

TOWN OF WARWICK
ZONING BOARD OF APPEALS

Members Present:

Chairman Jan Jansen

Attorney Jeremy Havens

Marc Malocsay

Diane Bramich

Glenn Ehlers

Aaron Ubides (Alternate)

Mary Garcia, ZBA Recording Secretary

Not Present:

Chris Daubert

PUBLIC HEARING OF Kristina & Christopher Figueroa - regarding property located at 21 Stony Brook Dr., Pine Island, NY 10969, and designated on the Town tax map as Section 10, Block 1, Lot 60 and located in the RU district for an area variance from the side yard setback requirements under Town Code §164-40N for a proposed 30'x 40' family room addition with bathroom, where the proposed addition reduces the side setback to 20' where a 75' side setback is required.

Continued from the November 25, 2024 ZBA Meeting.

Representing the Applicant: Christopher Figueroa, Owner/Applicant

Chairman Jansen: Tell us a little bit about this.

Mary Garcia: Your name?

Christopher Figueroa: Christopher Figueroa. I just want to expand the house a little bit because the house that we have right now is a tiny bi-level so we just want a little more room, that's all

Chairman Jansen: There's no building violations, right?

Christopher Figueroa: No.

Chairman Jansen: Do we have a response from the County?

Attorney Havens: The GML 239 response was received on October 31st, 2024 stating the County recommendation was that this was a local determination with no further recommendations.

Chairman Jansen: Anything particular that you want to make us aware of on the project?

Christopher Figueroa: No, not really.

Chairman Jansen: Anyone from the public that would like to address this application? We can close the public hearing at this point.

Attorney Havens: On the short EAF form question number 9, does the proposed action meet or exceed state energy code requirements? You checked off no. I wanted an explanation as to why you don't believe it's going to. If it's going to be a new expansion you're probably going to need to meet those in order to satisfy the building inspector. Are you aware of that?

Christopher Figueroa: Correct. My wife filled out most of the form. We're getting a plan drawn up from an architect. So whatever he has on the plan is what we're going by.

Diane Bramich: You don't have the plans yet?

Christopher Figueroa: No, I was not going to get plans drawn up for something that may not go through for \$10,000.

Marc Malocsay: It's common. He is asking for the variance if anything changes he...

Christopher Figueroa: Right. If I come here with a \$10,000 plan and you tell me I can't do it, what's the point of me getting a plan? I just gave somebody \$10,000 for nothing.

Attorney Havens: Item number 15 on the EAF form, the auto-populated response to regarding whether or not the site or proposed action contains any species of animal or associated habitats listed by the state federal government, threatened or endangered. It does identify the Indiana bat. It's common in this whole region. I just wanted you to be aware as a result of that you would be limited to any tree clearing between November 1 and March 31st.

Christopher Figueroa: There's no trees coming down.

Attorney Havens: I just wanted to make sure that you're aware that outside of that time period you'd have to talk with the Building Inspector about taking down any trees for this project. So in light of the fact that this is simply an expansion of a residential property this would qualify as a Type 2 action under SEQR section 617.5 (C), subsections (11) & (16). Would someone care to make a motion typing the action as a Type 2 action with no adverse environmental impact?

Diane Bramich: Motion.

Marc Malocsay: Second.

Chairman Jansen: Motion by Diane, seconded by Marc. Any further discussion? All in favor?

Board Members: Aye.

Chairman Jansen: Any opposed? Motion carried.

Attorney Havens: The Board needs to determine if a site inspection is necessary for this application.

Chairman Jansen: I've seen the place.

Marc Malocsay: Yeah. And almost any time when you've asked that. Almost always when we get the application we drive by and take a look.

Attorney Havens: Alright. Note on the record that an inspection was done by Chairman Jansen and Board Member Marc Malocsay.

Chairman Jansen: Anyone else take a look at it?

Glenn Ehlers: From the space camera.

Aaron Ubides: I drove up there and it looked fine.

Chairman Jansen: Apparently everyone did.

Attorney Havens: So no further site inspection necessary?

Chairman Jansen: No.

Attorney Havens: It's already been done.

Chairman Jansen: Yes.

Attorney Havens: The Building Department specifically identified reasons for denial. It didn't meet the side yard setback requirements, but that prior to a permit issuance Building Department would require stamped New York State architectural plans, which is what you were just discussing previously. Clearly that would need to be submitted before you could get a building permit. You'd have to identify what the project scope is in detail and provide other necessary forms for a standard building permit like New York State Workers' Comp, the permit fee, and so forth. So the ZBA Board should consider whether any use restrictions or any other additional conditions would be imposed if the variance were to be granted beyond submission of what the Building Department has specifically requested.

Chairman Jansen: I think that pretty much covers it.

Marc Malocsay: Yes.

Chairman Jansen: I will close the public hearing at this point also.

