake that requires the denial
5 of this application, in and of itself, is that the
6 R-15 zoning district was not adopted in 1979 for
7 this property. It was a fundamental error that
8 there was the applicant's belief that the subject
9 property was zoned residential use in 1979, that's
10 why they dictated all their testimony and their
11 argument. The fact of the matter, when you look
12 at the ordinance, that that ordinance, specifically
13 in 1979, was a modification of the existing
14 ordinance that the R-15 zoning designation for this
15 property, it goes back decades earlier. There's a
16 1964 master plan that makes reference. So you
17 don't have adequate proofs, as a matter of law,
18 that this application, for this reason alone: The
19 applicant has the burden of proof. The key,
20 again, that they mistakenly argued, was that the
21 key date was 1979, believing that the property was
22 zoned residential in 1979, in light of the Exhibit
23 25, that the zoning predated 1979.

24 I'm always reluctant to use this
25 word, but respectfully, this board is required to

1 deny this application tonight, because the whole
2 foundation of this application was that the
3 property had become a residential zone in 1979,
4 and that is not the case; and that, in and of
5 itself, requires the denial of the application.
6 However, let me address the substantive evidence
7 of why this application should also be denied.

8 First and foremost, my perception is
9 that some of the members were here in 2005. So
10 the first argument that we have is commonly
11 referred to judicial estoppel. Judicial estoppel
12 simply means, when you take a position in a legal
13 proceeding, you are not permitted to then take an
14 opposite position in any subsequent legal
15 proceeding. And this board, this constitutes a
16 legal proceeding, that's why witnesses are sworn
17 and transcripts are made. In 2005 -- now, let's
18 backtrack.

19 We know in 2002, before he bought the
20 property, the zoning officer already told him that
21 the outdoor service of food and alcohol and was
22 not permitted, that was a specific question
23 Mr. Ryan had before he bought the property, he
24 elects to buy the property knowing that from your
25 zoning officer. 2005, he's going through the

1 divorce, he wants to expand the residential use of
2 the property. He made certain representations
3 that were incorporated in the resolution of
4 approval, specifically concerning the use of the
5 property. Some of the board members reflected his
6 site plan. The 01 site plan from 2005 makes no
7 reference to any outdoor service of food and
8 alcohol, no tables, no outdoor bars, no chairs, et
9 cetera. That's evidence in and of itself, but
10 more importantly or equally are the
11 representations. The resolution itself is that
12 the applicant testified there's presently 15
13 chairs in the restaurant and 16 stools. It's used
14 for private parties. Not one seat or stool will
15 be added to this establishment nor would the
16 present use be expanded. Now, the minutes also
17 reflect that he made those comments. Your minutes
18 from June 1st of 2005, he specifically said to
19 this board, "I want the board to know whatever
20 uses exist on the property now will remain."

21 Whatever happens, the applicant wants
22 to bind all future owners from using this property
23 in any way other than what's existing today.

24 Earlier, in the meetings before he
25 had specifically said, quote, "We will never add a

1 stool or a chair or in any way expand the use of
2 the restaurant bar area."

3 Now, he needed a parking variance.
4 And it would have been critical, in that
5 application in 2005, that had there been outdoor
6 service of food and alcohol, but that would have
7 had to have been incorporated into the parking
8 calculations. They were extremely deficient for
9 the parking application, that now if you add that
10 there's outdoor service and additional seating
11 beyond the 15 and 16, it would have increased the
12 nonconformity and the need for additional parking.
13 So the fact he comes before this board in 2005 and
14 represents, I have 15 chairs and 16 stools and I'm
15 never going to expand beyond that and no future
16 owner is going to be able to expand beyond that
17 and there's no indication of outdoor food and
18 alcohol, he's bound by that. You can't testify
19 under oath and then come back in another
20 application and take a different position. So
21 based on that principle of judicial estoppel, he
22 should be barred upon it.

23 Now, let's get into, if I may, now
24 the area of what's the criteria of the standard to
25 establish a preexisting, nonconforming use. Well,

1 when I did the research, and I was looking at my
2 notes, there was a term that Ms. Henderson used in
3 one of her questions of the witnesses, that she
4 asked the witness, one of the witnesses, was this
5 outdoor use. You used the word sporadic. Well,
6 ironically, the New Jersey courts, in addressing
7 this issue of law of the preexisting,
8 nonconforming use, also used the word sporadic.

9 MR. COVELLI: She knew that.

10 MR. FERNICOLA: She's a better lawyer
11 than I am, because I didn't know. And it makes
12 common sense that a sporadic, noncontinuing use is
13 not protected as a preexisting, nonconforming use,
14 that this use that you want this protection of
15 grandfathering, it can't be, the courts have said,
16 it can't be intermittent, it can't be indefinite
17 and it can't be precise. What you have here is
18 clearly imprecise testimony.

19 The other interesting case that we
20 found on this issue, believe it or not, is that in
21 1971 that the New Jersey Supreme Court in a case,
22 Donadio v. Cunningham, 58 N.J. 309(N.J. 1979),
23 the issue was McDonald's. And in footnote number
24 7, what the Supreme Court had questioned is
25 whether the consumption of food and beverages on a

1 restaurant parking lot is not a land use, as we
2 use the word, and is not entitled to the
3 protection of a nonconforming use. Well, that's
4 what you have here, at best, their testimony that
5 they rely upon that there was a Ballantine beer
6 truck that occasionally came to the property. And
7 putting aside -- let's take off our lawyer hats
8 and just use a little common sense. Think about
9 it, the Republican organization had a picnic,
10 let's say from 12:00 to 4:00 that day, and you're
11 the neighbor next door and you go out with your
12 spouse to run errands at 10:00 in the morning and
13 you come back at 5:00 at night. You would have no
14 idea, no knowledge, that there had been a beer
15 truck on that property, and that's why it's not a
16 land use of the property. When you build a
17 permanent structure, that's different. That puts
18 you on the -- it's not intermediate. It's not
19 that you went out with your wife or husband to run
20 some errands and you come back several hours later
21 and the truck is not there, that is why the use of
22 a beer truck does not vest you with any rights.
23 One of witnesses there was, "Was there chairs?"
24 "Yes, we used to bring folding
25 chairs."

1 Again, that is a sporadic,
2 intermediate use that doesn't give you the vested
3 rights of being grandfathered and to have those
4 protections going forward.

