

TOWN OF WARWICK
ZONING BOARD OF APPEALS

Members Present:

Chairman Marc Malocsay

Attorney Jeremy Havens

Diane Bramich

Glenn Ehlers

Aaron Ubides

Bill Cerone

Mary Garcia, ZBA Recording Secretary

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 non-conforming building built on the property in 1950 and if so, requesting an area variance permitting such expansion. **Continued from the January 27, 2025 ZBA Meeting.**

Representing the Applicant: Louis Amend, Applicant

Chairman Malocsay: Are you here?

Louis Amend: Yes, Louis Amend.

Chairman Malocsay: At the last meeting we decided we were going to revisit the property. I believe every one of us was out. Does anybody have any comments? The variance being sought on a pre-existing non-conforming second house labeled 'accessory dwelling' expanding more than 15%, thus an area variance.

Louis Amend: In code 164-22 an accessory building is a detached subordinate building on a lot, the use of which is customarily incidental to that of the main or principal building. I came to a point that says a detached building surrounded by an open space on the same lot. The cabin in the back is farther away from the neighboring houses than the actual main house is. So I was wondering if this would help that 15% because this didn't come up in the January meeting?

Chairman Malocsay: What you have doesn't necessarily apply with that because the principal use of the property is a single family dwelling. An accessory structure—and there's a list of what is allowed—for the most part, a garage would probably be the most common. A second one would be a shed; not another dwelling.

Louis Amend: I understand my property is one of <inaudible> compared to <inaudible> area. I couldn't even find comparables to it.

Chairman Malocsay: Which doesn't help the application, but we said that this is pre-existing non-conforming. So you're going to have a second dwelling on the property. The question is how big will that second dwelling be and why does it have to be that size? I am willing to go to the maximum allowed for that structure because it was in the code and defined as an accessory dwelling at 800 feet. At 800 feet you could easily have a one bedroom house with the office/living area/kitchen/bathroom.

Louis Amend: Is that an additional 800 or 800 total?

Chairman Malocsay: Eight hundred in total.

Louis Amend: The house is becoming a burden on my mother. She can't go out and maintain the property. Me staying there and being able to help financially and maintain the property, as well as still being able to start my own family, and stay and keep it, I can put funds towards what needs to get fixed and upkeep. Moving to a different town I don't know how often I could get there. My mother doesn't have the funds to pay to do it, so back to detrimental to the neighborhood, I feel it'll slowly slip.

Chairman Malocsay: So an answer to part of that is we're always looking at the property itself, knowing that one day you won't be there and then it becomes an Airbnb, etc.

Louis Amend: I don't have any plans to do that. If I get what I'm hoping for, this is long term. This is where I'm going to raise my kids. I grew up here, my mother loves it. East Shore's the best area in Greenwood Lake. I understand with the total allotted square footage that you're allowed to grant within that 15%. I'm putting a staircase, we're going up, not going out. I'm not encroaching on any neighbors, there's no overcrowding, everybody who's there is already there. I could be on record—I don't plan to rent it or Airbnb it ever. As long as it's under the Amend name, I don't plan on doing that.

Chairman Malocsay: But again, the variance goes with the lay of the land. When they built the second dwelling on the property, there wasn't zoning and that's why it's grandfathered. And the variance goes with the land. We can have some more discussion, come up with a motion and then vote on the motion. We will go through the criteria.

Louis Amend: Is it a majority?

Chairman Malocsay: No. In going through that list, it is feasible to answer every one with a 'no' and still grant the variance, unlikely. And it's also feasible for every one of them to be 'yes'. And deny, unlikely. When we do that we we're generally all on the same page when we're going through those questions. What the Applicant is seeking is substantially more than what's allowed. I would be fine with going to the 800 square feet which is allowed and a question of it being allowed in the zone.

Glenn Ehlers: I agree to the 800, I just think the character of the neighborhood, if you go higher or larger, it's going to block a view, it just doesn't fit where it is.

Louis Amend: My rebuttal is that my neighbors are supportive. I mailed 37 letters and if anybody had a problem, they would've come. The character of the neighborhood, I don't agree.

Diane Bramich: It doesn't change the character.

Louis Amend: No, I don't think by definition.

Diane Bramich: Definitely does not change the character of the neighborhood.

Attorney Havens: We can go over that when we go through the five statutory criteria and everybody can specify what their position is on each.