Attorney Havens: Deliberations? Questions from the Board?

Marc Malocsay: No. It's virtually everything we talked about last time.

Attorney Havens: With respect to considering an area variance, the Board is statutorily required to consider five specific criteria. The first criteria is will an undesirable change be produced in the character of the neighborhood or a detriment to nearby properties be created by granting the variance requested? The applicant states no and states that there's no neighbor that would see the addition on that side of the

home as the reason for why he doesn't believe that it would create an undesirable change in the character of the neighborhood or a detriment to nearby properties.

Chairman Jansen: I agree. How does everyone else feel?

Marc Malocsay: Yes, I agree.

Attorney Havens: The Board agrees with the applicant?

Board Members: Yes.

Attorney Havens: Question 2, can the benefit that the applicant seeks be achieved by some feasible method other than the variance? The applicant states no because there's a garage on the opposite side of the house. Can the benefit that the applicant seeks be achieved by some feasible method other than the variance?

Board Members: No.

Attorney Havens: Is the requested variance substantial? The applicant states no.

Board Members: Yes.

Attorney Havens: 20 feet versus 75 feet?

Board Members: Yes.

Attorney Havens: Will the proposed variance have an adverse effect or impact on physical or environmental conditions in the neighborhood or district? The applicant states no. Does the Board agree?

Board Members: Yes.

Attorney Havens: Is the alleged difficulty self-created? The applicant states no because the property line is too close. Does the Board agree?

Board Members: No, it is self-created.

Attorney Havens: Any further deliberation?

Board Members: No.

Marc Malocsay: I'll make a motion to move it as advertised.

Diane Bramich: Second.

Chairman Jansen: The motion is to move as advertised by Marc and Seconded by Diane. Any further discussion? All in favor?

Board Members: Aye.

Chairman Jansen: Any opposed? Motion carried.

PUBLIC HEARING OF Louis Amend - regarding property located at 59 East Shore Rd, Sterling Forest, NY 10925, and designated on the Town tax map as Section 76, Block 1, Lot 99 and located in the SM district for an interpretation of the Town Code regarding whether the applicant's planned expansion plans for a 2nd floor addition are permissible under the Code for an accessory "cabin/bungalow" which may be a pre-existing, nonconforming building built on the property in 1950, and if so, requesting an Area Variance permitting such expansion.

Representing the Applicant: Louis Amend, Applicant

Chairman Jansen: Please identify yourself for the record.

Louis Amend: My name is Louis Amend. I brought my mother who's the owner of the property and that's my girlfriend.

Attorney Havens: With respect to the Orange County Planning Department, a GML 239 referral wasn't made because the initial request is an interpretation. Also, the applicant stated 'no' to the question whether the property is within 500 feet of any of the identified triggers for submission of a GML 239. However, the property is within 500 feet of Sterling Forest State Park so a GML 239 referral must be submitted if an area variance or special use permit is requested by the applicant. If all we're doing is an interpretation, it's not necessary. But for granting an area variance, a GML 239 referral would be needed and one was not submitted. In order for this Board to consider your interpretation, they first need to know how the property has been used and occupied because the pre-existing use of the property dictates whether and to what extent this Board can grant the relief that you're requesting. So if you can explain to the Board how the property has been used give us a description of how the property's laid out first and then how the different parts of the property have been used.

Louis Amend: I brought a plot map; it's just two structures on one property. We bought the property in 2001, since then I've lived back there. My brother's lived back there, I'm staying there currently right now, and we just want to put a second floor on that bungalow so I can continue to stay on the property.

Diane Bramich: You are in the house, in the back?

Louis Amend: Yes. In the beginning when I started doing all this I was told that there was no bathroom and bedroom back there. From my understanding, that's the original structure of the property and there's always been a bathroom and bedroom in there. We actually took out the closet in the room to make it more of an entertainment type area, but it's always had a bathroom running to the septic. And I'm not trying to disturb too much of the carbon footprint. I just want to go up one level and create more room.

Attorney Havens: So you stated a minute ago that you're currently residing in the accessory building in the back.

Louis Amend: Yes.

Attorney Havens: And your brother stayed there previously and you purchased the property in 2001. Can you articulate for the Board who has been living there since it was purchased?

Louis Amend: So when we originally bought the property, it was dormant for a while. In high school was when I moved back there. I graduated in '06, so it had to be around '05, '04 is when I started. And then when I went to college, my brother took it over and now that's where I am.

Diane Bramich: Who's in the house in the front?

Louis Amend: My mother.

Diane Bramich: I have a question. If you look at the map it's encroaching on another piece of property with an oil tank. The oil tank is actually shown on another piece of property.

Louis Amend: I saw that on the plot map myself. When you're at my property and you're looking down the property line...

Diane Bramich: Yes I was down there.