5 Another vital factor in this case
6 that many of the witnesses, they testified, the
7 functions that they came here were for, I believe
8 it was political organization. I believe they
9 indicated the Republican Party or the Republican
10 club. Well, any of the functions -- so we don't
11 know, did the Republican Club bring the alcohol or
12 the food or was it catering? But more
13 importantly, a political organization is a
14 nonprofit organization and the land use law
15 creates distinctions between nonprofits and
16 charitable organization versus a commercial use.
17 In order to get the benefits for the outdoor
18 service of food and alcohol at this property as a
19 preexisting, nonconforming use, you would have to
20 show that it was a commercial use.

21 So what I am saying to you, you as a
22 board, because a political organization's use of
23 the property as a nonprofit organization, you
24 cannot rely upon as evidence as a preexisting
25 nonconforming use, because it doesn't represent a

1 commercial use of the property. It's no more
2 different than if I host and have my child's
3 wedding reception in my backyard, that now I can
4 say, I can have catering events in my backyard,
5 because I had my child's wedding.

6 The other issue too that's
7 incorporated in this argument about a nonprofit,
8 but particularly a political organization, when
9 you have a political organization and people who
10 are assembling because of their common political
11 views, you incorporate and address First Amendment
12 rights, the fundamental rights that this country
13 was founded upon, number one. So in order words,
14 if the Republican Party wanted to meet in
15 someone's private home and they were going to
16 charge \$50 a ticket to raise for a candidate, you
17 couldn't stop them and say, look, that's a
18 residential zone. We're not going to allow you to
19 meet. Why? Because the First Amendment
20 guarantees you the right to assemble, particularly
21 for political purposes.

22 And number two, you would be
23 infringing upon their First Amendment right also
24 of freedom of speech. So that is why a political
25 organization, particularly being a nonprofit, but

1 because of those First Amendment issues of the
2 right to assemble and right to speak is not any of
3 the evidence that can be relied upon to accomplish
4 a nonconforming use.

5 So what you have here is that, you
6 have testimony that has been countered by people
7 who have lived here for years and years saying
8 that the property was not used in this fashion.
9 Clearly, the photographs from Facebook and other
10 evidence, and their there's been an
11 acknowledgement, you know, I almost felt like I
12 was wasting the board's time showing about this
13 bar, when this outdoor was physically constructed.
14 Well, we saw the pictures from May. You saw it
15 didn't have a roof on it at the time. You saw
16 then their statement that the grand opening, the
17 first weekend, so you know there's an expansion,
18 that's clear. But the central issue is that
19 there's no competent evidence before this board to
20 conclude that there's a preexisting, nonconforming
21 use. Getting back to my first argument, because
22 you don't even know the year that the property was
23 zoned for a residential use, and that's the
24 trigger that everything else on the application
25 rests upon.

1 Now, you know, I'll just make some
2 points in conclusion. You have a tremendous
3 amount of evidence in this case. You have your
4 own zoning officer told you in 2002, in 2010
5 again, both times, that there was not a
6 preexisting, nonconforming use. That's his job.
7 That's role of the zoning officer, okay, and he
8 made those determinations.

9 You have your alcohol beverage
10 officer, who was Sergeant Calabro, who wrote that
11 memorandum that you saw to his chief of police.
12 And you can imagine a sergeant writing to his
13 chief and saying, look, they're saying it's
14 preexisting, there's never been evidence, in all
15 the years I've been here, and he documented it.
16 Why would a police officer take the time to
17 document it? And he was the one who imposed the
18 condition, because he knew what was happening
19 there was not appropriate. And he put his name on
20 the line by writing a memo and putting in the
21 file, which we got in the litigation, documenting
22 it. So who are you going to believe? Are you
23 going to believe your zoning officer? Are you
24 going to believe the sergeant of your police
25 department? You don't have competent evidence to

1 say that there was a preexisting, nonconforming
2 use.

3 And again, it is the applicant's
4 burden. This is their responsibility, their
5 burden of proof, because nonconforming uses are
6 frowned upon. A restaurant/bar in a residential
7 zone is frowned upon, because of the fact that it
8 is not a permitted use. And based upon -- you
9 have the documentary evidence that, you know, the
10 Bocce was on what is now the Bellante's property,
11 it was never there. You don't have a continuous
12 use to put people on notice.

13 We respectfully request that you deny
14 the request for an interpretation that outdoor
15 service of food and alcohol was a preexisting,
16 nonconforming use at the Ryan property.

17 Thank you very much.

18 MR. MONDELLO: Thank you, Mr.

19 Fernicola. Fine job.

20 Any questions for Mr. Fernicola?

21 MR. LUDWIG: The survey that he had,
22 do we have that in evidence?

23 MR. MONDELLO: The 2005?

24 CHAIRMAN DUNNING: Yes, I have it.

25 MR. LUDWIG: Can I take a look at it?

1 MR. MONDELLO: Any other questions?
2 There you go. That's fine. Thank you, Mr.
3 Fernicola.

4 MR. LUDWIG: I just recall one of the
5 plans had preexisting, you know, base and
6 foundation or something or other noted on it.

7 MR. MONDELLO: Okay. Any other
8 questions for Mr. Fernicola?

9 MR. RUBIN: Mr. Chairman, is it
10 possible for me to say one thing?

11 MR. MONDELLO: Of course. And then
12 if Mr. Fernicola wants to say one thing and then
13 we're going to close it.

14 MR. RUBIN: Yes, I got it.

15 The year, 1979, we did not take the
16 year out of thin air and bring it to this board.
17 We were given that year by the municipality. That
18 was the year that the zoning officer and the town
19 and the borough attorney gave us that that is the
20 year that we should start with. We did not pull
21 it out of the air, we were give that by the
22 municipality, the only point that I wanted to
23 make, rather than going into each item. But I
24 think that's important, because we started -- and
25 the first hearing, as to 1979, and we've been

1 going right through it, but I just wanted to board
2 to know where it came from.

3 MR. MONDELLO: In fact, my records,
4 when I was researching the deed, is that ordinance
5 in Wanaque, period, was adopted, June 9th, 1954,
6 it was amended in its entirety on December 29th.
7 I guess they had nothing to do around the
8 holidays. 1976, and then this particular code was
9 adopted, January 31st, 1979. So in any event, I
10 think we're safe with '79.