Glenn Ehlers: I just didn't see any other lots that had two dwelling units on them.

Louis Amend: Because it's 1 of 1.

Chairman Malocsay: I would agree with that. The only thing you have to your advantage is that some of the lots are smaller and they have something on them. So without knowing where the property lines are...with what Diane said and the character of the neighborhood, it kind of works, but still it is one piece of property with two dwellings on it, which is allowed but with a limit of 800 square feet, which is larger than what's there. As we go through the criteria maybe we can explain things a little bit.

Louis Amend: I have one other question. We had discussed the last two times about the residential traditional neighborhood overlay district. And Attorney Havens had asked on that December meeting 'does anyone feel that the intended use of this residence was a residential traditional neighborhood overlay district would have any adverse effects on the community?' The Board answered no. Marc said, 'yes, anybody could build a second home on that property.' But Diane said it's pre-existing. I know a lot of

people can ask for the same thing I'm asking for, but they don't already have a pre-existing structure. So if I am the only one, then I'm the only one that can ask that.

Attorney Havens: Surprisingly, I looked and you're not the only one.

Louis Amend: I don't know of any.

Attorney Havens: That's not honestly the key critical issue for the ZBA to consider.

Chairman Malocsay: If we don't have any more questions, can the public hearing remain open? Only because we're going to go through those five criteria. We just might want to explain something better, he might want to add something. Or should we close the public hearing?

Attorney Havens: We close the public hearing, do our deliberation, and then if majority of the Board chooses to reopen the public hearing for further comment then the majority of the Board can make such a motion.

Aaron Ubides: My concern is that it's over 100% increase. I did look at the property, and I understand there's two dwellings, but that's quite large and that's my concern in the neighborhood. It doesn't fit.

Chairman Malocsay: Eight hundred square feet is allowed. We always try to give the variance, but the least amount possible. Can you have 800 square feet and still have a two-bedroom house?

Louis Amend: It's only a one-bedroom.

Chairman Malocsay: But when you say raising a family...

Louis Amend: When children come, it allows me to keep my mother on the property, take care of the property, and take the house over in a more official capacity. It will just be the people who are there, they might be shuffled around. I'm under the 25 feet in height, not going out towards the sides, the back, not encroaching on property, and not obstructing anybody's view.

Diane Bramich: If you're going straight up, what is the footage down there?

Attorney Havens: I have 667 square foot.

Diane Bramich: So downstairs is that amount, if he put the same thing, he squared it off upstairs, it comes to 1281.

Attorney Havens: Yes.

Diane Bramich: And he's allowed 800?

Attorney Havens: Correct.

Diane Bramich: He's only putting what he originally had. He's not expanding out or going up and <inaudible>. He's going straight up and putting the same amount up there. It's just making the house, the whole structure now is 1281 instead of 600.

Chairman Malocsay: I agree with the exception of there's a bump out that's built out with the...

Diane Bramich: Staircase, you've got to have it.

Aaron Ubides: But it's enclosed so it adds that to square footage.

Diane Bramich: I know. It adds some square footage. But if downstairs is 667 and upstairs you go the same amount, you're 1281.

Chairman Malocsay: You're over 1300 square feet.

Glenn Ehlers: You're 1334.

Attorney Havens: That's not the existing, I think that includes the front porch. That would be the footprint including what's now currently a front porch that would be enclosed for the stairs. The existing is 532 square feet.

Diane Bramich: So because he's putting a staircase in...

Attorney Havens: He has to enclose what's currently part of a deck.

Diane Bramich: Put an inside staircase. Is it possible?

Bill Cerone: By closing in the porch and putting an enclosed staircase that adds to your square footage.

Louis Amend: That's the only thing that I'm touching. I'm making it a complete square rather than an "L" that it is now.

Diane Bramich: I don't get the problem; I understand the square footage. And you're bringing down the square footage. I don't get why you are arguing against besides the bump out, going up directly above should not be a problem in that area. Giving a variance for 200 square feet.

Aaron Ubides: So the issue is that he's not going above straight up. He is going out.

Diane Bramich: He's going straight up and the...

Aaron Ubides: No, he's going out.

Diane Bramich: No, he's not. Because there's a deck there, the deck is included.

Aaron Ubides: No, the deck is not included because the deck is not enclosed.

Attorney Havens: The deck is not enclosed.

Aaron Ubides: So if its not enclosed...

Diane Bramich: It's still part of the structure.