Louis Amend: ...we just had that windstorm, so trees fell. My neighbor's house is a mess. But if you look down the property line, it is technically on my side up against my house. There's like a border going down, but on the plot map, it shows right on it. So I don't know how to decipher that or...

Diane Bramich: Who owns the property next door, where the oil tank faces?

Louis Amend: His first name is Joe, I can't remember his last name. They haven't been there for a few months.

Diane Bramich: Okay. And they didn't show, so...

Attorney Havens: Do you have any idea when the fuel oil tank that's attached to the side of your house right around the property line, when was that installed?

Louis Amend: We have propane now. So the propane tanks had to be installed, I don't know, what would you say (*asking his mother*), like 5-ish years ago? I can't remember.

Attorney Havens: Is that the tank we're talking about? That says fuel oil. Is it the same location or is it a different location there? The propane tank is, you converted them?

Louis Amend: Yes, we converted. I have two on the right side of my house running along my house and the neighbor's driveway. And then I have another one by my garage on the other side. Oil tank though, I submitted pictures of the side of the house and the front of the house, let me just pull out this plot map so I can see for myself.

Attorney Havens: The side where it's up against the fence.

Louis Amend: That is no longer there.

Diane Bramich: So where is the tank for the propane?

Louis Amend: (*pointing to the plot map*) The tank for the propane is right here and I have another one here.

Diane Bramich: What about the back house?

Louis Amend: It's run from one of the tanks on this.

Diane Bramich: So you're feeding from the main house to the bungalow?

Louis Amend: It's its own tank. Also, I do have the original appraisal report from 2001 showing that there was a bathroom back there.

Diane Bramich: So there's a bathroom in it now?

Louis Amend: Yes, it's always been since we bought the house.

Diane Bramich: Do you plan putting another bathroom in?

Louis Amend: Upstairs.

Diane Bramich: Where's the septic on this?

Louis Amend: So my permit denial asked for a septic pump-out affidavit. I saw Greenwood Lake has a form so I just assumed it was basically the last couple clean-outs. And basically this is how it works; here's the septic tank. It runs from both houses and this is all the leach field. It's basically like a 50 x 40.

Diane Bramich: They have one tank for the two houses. And it's 1250.

Louis Amend: I also have a injector pump. I believe it's a 75 gallon off the back house or cottage. And attached is the last two clean-outs.

Attorney Havens: How many bedrooms do you have in the primary residence—in the front residence?

Louis Amend: Two.

Diane Bramich: How many bathrooms in the main house?

Louis Amend: How many bathrooms in the main house? One and a half.

Diane Bramich: How many bedrooms in the main house?

Louis Amend: Two.

Diane Bramich: So there's two in the main and there's going to be one in the bungalow.

Louis Amend: One in the bungalow, correct.

Attorney Havens: Anybody else?

Marc Malocsay: I'm trying to get a grasp on what exists, what is grandfathered, and if it is grandfathered pre-existing non-conforming and an expansion of a pre-existing non-conforming. Our code talks about that. So we're saying there's two residences on the one piece of property.

Attorney Havens: We should formally open the public hearing.

Chairman Jansen: Public hearing is open.

Attorney Havens: What we first need to ascertain based on its actual use is to classify what type of structure it is under the Use Table. There was a note from the Building Department in relation to the application that identified it as a guest house, which is according to them, not an allowed use in the SM zone. I pulled and provided to all the Board Members in relation to this application, all of the specific provisions that specifically identify and reference a guest house. And a guest house falls in among the definitions associated with uses that are transient in nature. So if you take a look at the section of the code that I provided, the code references, specifically the definitions,

Glenn Ehlers: 164-46, the guest home?

Attorney Havens: Right.

Glenn Ehlers: Do we have to first determine if it's a legally existing guest home?

Attorney Havens: No. We have to determine...

Glenn Ehlers: Whether it is a guest home?

Attorney Havens: Right. How is this being classified? The Building Department identified it as a guest house. But a guest house under the Code has to be sitting on sufficient property for it to be independently sub-dividable, even if they don't do a subdivision. It has to have all the other independent elements like an independent septic for it to be independently supported. That's clearly not the case here. So it doesn't meet the statutory definition and requirements to be classified as a guest home.

Diane Bramich: What if it was classified? We had one once before. It's more like a mother/son.

Attorney Havens: Yes. I also provided the code provisions that define an accessory apartment and accessory dwelling and what constitutes an accessory dwelling. An accessory dwelling is defined in the code as a second dwelling unit, either in or added to <inaudible>. In looking through the statutory definitions, there's also a similar accessory apartment definition, which is a separate and complete dwelling unit that is contained within the structure of a lawful one family dwelling unit, an accessory structure to a lawful one family dwelling unit, which this appears to be, or in a mixed use context with a

lawful mixed use. So this could be defined as an accessory apartment and accessory dwelling. It meets those definitions under the code as far as its layout, the clear actual use and intended use. So it could be deemed if the Board were to make such a finding. And if we look at dwelling, this is another point under the definitional code 164-22 for the defined terms, those are transient residential housing. And so that helps us clarify that this is not in fact a guest house or guest home. Does the Board believe that there's been adequate testimony from the applicant and that the code could be interpreted such that the accessory building on the back of this property would constitute an accessory dwelling?