11 MR. FERNICOLA: Well, I will limit
12 that, because respectfully, I disagree. We have
13 the ordinance that has been marked and the
14 ordinance itself is entitled, Ordinance 1-77-79,
15 "An ordinance providing for the adoption,
16 revision, amendment and modification to existing
17 Chapter 114."

18 This is on the second page, if you
19 need a copy, counsel.

20 So the ordinance itself to existing
21 Chapter 114 known as the zoning ordinance of the
22 Borough of Wanaque and the Code of Wanaque. And
23 it goes on to say what they were adding and what
24 the significant -- the significant and main
25 objectives of this ordinance are as follows: One,

1 the establishment of provisions for cluster
2 single-family detached residential development and
3 specified zoning directs.

4 Two, establishment of a water
5 resource conservation district, both within the
6 text and on the zoning map for certain publicly
7 owned lands within the borough.

8 Three, establishment of a senior
9 citizen multifamily residential development
10 regulation as a conditional permitted use.

11 Four, establishment of a floodplain
12 ordinance.

13 And five, modification and updating
14 the application fee requirements.

15 And what you can see, when you review
16 it, is that the changes, you can see the
17 difference in font, that's pre-computers, that
18 someone typed on the existing ordinance. And
19 specifically that the R-15 zone, and that it was
20 limited to single-family uses is contained in this
21 ordinance.

22 So respectfully, counsel --

23 MR. MONDELLO: Well, what year and
24 what date is the R-15 change?

25 MR. FERNICOLA: That's my point. My

1 point is, that in coming before you and making
2 this application, the applicant mistakenly
3 believed that the property was adopted as a
4 residential zone, specifically R-15, in 1979. And
5 that is erroneous that, as you said, I guess the
6 original one was 1954.

7 MR. MONDELLO: Right.

8 MR. FERNICOLA: So that's the
9 problem, is that they mistakenly believed that the
10 property became a residential zone in 1979, and
11 that's not the case. And that's why, in and of
12 itself, it requires the denial of this
13 application.

14 MR. MONDELLO: Fine.

15 Any other questions for
16 Mr. Fernicola?

17 Hearing none, seeing none, now it's
18 my turn. And that's it, the application is
19 closed. I don't want any comments from either
20 attorney. You can make them to the judge.

21 All right, so this is basically what
22 the board must now start to think about and
23 deliberate. And the first question is: Did the
24 serving of food and drink outside occur prior to
25 the enactment of the zoning code prohibiting such

1 activities? And from my research and from what
2 the applicant was relying upon, I've got a date of
3 January 31st, 1979. The entire code was created
4 in '54, so if you found that there was drinking
5 before '54, I think the issue as to what year is
6 irrelevant.

7 So let's focus on the law, and I want
8 this read into the record, and please let me know
9 if I'm speaking too rapidly.

10 "When a municipality adopts a zoning
11 ordinance, inevitably, there will be uses which are
12 newly prohibited and structures which do not
13 conform with the bulk requirements."

14 These are known as nonconforming use
15 and structures, respectfully. As in this case,
16 the serving of food and beverages outside is a
17 nonconforming use.

18 Under the municipal land use law, a
19 nonconforming use is deemed to have acquired a
20 vested right to continue in such form, despite the
21 zoning provisions.

22 And N.J.S.A 40:55D-68 provides, "Any
23 nonconforming use or structure existing at the
24 time of the passage of an ordinance may be
25 continued upon the lot or in the structure so

1 occupied, and any such structure may be restored
2 or repaired in the event of partial destruction
3 thereof."

4 So the board must weigh the evidence,
5 determine who is credible, and make a finding as
6 to whether or not the serving of food and drink
7 outside occurred prior to the enactment of the
8 zoning code prohibiting such activities, that is
9 your first question that the board must determine.

10 So that I may continue with the
11 analysis, and I don't vote and I don't decide, but
12 I'm going to assume, for purposes of continuing,
13 that the board finds that the use was preexisting.
14 So next, the board must determine whether or not
15 this use, the serving of food and drink outside,
16 was abandoned.

17 The issue of whether a nonconforming
18 use has been abandoned cannot arise until the
19 burden of establishing the existence of a valid
20 nonconforming use has been met, and I cite to
21 *Ferraro v. Zoning Board of Keansburg*, 321 N.J.
22 Super. 288 (N.J. Super. App. Div. 1999)

23 See also *McDowell, Inc. vs. Board of*
24 *Adjustment*, 334 N.J. Super 201 (N.J. Super. App.
25 Div. 2000)

1 "Thus, the applicant must first prove
2 the structure was lawful at the time of the
3 creation of the zoning ordinance, and then must
4 show that the use has not been abandoned during
5 the period in which it was a prior nonconforming
6 use.

7 After an applicant establishes the
8 existence of a valid, prior nonconforming use, he
9 then also has the ultimate burden with respect to
10 the issue of abandonment."

11 And I cite to Berkeley Square vs.
12 Trenton Zoning Board of Adjustment 410 N.J. Super,
13 255 at 269, Appellate Division, 2009.

14 "Nonconforming use status may be
15 terminated as a result of abandonment. However,
16 mere nonuse of the nonconforming right does not
17 constitute abandonment."

18 The courts in New Jersey have, until
19 recently, uniformly espoused the traditional view
20 that abandonment of a nonconforming use requires
21 the concurrence of two factors: Some overt act or
22 some failure to act which carries a sufficient
23 implication that the owner neither claims nor
24 retains any interest in the subject matter of the
25 abandonment. And number two -- you need all of

1 this -- an intention to abandon, that's the second
2 question that the board has to determine.

3 The final question, and again,
4 assuming that the board has determined that the
5 use was preexisting and not abandoned, the final
6 inquiry for the board to answer is as follows:
7 Was there an illegal expansion of that
8 nonconforming use from what it was at the time you
9 heard testimony of versus -- sorry -- from what it
10 was at the time of the adoption of the ordinance.

11 So in other words, what was it like
12 back then in '79 versus what it is like now. A
13 prior nonconforming use is ordinarily restricted
14 to its character and scope at the time the
15 ordinance, making it a nonconforming use, was
16 enacted.

17 The issue is whether the present use
18 the substantially similar to the use which existed
19 at the time of the adoption of the zoning ordinance
20 or whether that has been an illegal extension of
21 the use.