Aaron Ubides: It doesn't count in square footage because it's not enclosed.

Diane Bramich: We are a Zoning Board of Appeals. They're coming before us because they need something. And it's not only this particular application, it's other applications. It's something that a family needs. The code says 800 square feet. What's 200 more square feet? If he went straight up, you'd be fine but because of a staircase that's bumped out...he's not changing the neighborhood.

Aaron Ubides: What we're trying to explain is once you enclose that staircase and the porch, it is considered full square. If it was an open staircase it wouldn't be considered square footage, like an outside deck just walking up. So that's the issue—is that it's going out a little bit.

Louis Amend: Per the Building Department office I spent \$8,000 on architectural drawings. If the staircase is the problem, I will take it out.

Chairman Malocsay: It's not a matter of taking it out with a second story, the staircase is going to have to meet code. The issue is that the chances of any of those properties going before the Planning Board and allowing them to get a second building on the property is it's not going to get it.

Diane Bramich: Each application before this Board is different. It's a separate application and taken that way, it has nothing to do with this application.

Chairman Malocsay: So this application, we grandfathered them having the second house. And the maximum allowed is 800 square feet. We're giving them the 800 square feet that is allowed.

Diane Bramich: But they're asking for a variance for more.

Chairman Malocsay: And the variance is substantial.

Diane Bramich: I don't feel it is.

Chairman Malocsay: If this were a house on Greenwood Lake and there was only one and they wanted to increase the size and added a second story to it and needed variances, I probably wouldn't have a problem because the other properties around it probably conform, meaning it's not a substantial variance when looking at the other properties. In this particular application, it's the only place that has a second house. And our code does allow it with a special use permit, we grandfathered it. So 800 square feet is fairly large for a second dwelling.

Diane Bramich: So make it the first dwelling and make the other house the second dwelling.

Attorney Havens: The code requires the larger one to be closer to the road. The secondary accessory dwelling must be a minimum 20 feet behind the primary dwelling.

Louis Amend: We're at an impasse of 200 square feet. Is the reason that the 200 square feet is considered detrimental to my neighborhood?

Chairman Malocsay: When you go through the criteria, that's one of the questions and I would answer that, 'no'. But we can do the calculations and depending on the variance given we would have the percentage that it's increased and it's not 200 square feet. I think the structure's going to be 13 and change, which is over 500 square feet more than what's allowed.

Diane Bramich: I've got a question. I'm looking at your architectural plans. You're landing up, and then you're bumping this out to meet that?

Louis Amend: No.

Diane Bramich: So he's not adding that.

Louis Amend: That would be an eventual porch.

Diane Bramich: It is the entrance right here.

Louis Amend: That's the entrance right there.

Diane Bramich: It's just this little piece here that everybody's concerned about?

Louis Amend: That right there is the front door.

Diane Bramich: What's the problem?

Chairman Malocsay: The way you're describing it is not what I saw. Can I take a look?

Louis Amend: *(Referencing the plans in further detail to Board Members)* So here's my front door. That's the house. This will eventually be a front porch, but for now we'll just have stairs going in.

Chairman Malocsay: The point is that a lot of those additions do not need a variance. They're not limited to a size unless it's going to be a side yard, front yard, rear yard setback, for example.

Louis Amend: Understood. But I don't see how I'm hurting the neighborhood. I'm not obstructing anybody's view. There's only two houses that could look there unless you're standing in my driveway. You can barely see the house unless you strategically stand on the road. I don't know what view they would be looking at. I'm not pushing water onto somebody's property. This house is still a minimal size.

Glenn Ehlers: My thing is just the second story. I wouldn't have a problem if he wanted to build a bigger one-story and put storage.

Louis Amend: Another thing is I don't have an attic or a basement. The big closet, the office, that's my storage.

Chairman Malocsay: So Jeremy, just in some rough numbers so we have the the footprint of 667. Is that what you have inclusive of the porch?

Attorney Havens: Inclusive of the proposed expansion—not the original. The original is 532.

Louis Amend: I've had an architect and two builders come to the property, both saying it can be done.

Chairman Malocsay: All I'm saying is that there's some options that we have to look at.

Louis Amend: I understand but even going forward, to knock it down and put an 800 square foot house, that's triple the cost of just going straight up.