Marc Malocsay: No.

Attorney Havens: Okay. Why?

Marc Malocsay: Because in applications that have been similar to this would...take a step back.

Attorney Havens: I'm not asking whether or not it's a legally permissible accessory dwelling. We have to first define what the structure is based on its actual and intended use. And also the definitions within the code for how is it situated on the property? How is it associated with other elements of the property? And then after defining what it is or isn't, we can look at the Table of Use definitions to see what is or isn't permissible in which particular zoning district and whether this is a permissible use or a special permit use. But we have to define to a large degree what it is before we can determine whether it's a permissible use within the zone.

Glenn Ehlers: I think it definitely fits the dwelling accessory, except that that entails a separate sanitation system, which I don't see, but everything else fits.

Attorney Havens: Glenn, can you tell me which provision in the code you're referencing that requires a separate sanitation system?

Glenn Ehlers: Under dwelling accessory.

Attorney Havens: No it just says that has the provisions within the accessory dwelling unit for cooking, eating, sanitation, and sleeping. That doesn't actually specifically state that it has to have a separate septic system. You have to have a stove for cooking, you have to have a sleeping area, you have to have sanitation facilities for bathing and toilets and stuff like that.

Diane Bramich: The bungalow in the back was there when you purchased the property?

Louis Amend: Correct, yes, we believe it was the original structure.

Diane Bramich: I would say it was definitely part of that piece of property when the first house was built on the land.

Attorney Havens: So we can get to that additional element after we try to define what it is as far as what type of structure is this, is it a garage? Is it a storage shed?

Diane Bramich: It's a dwelling.

Attorney Havens: If it's an accessory dwelling, then we can move forward with the other elements to be considered.

Marc Malocsay: I didn't disagree. I thought the first part was more important than this part in determining on what it is. Building permits everything, and we've used the date before of 1973 because that was a time when our codes were fairly open. Before '66 I think we didn't really have any code per se. So the issue is almost regardless of what we're calling it, is it pre-existing non-conforming or is it...

Attorney Havens: That's a separate issue. We have to first identify what kind of a structure we're talking about.

Marc Malocsay: I would agree that it's the definition of an accessory dwelling 100%.

Attorney Havens: Is the Board in agreement that this is in fact an accessory dwelling?

Board Members: Yes.

Attorney Havens: So the next item that has to be considered, the Board has made a determination based on the interpretation of the code and the stated use, both prior use and existing and intended use is that this is in fact an accessory dwelling, both in its current capacity as well as in the proposed capacity. So then the question becomes is the use permissible within the applicable zoning district, even if only by a special use permit? Accessory dwelling otherwise referenced with essentially the same definitional parameters as an accessory apartment under the zoning code definitions is a permissible use by special permit application in the AI and the LB zone, as well as in the traditional neighborhood overlay district. It is not specifically a permitted use in any other district. And this property is situated in the SM district, which is suburban medium density residential district. In that district an accessory apartment is not specifically permitted within the SM zoning district. However, it is permissible under a special use permit in the traditional neighborhood overlay district. And this property does fall within the traditional neighborhood overlay district. So the actual and intended use would be permissible under the TNA (traditional neighborhood overlay) district as a special use permit, if they were to submit such an application. And any special use permit use is deemed to be generally a beneficial use of property but it just requires additional advance review to ensure that this particular use within this particular zone isn't going to have a significant adverse impact on the community and the neighbors. Being that it's a residential use within a residential zone surrounded by residential houses, does anybody here feel that the intended use as a residence within a residential traditional neighborhood overlay district would have any adverse impact on the neighbors?

Board Members: No.

Marc Malocsay: Yes. What are the requirements of acreage? Because if we use that as an example, everybody could apply to build a second home on their property.

Diane Bramich: But this is pre-existing,

Marc Malocsay: That's not before us yet. We're looking at this one step at a time; that is not before us. You asked the question specifically in that area, for special permitted use, they'd have to go before the Planning Board because the lot doesn't have much in acreage.

Attorney Havens: The acreage does exceed the acreage required for existing small residential lots. It's 17,000 square feet approximately and the existing small residential lots only require 12,500 for development purposes. I'm not saying it's determinative of anything. I'm just putting it in context with respect to this particular application. Marc, what you're addressing is whether this particular application is appropriate given the square footage of the lot and the square footage of the buildings and what impact might that have on other similar applications. The question I was asking is whether in general terms of residential use of an improvement on a residential parcel within a residential district, is that something that would strike the Board as being potentially detrimental to the neighbors based on dissimilarity of uses? It's all the same.