22 If the present use is substantially
23 similar to the use at time it became
24 nonconforming, it will be permitted to continue.
25 And I cite to Arkam Machinery and Tool Company vs.

1 Lyndhurst Township, at 73 N.J. Super. 528 at 532,
2 Appellate Division, 1962.

3 "On the other hand, if there has been
4 an illegal extension of use, a variance must be
5 obtained."

6 I cite to Weber vs. Pieretti at 77 --
7 I'm sorry, that's spelled P-i-e-r-e-t-t-i, 77 N.J.
8 Super, at 423 Appellate Division, 1962.

9 I just want to read one section of
10 cases that I did send to the board, and this is
11 the Court discussing one of the cases that I sent
12 to you.

13 "Furthermore, there has been an
14 intensification of the nonconformity since
15 Bonaventure assumed ownership of the restaurant.
16 Prior to 1992, the restaurant was not used for
17 banquets or other catered affairs. The music
18 offered at the restaurant changed from a
19 background pianist to prerecorded or live dance
20 music. The restaurant hours were extended to
21 include breakfast, including service club
22 breakfast at 7:00 a.m., and it now closes at 11:00
23 p.m., rather than between 9:30 and 10:00 p.m.
24 Off-premises catering is conducted from the site,
25 and there's no onsite parking for patrons or for

1 delivery vehicles."

2 So if the board finds that there was
3 an illegal expansion of the nonconforming use,
4 then a D-2 variance must be obtained. If the
5 board finds that there has been no expansion, then
6 the case is concluded.

7 Questions for me? Or you can
8 deliberate.

9 VICE CHAIRMAN GRYGUS: Any
10 discussion? Or are you looking for --

11 MR. MONDELLO: If the board has no
12 questions, if the board has no discussions, then a
13 board member should make a motion to either find
14 that -- those three questions, would you like me
15 to go through them again? I'm not going to read,
16 but --

17 MR. HOFFMAN: I have a question.

18 The lease that was given to the
19 applicant, to the original owner, what year was
20 that? Could we get that out of the file? I think
21 it was like 1951, 1952, which would have been
22 prior to the 1954 ordinance?

23 MR. MONDELLO: Right.

24 MR. HOFFMAN: And was the 1952
25 ordinance strictly that that became a residential

1 zone?

2 MR. MONDELLO: The reference that I
3 made to 1954 is the code. There was none.

4 MR. HOFFMAN: There was none before
5 that?

6 CHAIRMAN DUNNING: That's when they
7 created the zones.

8 MR. MONDELLO: So the record is
9 clear, you're referring to O-17, August 22nd, 1952
10 lease agreement.

11 MR. RUBIN: '51.

12 MS. FIORITO: Maybe I did a typo.

13 MR. MONDELLO: Okay, '51.

14 MR. RUBIN: Mine says '51.

15 MR. MONDELLO: Okay. Fair enough.

16 MR. HOFFMAN: So it was a lease for a
17 preexisting condition prior to any ordinance.

18 MR. COVELLI: Mr. Fernicola, can you
19 verify whether it was '51 or '52, since it's your
20 submission?

21 MR. MONDELLO: It is '51. The
22 expiration date was used. We don't need Mr.
23 Fernicola to comment. August 22nd, 1952, is when
24 it expired. It was dated, August 22nd, 1951, for
25 the sum of \$10.

1 So question one is, did the serving
2 of food and drink outside occur prior to the
3 enactment of the zoning code prohibiting such
4 activity?

5 VICE-CHAIRMAN GRYGUS: If I could,
6 Mr. Chairman, I'd like to just -- I guess I was
7 going to look for a motion. And I just have some
8 discussion or just some explanation or just my
9 thought process behind the motion that I'm going
10 to put out there.

11 With respect to question number one,
12 did it preexist, this was a very difficult case.
13 I mean, I think that, clearly, we can ascertain
14 something existed since that business was there on
15 the first name, through the names, through the
16 years, whatever.

17 Having said that, I think it also
18 becomes very unclear where it existed. Was it on
19 the subject property? Was it on the adjacent
20 property? And the scope of that use, you know,
21 clearly, I think the sporadic word that counselor
22 added, it was a sporadic use. So from a point of
23 whether it's '51, '54, '79, at some point in time,
24 from the first time that someone put a key in the
25 door and put a beer in the refrigerator at this

1 site, something has existed of a aka commercial
2 use in the residential neighborhood.

3 With respect to abandonment, I guess
4 the -- it's difficult to determine what is an
5 owner's mindset, what is their intention? And
6 again, I get back to my first statement, where a
7 lot of the activity, it appears, took place not on
8 that property. So if you don't own that property,
9 it has to be abandoned, if you have no lease to
10 that property, you don't own that property
11 anymore. Now, you could say, well, there was
12 always an intent to maintain the same type of
13 activities on that property. But yet, when we
14 went back to our board hearing of 2005, there was
15 never any testimony with respect to outside use.
16 The site plan never showed it. In fact, the site
17 plan shows a wooded area, which I recall from
18 going back -- my memory is getting a bit worse as
19 I get older -- but I can remember going back
20 there, it was quite overgrown.

21 So with respect to abandonment,
22 again, I think that's difficult for this board to
23 ascertain, not knowing what was the intent.

24 MR. MONDELLO: Well, don't forget,
25 the test was not just that. There are two

1 factors, some overt act or some failure to act
2 which carries a sufficient implication that the
3 owner neither claims nor retains an interest in
4 the subject matter of abandonment, and two, an
5 intention. So it's not just a mental state.

6 By way of example, let's suppose --

7 VICE-CHAIRMAN GRYGUS: Let's suppose
8 he built a garage on that wooded -- cleared and
9 put a garage on that wooded area, that's pretty
10 much intending that you intended to abandon that
11 use, because you built a garage there.

12 MR. MONDELLO: I would agree with
13 that.

14 Let's flip it on its head. Let's say
15 there's a very large swimming pool that should be
16 there, but it is a nonconforming use and it's not
17 used for a decade, it's filled with leaves, it gets
18 cracked, et cetera, et cetera. However, the
19 applicant explains that he had some severe
20 financial problems and never intended to abandon
21 it and now has the financial resources to fix the
22 pool. In that case, the board would be well
23 within its right to say, you didn't abandon it.
24 It's not just nonuse, it's those two factors.