Chairman Malocsay: Yes, but then there aren't variances that are needed. And even if he came back to the Board and said the architect came up with something and it's 870 square feet, you'd still need a variance from us. But that variance is minor in comparison to 100% increase. We can have the Board vote. And I don't know for sure, but with what I'm hearing I don't know that you're going to get the variance.

Louis Amend: So even though it's 500 square foot I'm coming here asking for something that will help my family greatly rather than push us back.

Attorney Havens: I did the math and what was being kicked around is the idea that you're enclosing an area outside the current footprint in order to create a stairway. And then on the second floor, there's a projection that becomes a covered porch on the ground floor that it further expands the overall footprint

of the house. Based on the plans that were presented I did a little bit of math and the area that's dedicated to the entry and the stairs going up is 109 square feet. When you count that with two floors, that's 218 square feet of floor space that you're allocating for entryway and a set of stairs to get upstairs. 218 square feet is a good sized room. If you had a little bit more, you could make two decent sized rooms with almost the square footage that you're allocating to a double size staircase. Marc was saying a minute ago if you can build out instead of up, you might need a significantly smaller variance by eliminating the staircase, you save 218 square feet. You're already asking to build out a little bit, not much, if you're able to build out and make it habitable instead of going up, you'd save yourself 200 and almost 220 square feet of floor space by eliminating the stairs.

Louis Amend: So you're saying change the floor plan instead of go up, go out?

Attorney Havens: Yes.

Louis Amend: Now wouldn't that be disturbing the characteristic of the property within the community?

Attorney Havens: Not any different from the character of the community. In fact, it would have less of an impact because it would be less of a potential visual barrier for your neighbors.

Diane Bramich: What size is the lot?

Louis Amend: I think it's over 17, not sure. But now I would be eating into the yard. And building another room may deter water to other properties by building onto the grass instead of going up.

Chairman Malocsay: I don't think you want us to vote now. With the exception of Diane, from what I'm hearing, the vote sounds like it's going to be 3:1, and one person I'm not sure of.

Attorney Havens: We could close the public hearing and during our deliberation you can determine whether or not you want to take the vote at this meeting or if there's still further questions to be answered you could make a determination upon further deliberation if you want it at a subsequent meeting.

Chairman Malocsay: Yes, but if the Applicant comes with different information, the questions that we're answering now would be mute. By doing that, at least the Applicant can see where we're coming from with the five questions and us not making a vote. And then we can open a re-hear if the Applicant should decide to present something.

Attorney Havens: If they wanted to reopen it they absolutely could.

Louis Amend: So instead of voting, not voting this time, what could change in next month's meeting?

Chairman Malocsay: Assuming the vote was going to allow for 800 square feet, then you would have to figure out how to make that work.

Louis Amend: Which would be virtually impossible.

Chairman Malocsay: Then it probably would end up being a compromise from what's allowed to what you have planned. And either talking to a builder's engineer on the second story or just the one story. And then you're going to be less square footage. And again, I still don't like the idea of going over 800 square feet because then no longer does it fit the definition of an accessory dwelling, then it becomes two dwellings on one piece of property, which isn't allowed.

Louis Amend: It is already two dwellings on one property.

Chairman Malocsay: So we grandfathered and said that's what it was, and you are allowed a 15% expansion. That's not helping you. By going the other way at 800 square feet you are much better off.

Louis Amend: I'm just confused on why I would've been told to get the architectural plans.

Chairman Malocsay: We didn't say that.

Louis Amend: The office did. And it took me three months to get out <inaudible>.

Chairman Malocsay: Yes, and mostly because then you wouldn't know the variance that you need. It's kind of a catch-22 because sometimes we absolutely need that information. And a lot of times, because you're going to ask for a variance and then you can make something work.

Louis Amend: My question is let's say I have an extra \$8,000 to pay the architect to write a brand new plan. Now we're talking \$16,000 to still potentially get denied.

Chairman Malocsay: You could come up with sketches that show us.

Louis Amend: But I would need an architectural design in order to complete the <inaudible>. It seems to be a lot of square footage but I do disagree with it hurting the community. The community would have been here if it obstructed their view, they had any concerns or questions. I've seen you push through, basically everybody that's come in front, people that want to go up against the property line and have garages, and I'm not doing any of that. I'm not even coming close to any neighbor's houses. I'm not trying to take advantage of the system. I just want to save money and stay in town.

Diane Bramich: Remember this is a relief Board, we are here to help people too.