Board Members: All all the same.

Attorney Havens: From that perspective, he's not putting in a quarry next to somebody's home is essentially the point I'm trying to clarify and put in the record. It's a residential use, it's not an industrial manufacturing facility in a residential neighborhood. Everybody in agreement with that?

Board Members: Yes.

Attorney Havens: Okay. So now we have to determine, since it would arguably, and just because it's permissible by special use permit doesn't mean the ZBA has to grant that, we could refer it to the Planning

Board for evaluation on the issues that you were just talking about, if the Board so chose to do so. But just because it could be potentially permissible as a special use permit doesn't necessarily mean that it must be granted. The other key underlying issue that has come up is whether or not the use constitutes pre-existing non-conforming use. According to the tax records, this additional dwelling was built as a cabin/bungalow. That's how it's identified in the tax records. So it wasn't a garage, it wasn't a storage shed, it was a cabin/bungalow intended to be used as a dwelling. And it was built in 1950 long before any of the zoning codes were adopted. So it is in fact a pre-existing non-conforming use because it was built for that intended purpose, it is still that intended purpose and it was built before the zoning codes. So therefore it would be a pre-existing non-conforming use. The question that the Board now has to ascertain through testimony from the applicant is whether or not the use has been continued and maintained sufficient to sustain continued use. Because under the pre-existing non-conforming use code, there is a provision that specifies that any pre-existing non-conforming use, if it's discontinued for a period of one year or more in its entirety, then the pre-existing non-conforming use is no longer grandfathered in and the use must be discontinued. The Board has to consider first whether or not the use was continued from the time that the zoning code was adopted in March 1989 that established pre-existing non-conforming uses all the way up to the date of the application. So the applicant is responsible to try to convince this Board with whatever testimony you have, that the use was continued to be used no less than once a year in that capacity from at least the time you bought the property.

Louis Amend: I know the the janitor at the middle school, I think he owns the beer store in Greenwood Lake now, he rented it out before the front house was actually built. But since we bought it the first couple years it was basically an entertainment area where we could bring friends, hang out, family comes over.

Chairman Jansen: But it was being used.

Louis Amend: It was absolutely being used, yes. Then since around 2003, 2004 it became my place then my brother's, and me now, and going forward we just want to keep the family together. So going forward, it's going to be used the same exact way as it was and still is.

Attorney Havens: Questions from the Board.

Marc Malocsay: So with the testimony given, the bungalow—the original structure built in 1950, predates zoning. The other structure was built much more recently.

Diane Bramich: Do you know when the main house was built?

Marc Malocsay: Just so we're clear, the bungalow was built first.

Diane Bramich: Correct.

Marc Malocsay: That's the main house.

Diane Bramich: Okay, so the bungalow you're considering the main house.

Marc Malocsay: It was the first one built.

Diane Bramich: The house in the front now would be the accessory use.

Attorney Havens: Not by definition. The accessory building is the one that is clearly accessory to the primary dwelling. It even specifically states in one provision of the code it's within the traditional neighborhood overlay district regulations where it specifies that it would normally be to the side or behind the primary dwelling. This is code section 164-47 (B) (4), subsection (A)(2). The accessory dwelling unit shall comply with the table of bulk requirements, except that a detached accessory dwelling shall be limited to a maximum building height of 25 feet, shall be clearly incidental to the principal dwelling, and shall be located a minimum of 20 feet behind the front facade of the principal dwelling. So even though it may have been the original dwelling on the property, by building a larger dwelling in front of it, the larger front dwelling became the principal dwelling and this one became the accessory to it.

Marc Malocsay: Okay. But before we didn't say that the other building was an accessory. We called it by definition...

Diane Bramich: An accessory dwelling.

Attorney Havens: Yes. An accessory dwelling. Because it is subordinate an accessory to the principal dwelling which sits closer to the road and consists of significantly more square footage. These are all new provisions that are not discussed up here on a yearly basis, much less monthly. So please bear with us.

Louis Amend: Yes, no problem.

Marc Malocsay: So when was the second building built?

Louis Amend: I don't know an exact date; it had to be late sixties, early seventies. I don't know for sure.

Diane Bramich: There was two dwellings on the property when you purchased it.

Louis Amend: When we purchased it, correct, there was already two.

Attorney Havens: Here's the survey from 2001 when they purchased it. This is the larger front dwelling.

Diane Bramich: And that was subdivided in 1909.

Attorney Havens: Yes it was. Sterling Forest area.