25 VICE-CHAIRMAN GRYGUS: Okay, so --

1 MR. LEVINE: But that's assuming the
2 person who's involved at the time is here to
3 explain what his mindset was. Here we don't have
4 that situation. We don't know what the mindset of
5 the two previous owners were.

6 MR. MONDELLO: You would have to
7 figure that out from the testimony of those
8 individuals that were there at the time.

9 VICE-CHAIRMAN GRYGUS: But for
10 argument's sake, let's just assume that we say it
11 meets -- we're going to agree to disagree that
12 something existed prior to, whatever the date, or
13 if it was always zoned residential, somehow,
14 someday, some kind of bar existed there. Let's
15 also assume that, all right, maybe we can say, at
16 some point in time, he intended to do something
17 outside.

18 With respect to the expansion, I
19 don't think anyone in this room that's sat through
20 all these weeks of testimony could argue at all
21 that it has expanded tremendously from what was
22 testified that has gone on from day one, from
23 sporadic use, picnics occasionally, pickup
24 horseshoe games, bring in a couple of beach chairs
25 and a cooler of beer to four or five nights a week

1 as a retail food and drink service is a huge
2 expansion. And also take into account that the
3 area itself has expanded. So back when you were
4 doing those things, you may have had a big empty
5 field on corner there where cars could have parked
6 and you didn't have as many houses back there. So
7 not only has the use of the property, the
8 nonconforming use, expanded, in my opinion,
9 everything is expanded in the area, so it's
10 created even worse of an impact.

11 So therefore, it is my opinion that
12 we should deny the request and have the applicant
13 come before this board and request a D-2 variance
14 for the expansion, for the legal expansion of a
15 nonconforming use.

16 MR. MONDELLO: So that I understand
17 what you're trying to say, Mr. Rubin bifurcated
18 this application.

19 VICE-CHAIRMAN GRYGUS: Correct.

20 MR. MONDELLO: And we have to get
21 over the hurdle, the board would have to vote to
22 decide that it was a preexisting use, it was not
23 abandoned; however, there was an expansion, and
24 then he would come back for a D-2 variance. Is
25 that you're trying to say?

1 VICE-CHAIRMAN GRYGUS: Exactly. Like
2 I said, let's assume, let's give him one and two.
3 But clearly, number three, there is clearly an
4 expansion.

5 MR. MONDELLO: Well, I suggest you
6 make a motion, see if it is seconded and then see
7 if --

8 MR. LEVINE: Are we voting on the
9 individual one, two and three or are we voting on
10 the whole concept of whether --

11 CHAIRMAN DUNNING: The first part is
12 a bifurcated application.

13 MR. LEVINE: That's all we're voting
14 on?

15 MR. LUDWIG: How did we get around
16 the parking?

17 VICE-CHAIRMAN GRYGUS: All right. So
18 my motion would be to deny their request for the
19 interpretation, as the applicant has come forth,
20 and then is the D-2 variance parts of that?

21 MR. MONDELLO: Let me see if I can
22 rephrase this so that it's a little bit more
23 crystal clear.

24 You're making a motion to find that
25 there was a preexisting, nonconforming use, why

1 don't we get past that hurdle. That is Bruce's
2 motion. Is there a second?

3 MR. HOFFMAN: I'll second that.

4 MR. MONDELLO: Roll call, please.

5 MS. FIORITO: Chairman Dunning?

6 CHAIRMAN DUNNING: Yes.

7 MS. FIORITO: Vice-Chairman Grygus?

8 VICE-CHAIRMAN GRYGUS: Yes.

9 MS. FIORITO: Member Covelli?

10 MR. COVELLI: Yes.

11 MS. FIORITO: Member Hain?

12 MR. HAIN: Yes.

13 MS. FIORITO: Member Hoffman?

14 MR. HOFFMAN: Yes.

15 MS. FIORITO: Member Ludwig?

16 MR. LUDWIG: No.

17 MS. FIORITO: Member Levine?

18 MR. LEVINE: Can I ask one question?

19 MR. MONDELLO: You can certainly ask
20 a question.

21 MR. LEVINE: Read what you just --

22 MR. MONDELLO: Sure.

23 You are only deciding whether or not
24 the serving of food and drink occurred outside
25 prior to the enactment of the ordinance, which,

1 we're taking judicial notice, is '79.

2 MR. LEVINE: So by agreeing to that,
3 are we denying that the use was acceptable and all
4 done?

5 CHAIRMAN DUNNING: No. No.

6 MR. MONDELLO: Separate issue. We've
7 got a long way to go.

8 VICE-CHAIRMAN GRYGUS: Ron, you're
9 taking the motion on all three points separately.

10 MR. MONDELLO: It just seems like
11 there's too much confusion.

12 MS. HENDERSON: But you're saying
13 that there was food being served before 1979?

14 MR. MONDELLO: Yes. Answer yes or
15 no.

16 MS. HENDERSON: Being served or being
17 brought in and catered from somewhere else?

18 CHAIRMAN DUNNING: In some form or
19 another.

20 MR. MONDELLO: No. The board will
21 have to determine, based on their recollection of
22 the testimony, what exactly occurred, was there
23 food or drink served back there?

24 I don't see a difference between --
25 there was testimony that they bought a drink and

1 they went outside. There was testimony that --

2 MS. HENDERSON: I think there is a
3 difference whether the restaurant is serving it
4 versus people bringing it in, that's a difference
5 in use.

6 MR. MONDELLO: Well, that is the
7 issue, whether or not food or drink was served
8 outside.

9 MR. LEVINE: So if I feel there was
10 no food or drink served outside --

11 MR. MONDELLO: Prior to 1979, you
12 would vote no.

13 The motion is to find that, prior to
14 1979, food and drink was served outside --

15 MR. LUDWIG: By the owner of the
16 establishment?

17 MR. MONDELLO: Sure.

18 MS. HENDERSON: And if we say no,
19 then what? What's that saying if we say no?

20 MR. MONDELLO: Well, then we'll do
21 the second question. Let's see what happens with
22 the first. Well, hold on. You have to understand
23 this, it's probably going to some judge, so you
24 have to understand this. What don't you
25 understand?

1 MR. LEVINE: It's not that I don't
2 understand, it's what I believe. If I believe
3 there was no drink or food served outside prior to
4 1979, then the case is denied and we move on to
5 the next phase, as far as, whether --

6 MR. MONDELLO: Okay, I got it. I'm
7 sorry.

8 If the majority of the board members
9 decide that there was no food or drink served
10 outside prior to '79, the case is over. Goodbye.
11 We're done. Okay?