Chairman Malocsay: Yes. And in our guidelines, it says *minimal* relief.

Diane Bramich: Yes. And we've done more than that in other circumstances.

Chairman Malocsay: Never.

Diane Bramich: Many, many times.

Chairman Malocsay: Never in my 30-some years have we had an application like this. Never. Going through the criteria so everybody has time to think about it and then see...

Attorney Havens: See what the deliberations are.

Chairman Malocsay: That'll give us time to make a decision on a vote for the next meeting.

Attorney Havens: That's up to you and the Board.

Chairman Malocsay: Are we okay with that? We're going to go through the criteria. The Applicant can hear it because at that point the public hearing will be closed and it's just a simple majority to reopen the public hearing because we wouldn't vote until the next meeting anyway.

Aaron Ubides: I agree with that.

Chairman Malocsay: Public hearing is closed.

Attorney Havens: In Considering an area of variance the ZBA is required to consider five statutory criteria. Number 1, Will an undesirable change be produced in the character of the neighborhood or a detriment to nearby properties be created by the granting of the variance requested? The Applicant states no. Does the Board agree?

Board Members: Agreed.

Attorney Havens: Number 2, Can the benefit that the Applicant seeks be achieved by some feasible method other than the variance requested? The Applicant states no. Does the Board agree?

Chairman Malocsay, Aaron Ubides, Glenn Ehlers, and Bill Cerone: Disagree.

Attorney Havens: That's 4 out of 5. Is the requested variance substantial? The Applicant says no. Does the Board agree?

Chairman Malocsay, Aaron Ubides, Glenn Ehlers, and Bill Cerone: Disagree.

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

Board Members: Agree.

Attorney Havens: And number 5, is the alleged difficulty self-created? The Applicant states no. Does the Board agree?

Board Members: Disagree.

Diane Bramich: <Inaudible>

Attorney Havens: Any further deliberations? Any further motions? Do you want to reserve decision or do you want to make a motion to call a vote?

Chairman Malocsay: Reserve the decision.

Glenn Ehlers: I make the motion to reserve.

Aaron Ubides: I second it.

Chairman Malocsay: All in favor?

Aaron Ubides, Glenn Ehlers, and Bill Cerone: Aye.

Diane Bramich: No.

Chairman Malocsay: The public hearing's closed but we went through the five criteria and everything that we talked about basically reflects the decision on why we made that decision, who voted which way. We don't have a motion now, but what I'm hoping is the Board Members have more time to think about how they're going to vote. And when we make the motion it will be accurate with the square footage that you're increasing.

Louis Amend: I don't know how I would get it to pass; I would need an architect drawing.

Attorney Havens: You actually would not need new architectural drawings. You could take your architect's drawings and mark it up with a pencil and show what the total square footage is so that we can consider the alternative variance that you're actually requesting.

Louis Amend: If it gets approved the next meeting?

Attorney Havens: Then you can go to the architect <inaudible—crosstalk> for Building Permit purposes.

Diane Bramich: Think about going out towards the first house instead of going up. Maybe a one-story.

Glenn Ehlers: That's the feeling I'm getting. If you made it a one-story building, I don't think there's any opposition.

Chairman Malocsay: And with the architect the only thing that you'll have to talk to him about is—because then you don't need a variance—is the 800 square feet. And you say, 'can we make this work at 800 square feet on one-story?' If he says no, then we look at the plans that you had.

Louis Amend: This was his professional opinion to go up and it made sense because I'm not losing property, which takes away from the house in the long run.

Chairman Malocsay: I understand what (Attorney) Jeremy did just alone with the staircase is a huge savings in space. And that's why we voted in the way that it was a substantial variance. Now that'll change if we reopen the public hearing without voting, without new information.

Louis Amend: So this is basically because of the staircase.

Chairman Malocsay: It's a substantial variance.

Louis Amend: So the staircase is our main reason.

Chairman Malocsay: If you take out the staircase, you'll be able to reconfigure the rooms for a two-bedroom house.

Attorney Havens: It can't be a two-bedroom house. Let's just clarify. He's not directing you to apply for a two-bedroom house because it won't get approved.

Louis Amend: I don't want a two-bedroom.

Chairman Malocsay: For a one-bedroom house 800 square feet is very feasible. And that's the other reason that we have a hard time giving this variance. I believe that's why the other members are feeling the same way at 800 square feet.

Louis Amend: If I stay under 800 square feet but go up, that would be okay?