Marc Malocsay: If we're going to the next step and say that this is pre-existing non-conforming as opposed to pre-existing conforming, as opposed to non-conforming, pre-existing non-conforming can only be expanded by 15%.

Attorney Havens: Correct.

Marc Malocsay: We are going to have to know that...

Attorney Havens: That's a separate issue. We have to first determine whether or not it's pre-existing non-conforming to see if the 15% limitation even applies.

Marc Malocsay: Okay. In order to do that, we need the information that you were trying to look up.

Chairman Jansen: So to his benefit it would be better if it was pre-existing conforming.

Marc Malocsay: It was if the house was the other, the second house (primary) was built before 1973.

Attorney Havens: Here's a better question. Do you think the front building was built without a permit?

Marc Malocsay: If it was before 1973 I would just say that we can move on and say it's pre-existing non-conforming. However, if it was built after that there should be a permit. But a permit would have to be given under certain circumstances it might be able to give us a little bit more information. It's hard to take the next step without knowing what we're calling the property.

Attorney Havens: Understood.

Marc Malocsay: So Jeremy, the first part was an interpretation and the interpretation that they were asking for was what exactly?

Attorney Havens: The interpretation is kind of broad based. It's not narrowly defined within the application. And so it's identified based on all of the elements of the application was an interpretation regarding whether the applicant's expansion plans for a second floor addition are permissible under the code essentially for what's identified on tax records as a cabin/bungalow whether or not it's pre-existing non-conforming.

Marc Malocsay: Would they have to go before the Planning Board for a special use permit?

Attorney Havens: They wouldn't have to. This Board if they were otherwise to make a determination that this structure does qualify as a pre-existing nonconforming building and use, that has not been interrupted for a period in excess of a year. Such that they would lose the right to continue it. Then there's one

additional element that we have to consider. Even if it was discontinued, would it be an unreasonable burden and hardship on the property owner to be required to discontinue a longstanding use? And we'd have to weigh that loss to the property owner as against the detriment that the continued use would have to the character of the neighborhood and detriment to nearby properties. And whether or not it's continued use would be so detrimental or affect the character of the neighborhood in such a way that regardless of the financial loss to the property owner, it still needs to be discontinued.

Marc Malocsay: Okay. So this is for you and the rest of the Board Members. We said that you have to provide that proof to us. It's virtually impossible to prove because not as much from 2001 when the property was purchased, but before that it would be very difficult to prove whether it was discontinued for a period on that. As far as I'm concerned, from 2001 you had purchased the property it was being used.

Attorney Havens: There's two additional points from the Building Department record that were provided to me. And that is a note in, I believe 2006 where the Building Department had done a visit to the property to evaluate whether or not the back unit had been rented out. And at that point in time, they were simply making inquiries, but there's no record anywhere in the Building Department of any violations being issued or cease and desist or anything along those lines. So as of 2006, five years after they bought it, the Building Department was aware that it was being used for residential purposes and did not issue any notice of violation.

Marc Malocsay: From 2001, the time that you purchased it, I'm fine with that. But we do have to know that question as to when the other structure was built, was there a building permit? What year that was? To me it's more about the year that it was...

Diane Bramich: How are you going to find that out?

Marc Malocsay: Building records and also the the assessor's office, they're unbelievable, their records on how far they go back. Because you're paying property taxes, so they have to be based on something. So they can go back to 1970 and say that it was assessed at this, and it says right there that there were two dwellings, then that all stops and then we can move on to the next one.

Glenn Ehlers: If we look it up it should give you a date, right?

Attorney Havens: Based on the public tax records, I would have to assume your recollection and understanding is inaccurate. The only thing that I can assume, which is nothing more than an assumption without actually digging through all of the Building Department records is that the larger dwelling in the front may have been a knockdown and replace at some point in time. And I don't know when, because you're saying that it's newer than the one in the back. But this is saying that the property was originally built in 1920 dwelling, garage, covered porch, all 1920 and a 532 square foot cabin bungalow in 1950. So I think based on this record, we would have to assume that the big house was first because that's the square footage of what's there, it's 532 square feet. So that was the bungalow that was added in 1950, but there was already a principle dwelling there with a garage since 1920.

Diane Bramich: I believe that. I truly do. That area was built up more before the upper part of the lake. Because that's where the steamboat came right in just around the corner.

Attorney Havens: I take that back, the 500 square foot porch, which I believe is wrapped around that bungalow. The cabin in the back? 500 square foot porch.

Louis Amend: It's like a shack but not a wrap around porch.

Diane Bramich: There's a deck on the principal. There's a deck here and there's two decks on the bungalow.

Attorney Havens: What do you think the size of that might be? That's 25 by 25.

Diane Bramich: That's 25. This is smaller. Maybe 20 by 15.

Attorney Havens: 20 by 15 is 300 square feet. This is over 600.

Diane Bramich: So I would say that's in between the two.