12 MR. LEVINE: No, I thought we go into
13 the next nonconforming use.

14 MR. MONDELLO: Well, then Mr. Rubin
15 would have come back on what's known as a D-1
16 variance, as opposed to a D-2 variance.

17 MR. LEVINE: Okay. So the way it's
18 worded, it's like --

19 MR. MONDELLO: Just focus on this one
20 issue.

21 VICE-CHAIRMAN GRYGUS: Can I rephrase
22 the motion?

23 MR. MONDELLO: Yes, go ahead.

24 VICE-CHAIRMAN GRYGUS: I would like
25 to make a motion to say that outdoor use did exist

1 on the property prior to 1979. I'm not saying
2 that's the date, but that's the date we've been
3 given, outdoor use was taking place.

4 MR. HOFFMAN: Can I just --

5 MR. COVELLI: Mr. Vice-Chairman, if
6 you may consider an amendment to your motion, what
7 you're stating is that, based on the testimony
8 presented, you feel that there's sufficient
9 evidence that the activity existed prior to the
10 creation?

11 VICE-CHAIRMAN GRYGUS: Correct.

12 MR. LUDWIG: On that lot.

13 MR. COVELLI: Right. Following
14 counsel's guidance, you need to take this one step
15 at a time and only answer one step at a time, then
16 proceed, like a flowchart, to the next question.

17 MR. LEVINE: But if you're agreeing
18 with the motion, then we're approving the
19 preexisting use and we're all done?

20 MR. MONDELLO: No. Let's take a step
21 back.

22 MR. COVELLI: That's why I said,
23 you've got to take it one step at --

24 MR. MONDELLO: No, it's a good
25 question.

1 So if the board decides that there is
2 no preexisting, nonconforming use, well then,
3 Mr. Rubin is going to pack up his stuff and he's
4 going to come back another day for a D-1 variance.
5 This never occurred and we want to do this at the
6 site.

7 On the other hand, if the board finds
8 that food and drink was, in fact, served prior to
9 1979 outside and the use was not abandoned and
10 that preexisting nonconforming use grew, he's
11 going to come back for another hearing on a D-2
12 variance, which is a lesser standard than the D-1,
13 got it? I'm sorry if I didn't make that clear.

14 MR. LEVINE: So based on the revised
15 motion --

16 MR. COVELLI: Well, wait a minute.
17 He hasn't agreed to my revision.

18 VICE-CHAIRMAN GRYGUS: Look, all I'm
19 saying is, in my motion, something was happening
20 there prior to 1979, and I think there was enough
21 testimony here to say that it was happening
22 outside.

23 Now, you could say, you know,
24 question maybe the frequency wasn't, you know, you
25 may have a little question of how frequently it

1 happened, but clearly, there was pictures that
2 showed something going on.

3 MR. LEVINE: But was it on their
4 property or on the other property?

5 MR. HOFFMAN: The pictures were --

6 MS. HENDERSON: And were they serving
7 it or were people bringing it in?

8 MR. HOFFMAN: Even if people were
9 bringing it in, it would be awful hard to
10 establish whether or not something was purchased
11 at that establishment and used on the property.
12 Even if there was a beer truck and somebody wanted
13 a soda and they purchased it from the restaurant,
14 it means that they were serving food outside.

15 MR. LEVINE: But it was established
16 or the witness, some of the witnesses, said it was
17 not on the Tree Tavern's property, it was on the
18 adjoining property.

19 MR. HOFFMAN: But when you cojoin the
20 two lots like that, it's all awful hard to
21 determine where on those two properties the
22 consumption was being taken, so you know they're
23 going to comingle.

24 CHAIRMAN DUNNING: Ms. Preyers'
25 testimony, when did she build the house?

1 MR. FERNICOLA: 1962.

2 CHAIRMAN DUNNING: Okay. So the
3 adjoining property wasn't used after 1962, because
4 it was sold and there was a house on there.

5 MR. FERNICOLA: But they don't get
6 the benefit of using the adjoining property,
7 that's not part of this application.

8 CHAIRMAN DUNNING: Right, it wasn't
9 part of this.

10 VICE CHAIRMAN GRYGUS: Well, listen,
11 there's a motion on the floor. I think we need to
12 either vote or --

13 MR. COVELLI: I think, for starters,
14 you better remake it. There was a motion and
15 there was a second and then there was a full
16 discussion, even though we didn't really have the
17 authority to have that at that point. In any
18 event.

19 CHAIRMAN DUNNING: Any other
20 questions?

21 MR. LEVINE: What's the motion?

22 CHAIRMAN DUNNING: Clarify the
23 motion, boss.

24 MR. MONDELLO: The motion is whether
25 or not food and drink was served outside.

1 VICE-CHAIRMAN GRYGUS: How about
2 served and/or consumed?

3 MR. MONDELLO: Okay.

4 VICE-CHAIRMAN GRYGUS: That kind of
5 is a catchall.

6 MR. MONDELLO: Okay.

7 VICE-CHAIRMAN GRYGUS: Was food
8 and/or drink consumed outside, and I'm going to
9 say 1979, only because that's the date that's been
10 kicking around, prior to 1979 in some way, shape
11 or form?

12 MS. HENDERSON: Served and --

13 VICE-CHAIRMAN GRYGUS: Served and/or
14 consumed.

15 MR. LEVINE: Counselor, if we say no
16 to that motion, what are we saying?

17 MR. MONDELLO: It depends if it's a
18 majority. If the majority of the board says no,
19 then Mr. Rubin will come back on another day with
20 an application for a D-1 variance.

21 If the majority says, yes, there was
22 enough testimony that somebody brought a beer and
23 they walked outside with the beer and they do vote
24 that food and drink was served on the premises,
25 then we move to the second question, which is

1 whether or not it was abandoned.

2 MS. HENDERSON: Well, one thing,
3 somebody buying something at a restaurant and
4 walking outside is different than it being sold
5 outside.

6 CHAIRMAN DUNNING: It's consumed on
7 the property.

8 MS. HENDERSON: But there were never
9 approved permits for that, for outside use.

10 VICE-CHAIRMAN GRYGUS: That's not
11 what we're determining right now.

12 All the question is, did the outside
13 consumption of food and drink occur prior to 1979,
14 based upon the testimony that you heard over the
15 last few months?