Attorney Havens: You can go up to 800 square feet.

Chairman Malocsay: Yes, you could do the 800 square feet and go up. Because it's still 800 square feet. That's only 400 on the first floor.

Bill Cerone: When you reference the enclosing of the staircase it's bloating the total square footage. It's creating the delta from 667 to 800 to way above it, where it's not as palatable to go to 800, so it's substantial.

Louis Amend: So basically I have to get rid of the staircase; that's the majority of my problem. I'll be a hundred and something over the allowed square footage?

Bill Cerone: I have a question, if he can't go to 800 and goes to 900?

Diane Bramich: It's not substantial.

Attorney Havens: The Board could view that as being a potentially less substantial variance. And still the Board will do that much different than 1300 more reasonably.

Diane Bramich: You made a motion to reserve decision. If he came back next meeting...

Louis Amend: If you give me 10 minutes I'll do it right now.

Diane Bramich: Do you want to give him time to try and figure out what he wants to do and stay until the end? If he sits down outside and revamps it and draws it, like you said, use what you have and figure it out and comes back in here, we're still open.

Attorney Havens: You can make a motion to do that if that's what you so choose.

Diane Bramich: Make the motion now or when he comes back?

Attorney Havens: No, when he comes back.

Chairman Malocsay: We close the public hearing. The only thing we'll have to do is reopen the public hearing.

Diane Bramich: That's fine.

Louis Amend: I did say I stay with under the 800, 900, 950 square feet and I go up, he told me it wouldn't be a problem, but just talking with Diane, it could be a problem.

Diane Bramich: He's saying the stairs are the problem. If he eliminated the stairs and put them someplace else, is there still a problem? That's what he wants to know.

Aaron Ubides: If he brings the square footage down, not just the stairs. Just the square footage.

Louis Amend: <Inaudible> was 220 that's the delta, which is eating up most of the space. So if I'm taking away 220 and I'm at give or take 100 on both sides of 1,000 square feet, would that be a problem?

Chairman Malocsay: Total square footage would be what when you're done?

Louis Amend: 1100 or 1,050.

Chairman Malocsay: It's considerably less than almost 100% expansion, 50% expansions.

Louis Amend: I'm just trying to get an answer articulated because if I have to come out more money and more time to get what you guys deem <inaudible> a large amount of square footage which I really still don't <inaudible> I need 20 minutes.

Attorney Havens: You're asking this Board to dictate what exactly they would approve. And unfortunately they can't do that because it's a collective, not a single person making the decision. They've given you a

lot of feedback on what some concerns and issues are. If you come back with another proposal that may be more palatable, there's a higher probability that you're going to walk away able to move forward.

Louis Amend: So I have some work to do and I'll see you next month.

Diane Bramich: Do you want to wait until next month?

Louis Amend: I don't, but I don't think I have a choice. I have to draw on the plans. And it might take me a half hour to do it, but I can do it now.

Attorney Havens: We have two other applications. If you feel confident and you want to represent then you can request that you do that. And if one of the Board members wants to make a motion to entertain it and reopen the hearing, then we can approve that if the Board chooses to do so.

Louis Amend: I'll give it a shot.

Upon the completion of the last hearing, Louis Amend presented the Board with the changes he made.

In summary:

Louis Amend: We have a 1st floor of 612 square feet and a 2nd floor of 669 square feet, totaling 1,281 square feet. For the bottom floor I took Diane's advice and just kept it the way it is. Right here I'm just squaring the house off. This section which is 4x7x29 encapsulates 133 square feet. I did the same on the top, which is another 133 square feet totaling 266 square feet. Subtract that, I'm at 1015 square feet now, which is a 215 square foot difference. I can possibly finagle another 87 square feet, dropping me to 128 above the 800 maximum allowable. I took the staircase out, as you can see in my drawing. I will talk to the architect and the builder to see if this is correct. We'll start with some staircases here. So I'd have to start here, climb up this way. And then it would pop out into a teeny hallway. And that's with the extra 87 square feet. So right now I'm just asking for an overage of 215 square feet.

Chairman Malocsay: If we allow 1,050 feet, it's 250 feet more than what's allowed. Just a little room in case because when you do all the calculations but you forget a wall 6" thick, it changes everything. I'm still on the 800 square feet for having that second dwelling on the property. But in this particular case it's on the percentage-wise from 800 to the 1,050. Diane, do you want to make that motion and speak?