Attorney Havens: So the 508 square foot porch open deck was actually constructed and permitted in 1990. So I assume that's probably the deck on the back of the main front structure based on the survey. So based on the discussion had, the Board needs to consider whether they can or will make a finding that this accessory is or was a pre-existing non-conforming use. We're not going to get to whether or not it's permitted to continue yet. We have to determine first whether it's a pre-existing non-conforming use.

Diane Bramich: Yes, it is.

Chairman Jansen: I agree with Diane.

Attorney Havens: Marc?

Marc Malocsay: Difference between pre-existing non-conforming and pre-existing conforming.

Attorney Havens: Conforming would mean it wouldn't have any setback variance requirements, et cetera. And it's a permissible use within the zone currently. So it's not specifically a conforming use because it would require a special use permit for which none has been issued.

Marc Malocsay: Okay. So yes.

Attorney Havens: So the Board unanimously agrees that it's a pre-existing non-conforming use. We now have to determine whether or not the use had been discontinued in excess of a year such that it should be discontinued. And if so, then we have to consider the detriment to the property owner versus the detriment to the neighbors to permit it to continue. But based on the prior conversation, analysis of what was built when and who used it, when and when was it last looked at by the building inspectors and so forth, does anybody feel that this has been continued based on the testimony from the applicant within the time period that we can reasonably establish?

Marc Malocsay: It's been continuous.

Attorney Havens: So if it's been continuous and it's a pre-existing non-conforming use, then the applicant would have a right to continue to use it so long as that use is not discontinued for a continuous period of one year.

Glenn Ehlers: I disagree slightly. The applicant stated twice that it was used as a hangout spot, not necessarily dwelling. So if you could clarify that, maybe I'd go along, but by all means, I think twice on record we have it stated as a hangout spot.

Louis Amend: So originally before I moved back there, it was always used; people coming over, cooking, parties, stuff like that. And when I moved back there...

Glenn Ehlers: I guess we're looking to hear people stayed overnight as a dwelling right? Would that be a classified dwelling, Jeremy? Like once a year you said?

Attorney Havens: Correct.

Glenn Ehlers: So we have to be clear that someone stayed overnight.

Louis Amend: Oh yes. We definitely slept in there more than once a year.

Glenn Ehlers: Thank you for the clarification.

Louis Amend: No problem. Most every weekend before I was able to get in there full time, any chance I could.

Attorney Havens: Are we now in agreement that this is in fact a continuous pre-existing non-conforming use for the period in question that we're considering?

Board Members: Yes.

Attorney Havens: So that being the case, then the applicant would have the right to continue the pre-existing non-conforming use. And now we have to address whether or not the applicant wishes to seek an area variance because a pre-existing non-conforming use cannot be increased under the pre-existing non-conforming use regulations by more than 15%.

Glenn Ehlers: The way I was reading and under the other footnote here was that the accessory dwelling unit shall not exceed 800 square feet—period. If we're terming it an accessory dwelling unit, then it shall not exceed 800 square feet. Shall not—period.

Attorney Havens: Correct. That is a limitation under the accessory dwelling.

Marc Malocsay: Where you're adding onto it, are you building directly up from the footprint...

Louis Amend: Straight up.

Marc Malocsay: So that's going to be just over 1,000 square feet. It's limited to 800 square feet.

Louis Amend: Okay.

Diane Bramich: You can't variance that?

Marc Malocsay: That would be a separate. And if we're doing that then we're going to need the County response.

Chairman Jansen: Is the County response going to be any different, even if it does go to a thousand square feet?

Attorney Havens: Well, that's not for us to determine, but I think everybody here anticipates that there's not going to be significant objection from the County since it's really just an expansion of a residential dwelling.

Chairman Jansen: Are you doing this tomorrow or are you doing this sometime this summer?

Louis Amend: I would like to sooner than later.

Attorney Havens: Well, the point that's being debated for your clarification is the Board has made a determination that this is a pre-existing non-conforming use that should be permitted to be continued to be used as such. But under the regulations, you cannot expand the square footage of a pre-existing non-conforming use by more than 15%. So your application actually more than doubles the square footage because you're putting a stairway where there's currently a deck or something along those sides.

Louis Amend: So that's where I am popping out a little bit.

Attorney Havens: Right, exactly. Where there's currently a small deck on the front of the building, you're putting the stairway to gain access to the second floor. So you're actually more than doubling the square footage, it would be well in excess of a thousand square feet. This Board would have to grant the variance if you wanted to go in excess of 15% of what you currently have. And if it's 532 square feet...

Louis Amend: Even without the staircase I still have...

Attorney Havens: ...you could only go up to 612 square feet.

Louis Amend: Additional?