16 MR. LEVINE: And a D-1 is more
17 stringent than a D-2?

18 MR. MONDELLO: It is. Well, the D-1
19 is basically saying, listen, this never existed.
20 So start from ground zero and --

21 VICE-CHAIRMAN GRYGUS: But
22 understand, he already has a commercial business
23 in a residential area.

24 MR. MONDELLO: Right. It would be
25 restricted to outside.

1 VICE-CHAIRMAN GRYGUS: So all you're
2 going to be hearing is the outside --

3 MS. HENDERSON: That's the point of
4 this. Right?

5 MR. FERNICOLA: I would just like my
6 objection noted to, I don't believe it meets the
7 legal standard of what this board is being asked,
8 I just want that on the record.

9 VICE-CHAIRMAN GRYGUS: So again, my
10 motion is, it's my opinion that, based upon the
11 testimony and the evidence presented here, that
12 some form of the consumption of food and/or drink
13 did occur prior to 1979.

14 MR. COVELLI: I second the motion.

15 MR. MONDELLO: Roll call.

16 MS. FIORITO: Chairman Dunning?

17 CHAIRMAN DUNNING: Yes.

18 MS. FIORITO: Vice-Chairman Grygus?

19 VICE-CHAIRMAN GRYGUS: Yes.

20 MS. FIORITO: Member Covelli?

21 MR. COVELLI: Yes.

22 MS. FIORITO: Member Hain?

23 MR. HAIN: Yes.

24 MS. FIORITO: Member Hoffman?

25 MR. HOFFMAN: Yes.

1 MS. FIORITO: Member Ludwig?

2 MR. LUDWIG: No.

3 MS. FIORITO: Member Levine?

4 MR. LEVINE: No.

5 MS. FIORITO: Member Henderson?

6 MS. HENDERSON: No.

7 MS. FIORITO: Five yay, three no.

8 MR. MONDELLO: The motion carries.

9 Next question, was the use abandoned?

10 VICE-CHAIRMAN GRYGUS: Okay, with
11 respect to -- my motion would be, once again, that
12 to meet the legal definition of abandoned, I don't
13 believe that this board could determine, based
14 upon the testimony given, that the use was
15 abandoned.

16 MR. COVELLI: I second the motion.

17 MR. MONDELLO: Role call. You guys
18 can vote as to the issue of --

19 MR. COVELLI: Before you ask for -- I
20 want to make point of order, counsel, the motion
21 was made and seconded, is there any discussion on
22 the motion? So that we don't get to the middle of
23 a vote and then decide to have a discussion.

24 MR. MONDELLO: Well, I was just
25 simply informing the folks that they didn't

1 believe it was a nonconforming use. I think they
2 can vote as to whether or not they thought there
3 was some form of abandonment.

4 MR. COVELLI: Do you have anything to
5 add to the discussion of the motion before the
6 motion is taken?

7 MR. LEVINE: Can you re-read the
8 motion, please?

9 MR. MONDELLO: Was the nonconforming
10 use, and the majority of the board has already
11 decided that it was preexisting, based on the
12 testimony, and it did occur, was that use
13 abandoned?

14 MR. COVELLI: Based on the definition
15 provided by our counsel.

16 MR. LEVINE: Okay. So if we vote in
17 favor of the motion, are we then saying it was not
18 abandoned?

19 MR. COVELLI: Correct.

20 MR. MONDELLO: Role call, unless
21 there's some more discussion.

22 MR. COVELLI: Is everyone clear on
23 the motion?

24 MS. HENDERSON: I do have a question.
25 So years ago, we're saying that people, you know,

1 had sporadic events there or meetings there?

2 MR. HOFFMAN: Not this.

3 MR. MONDELLO: The board --

4 MS. HENDERSON: I'm just back into
5 this, whether it was abandoned or not, and then
6 you had the other property next door that they
7 used for different events, that's gone now. So
8 it's just up until recently that they just started
9 food and drink and serving beer or serving alcohol
10 out there, so --

11 MR. COVELLI: You're on to the third
12 question, by the way. Don't move beyond the
13 second question.

14 MS. HENDERSON: I'm just trying to do
15 a timeline.

16 MR. MONDELLO: Hold on. The majority
17 of the board has already determined that this use
18 occurred, end of story, that's done.

19 So your next question is, was there
20 an abandonment of this preexisting use, that's it.
21 An abandonment, again, is some overt act, some
22 failure to act which carries a sufficient
23 implication that the owner neither claims nor
24 retains any interest in the subject matter of the
25 abandonment, and number two, has an intention to

1 abandon.

2 Any other discussion? Any other
3 questions?

4 MR. LUDWIG: I've got one more
5 question.

6 MR. MONDELLO: Shoot.

7 MR. LUDWIG: All right. If I said
8 that I think it existed, can I now say, yes it was
9 abandoned?

10 MR. MONDELLO: Because the board has
11 already decided it has.

12 MR. LUDWIG: Okay.

13 MR. MONDELLO: Somebody may call me
14 out on that, but it's my opinion that you can vote
15 on this question.

16 CHAIRMAN DUNNING: We all set? Okay.

17 MS. FIORITO: Chairman Dunning?

18 CHAIRMAN DUNNING: No.

19 MS. FIORITO: Vice-Chairman Grygus?

20 VICE-CHAIRMAN GRYGUS: Yes.

21 MS. FIORITO: Member Covelli?

22 MR. COVELLI: Yes.

23 MS. FIORITO: Member Hain?

24 MR. HAIN: No, it was not abandoned.

25 MR. MONDELLO: Here we go. Was the

1 motion that it was abandoned?

2 VICE-CHAIRMAN GRYGUS: My motion is
3 that the use was not abandoned.

4 MR. MONDELLO: Not abandoned, so a
5 yes would go along with Bruce, it was not
6 abandoned, and a no would flip it on its head.

7 MR. HAIN: Then I say yes.

8 MS. FIORITO: Member Hoffman?

9 MR. HOFFMAN: Yes.

10 MS. FIORITO: Member Ludwig?

11 MR. LUDWIG: Yes.

12 MS. FIORITO: Member Levine?

13 MR. LEVINE: No.

14 MS. FIORITO: Member Henderson?

15 MS. HENDERSON: Yes.

16 VICE-CHAIRMAN GRYGUS: So we're to
17 question number three.

18 MR. MONDELLO: We are question number
19 three, which is, was there an illegal expansion of
20 the nonconforming use from what it was at the time
21 of the adoption of the ordinance?