Attorney Havens: No. 612 total. Which means you're only getting approximately an extra 85 square feet without a variance. So if you want more than that, you're going to have to request a variance. And if you want us to consider that variance, we're going to have to submit your drawings and the whole application to Orange County Planning for them to consider it. We do not have legal authority to grant a variance without referring it to the Orange County Planning Department.

Louis Amend: I understand.

Attorney Havens: Which means if you want to seek a variance, we're going to have to adjourn.

Louis Amend: Okay.

Attorney Havens: Submit your application for a variance to the Orange County Planning Department. Have them come back with whatever response they have for the January meeting and we can reconvene and consider your application for a variance.

Marc Malocsay: They need 30 days to respond.

Attorney Havens: We might not have an answer but sometimes they issue a letter in a week and sometimes it takes them the full 30 days or more.

Louis Amend: If they don't respond in that 30 day mark does it roll over to the <inaudible>.

Attorney Havens: No. If they don't respond within 30 days, they lose the opportunity to respond. And then we're permitted to make a determination regardless of whether they would have approved it or not. But we have to give them 30 days to respond. And if we make a determination without either getting a response or giving them 30 days, then we're acting outside our jurisdictional ability.

Louis Amend: I understand.

Diane Bramich: So they have to go to the Orange County Planning Department and file there or do they do it from here?

Attorney Havens: No, Connie will take their application and send it through the new electronic system to Orange County Planning for consideration and referral.

Marc Malocsay: So I will say that you came a long ways today with what we've never seen anything like this before. And everything is moving in your favor, but now it's because of the size that you're requesting, you need a variance.

Louis Amend: Yes. And unfortunately, I wish I could say 85 extra square feet, great. But that might be like half the stairwell.

Attorney Havens: So the question you need to articulate for this Board this evening before we adjourn is whether the variance that you're seeking is what's spelled out in your architectural plans that Joe Irace put together, or if you're going to be seeking a smaller square footage. If you want to go with what's in these plans, then this Board needs to know that so that we can submit that referral to the Orange County Planning Department.

Marc Malocsay: And if I may interrupt, you're going to want to do that because if for some reason your plans change and it's less, that's not a problem. If your plans change and it's more, that's a problem.

Louis Amend: We're not going to add any more than what Joe Irace and being that it's only 85 square feet, even if I did try to condense, I'll still probably be over as well. So I think we will just go with the plans I already have and we submit that.

Glenn Ehlers: Jeremy, which part of the code are you using? You're using pre-existing non-conforming accessory dwelling unit?

Attorney Havens: Yes. Well pre-existing non-conforming can apply to any use or any structure.

Glenn Ehlers: I'm just curious why we're not using this section that says the accessory dwelling shall not exceed 100 square feet. Period. Why are we using the pre-existing non-conforming accessory dwelling?

Attorney Havens: Because if it's pre-existing non-conforming then the prior 800 square feet, there would be two separate considerations. If it was already over 800 square feet, then well, the point being whether it's a variance of the bulk table or a variance of the accessory dwelling provision, it's still a variance of the square footage that is permissible under the code.

Glenn Ehlers: Okay. But why are we using the 15% instead of the 800 square feet maximum?

Marc Malocsay: Because it exists at the way that it does...

Glenn Ehlers: And it exists at 500 feet.

Marc Malocsay: ...and if he went 15%, he wouldn't need a variance from us. You can expand it 15% and not need a thing.

Glenn Ehlers: As long as it's under 800 square feet?

Marc Malocsay: As long as in this case,

Attorney Havens: Yes. If it was under 800 square feet...

Glenn Ehlers: If it were under 800 square feet, I agree.

Attorney Havens: ...with the additional 15%, then we wouldn't have to grant him a variance. But if he's going more than 15% or more than 800, which he's doing both...

Glenn Ehlers: Okay. Right, because that's the way I was reading it.

Attorney Havens: It's not one or the other, it's both. They're both applicable. He's facing one limit of 800 square feet, but that 800 square feet would not be applicable if his pre-existing non-conforming was already in excess of 800 square feet, he could still add another 15 to it. Because he could add up to 15% to a pre-existing nonconforming building regardless of whatever other provisions might have limited its size. So if it was over 800 he could still do another 15 without a variance because it's pre-existing non-conforming. But since he's below on both, we may give him a variance for both. You ready to adjourn this?

Chairman Jansen: I certainly am. Adjourned.

Louis Amend: Just so I'm on the same page—Connie's going to send my stuff to the County?

Chairman Jansen: Yes.

Louis Amend: They have 30 days to respond. If they don't respond, then it goes to the Board and then you will make the determination.

Attorney Havens: Or if they do respond, then we'll consider whatever they recommend.

Glenn Ehlers: So you may or may not get back on January, it might be February.

Attorney Havens: It depends on whether or not we have a GML 239. But we'll put you in the agenda for January, correct?

Chairman Jansen: Yes.