22 VICE-CHAIRMAN GRYGUS: Okay. I will
23 make a motion that, yes, there was an illegal
24 expansion of a nonconforming use, not only at the
25 time of the adoption of the ordinance, based upon

1 the testimony that we've heard, but also since the
2 previous use approval before this board in 2005.

3 MR. COVELLI: I second that motion.

4 MR. MONDELLO: So a yes would
5 indicate that you agree with the movement that
6 there was an illegal expansion of the use from
7 what the use was back in 1979 prior to the
8 ordinance.

9 MR. LEVINE: So a vote of yes means
10 they have to come back?

11 MR. MONDELLO: Correct.

12 CHAIRMAN DUNNING: Okay, we all set?

13 MS. FIORITO: Chairman Dunning?

14 CHAIRMAN DUNNING: Yes.

15 MS. FIORITO: Vice-Chairman Grygus?

16 VICE-CHAIRMAN GRYGUS: Yes.

17 MS. FIORITO: Member Covelli?

18 MR. COVELLI: Yes.

19 MS. FIORITO: Member Hain?

20 MR. HAIN: Yes.

21 MS. FIORITO: Member Hoffman?

22 MR. HOFFMAN: Yes.

23 MS. FIORITO: Member Ludwig?

24 MR. LUDWIG: Yes.

25 MS. FIORITO: Member Levine?

1 MR. LEVINE: Yes.

2 MS. FIORITO: Member Henderson?

3 MS. HENDERSON: Yes.

4 MR. MONDELLO: Motion carries.

5 All right. I apologize to counsel,
6 that was somewhat of a deliberation. So I don't
7 know where we go from here, Mr. Rubin, it's your
8 application. We'll wait for planners and blah,
9 blah, blah.

10 MR. RUBIN: I already filed the
11 application. We paid the fees. And I thought I
12 made it clear in my moving papers that this was an
13 application in the alternative and we are ready to
14 move forward.

15 MR. MONDELLO: Yes, I was just
16 referring to --

17 MR. COVELLI: Not tonight, Mr. Rubin.

18 MR. RUBIN: That's up to the board.
19 I'm out anyway for the night.

20 MR. COVELLI: Well, that would
21 require overtime for all of us.

22 VICE-CHAIRMAN GRYGUS: We also have a
23 member who is absent tonight.

24 MR. RUBIN: It's up to the board.

25 MR. MONDELLO: Oh, you have your

1 planner here? I didn't know that.

2 MR. RUBIN: Yes. I didn't know how
3 much time the preliminaries would take.

4 MR. MONDELLO: The board's call. We
5 can move right to Mr. Rubin's second part of his
6 client's application, which would be the ---

7 MR. COVELLI: I was being
8 lighthearted. I was not making an official
9 statement on behalf of the board.

10 VICE-CHAIRMAN GRYGUS: Listen, we
11 take testimony until 10:30, so it's up to you.

12 MR. RUBIN: We can start it.

13 VICE-CHAIRMAN GRYGUS: So counselor,
14 the original notice is sufficient? Was the
15 original notice for the interpretation and a --

16 MR. RUBIN: Yes, I did an alternative
17 application in my notice. I was very clear on
18 that, because quite frankly, I've lived this
19 before in other applications and I made sure I put
20 it in the notice, both the publication and the
21 notice that went to adjoining neighbors.

22 MR. FERNICOLA: I'm going to make a
23 suggestion before we break. I would request that
24 you start the second part at a different meeting
25 to give myself an opportunity to consult with my

1 client concerning the board's ruling, based on the
2 number of hearings that we've already had on this
3 matter.

4 MR. MONDELLO: Well, that would be
5 your call, Mr. Rubin, you are paying for a planner
6 unless Mr. Fernicola wants to pay for him.

7 So let's take five minutes, speak to
8 your professionals, and let's see what we're going
9 to do.

10 MR. RUBIN: Thank you.

11 (Short recess was taken)

12 CHAIRMAN DUNNING: Okay, we're back.

13 MR. RUBIN: Mr. Chairman, members of
14 the board, after talking to our witnesses, it
15 seems to be -- everyone's in agreement to start
16 fresh on a new date. I'm advised by the secretary
17 of the board that April 5th would be the next
18 date, and if that's appropriate, we'll be back
19 then.

20 MR. MONDELLO: All right. So no
21 further notice. Those who are in the audience,
22 the application will continue to April 5th, which
23 is a Wednesday.

24 MR. RUBIN: Thank you very much.

25 MR. FERNICOLA: I think I'm going to

1 get voted out of office for having to adjourn my
2 meeting, but my wife is going to thank me for it.

3 MR. MONDELLO: Be careful what you
4 wish for.

5 MR. RUBIN: Well, Mr. Fernicola has
6 the furthest to go.

7 VICE-CHAIRMAN GRYGUS: I'll make a
8 motion to carry the application to the April 5th
9 meeting.

10 MR. LUDWIG: I'll second that.

11 MS. FIORITO: Chairman Dunning?

12 CHAIRMAN DUNNING: Yes.

13 MS. FIORITO: Vice-Chairman Grygus?

14 VICE-CHAIRMAN GRYGUS: Yes.

15 MS. FIORITO: Member Covelli?

16 MR. COVELLI: Yes.

17 MS. FIORITO: Member Hain?

18 MS. HAIN: Yes.

19 MS. FIORITO: Member Hoffman?

20 MR. HOFFMAN: Yes.

21 MS. FIORITO: Member Ludwig?

22 MR. LUDWIG: Yes.

23 MS. FIORITO: Member Levine?

24 MR. LEVINE: Yes.

25 MS. FIORITO: Member Henderson?

1 MS. HENDERSON: Yes.

2 MR. MONDELLO: Mr. Rubin, I've been
3 reminded, could I please ask, if there are any
4 time issues that you would waive those time
5 restrictions?

6 MR. RUBIN: Yes, absolutely.

7 MR. MONDELLO: Thank you.

8

9 (Meeting adjourned at 9:48 p.m.)

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C E R T I F I C A T E

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

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

[Handwritten Signature]



Notary Public of the State of New Jersey
My commission expires March 12, 2019
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