Diane Bramich: I make that motion.

Attorney Havens: Diane's making a motion to reopen the public hearing on the Louis Amend application for 59 East Shore Road.

Aaron Ubides: I second.

Chairman Malocsay: How do we vote?

Board Members: Yes.

Chairman Malocsay: All in favor?

Board Members: Yes.

PUBLIC HEARING OF Daniel Montgomery – regarding property located in the MT zoning district at 440 Buttermilk Falls Rd. Warwick, NY 10990, and designated on the Town tax map as Section 64, Block 2, Lot 15 for an area variance from Town Code §164-41.C.(4)(f) for repair and replacement of an existing unpermitted 6' driveway fence and gate located within the front yard setback where a 100' setback is required.

Representing the Applicant: Daniel Montgomery, Applicant

Chairman Malocsay: Can you state your name for the record?

Daniel Montgomery: Daniel Montgomery.

Chairman Malocsay: Just tell us just a little bit about the application and we'll go from there.

Daniel Montgomery: When I moved in five years ago, the fence was already there. It's worn out pretty badly. At this point, it is in such a state where I have to physically lift the gate to open and close it. I'd really like to get it replaced with something more functional.

Chairman Malocsay: Okay. just the key things is the, it's already there. You're replacing an already existing fence, but it appears that the town doesn't have any record of...

Daniel Montgomery: I don't know the full history of it.

Attorney Havens: No, the reason he's here is because the pre-existing gate is six foot and he submitted a building permit to replace the existing six foot driveway gate. And because it is six foot within the front yard setback, it requires a variance. I did want to make a few additional notes for the benefit of the Board. The original notes that were circulated on this matter stated that the Applicant did not have a building permit. He had previously applied, he didn't have a denial letter from the Building Department. An updated permit denial letter was received. So the ZBA does in fact have jurisdiction to hear this matter. Additionally, in the prior notes that were circulated, I had identified erroneously a GML 239 referral was required. There's no 500 foot triggering event that would trigger this, so that was an error. And I clarified it in your current notes and the section of the code 164-41C(4)(f) that prohibits a six foot fence in the front yard setback. There was a notice of public hearing issued by the Town Board and on February 13th they introduced a new local law that would delete that section of the code and create a new chapter 80a for fences that would completely redefine what's acceptable for fences within the Town. If this law gets passed, the specific section of the code that he's seeking a variance from is currently proposed to be deleted so he wouldn't have to come to the Board for a variance.

Chairman Malocsay: Do you understand that the law might change? If you get the variance, and the law changes, nothing changes with you. But we might not have to give a variance at all depending on how the new law reads. Something on the fences that we've had in the past is on the height it's more in the front yard that it's not a stockade fence where you can't see into the property at all. Everybody wants them high to keep the deer out but usually they're wire and you could see into the property.

Daniel Montgomery: I don't think <inaudible> You can see through the fence slats, there's space between. Also, it's a dirt road so it serves to help keep some of the dust off of the property.

Attorney Havens: I also just wanted to add the one additional point with the revised application that was submitted. The Applicant clarified and revised submission that the driveway gate is currently

approximately 25 feet from the edge of the road. So that would be in the variance that's being sought is 25 feet from the edge of the road.

Chairman Malocsay: We've interpreted in the code that gates themselves, it's a gate stands alone, isn't what we consider to be a fence. We determined it would be the example of a flag pole. Usually it doesn't meet certain requirements when it's put in the front yard, but we still allow them. Gates are more of an architectural thing if it's just a gate and not a fence.

Attorney Havens: This is a gate.

Daniel Montgomery: There is a fence attached to it; it's just the gate that needs to be replaced right now.

Chairman Malocsay: I got that especially from your testimony that you have to pick it up each time. So before we open up to the public you know that the law could change. Do you want to seek the variance tonight?

Daniel Montgomery: I would like to get this done sooner than later.

Chairman Malocsay: Public hearing is open. Is there anybody that wants to address this application?

Attorney Havens: The Zoning Board needs to consider SEQR and this particular application does qualify as Type 2 action under SEQR section 617.5(C) paragraph (12). Would someone care to make a motion typing the action as a Type 2 action with no adverse environmental impact?

Diane Bramich: I make a motion.

Aaron Ubides: Second.

Chairman Malocsay: Motion by Diane, Second by Aaron. All in favor?

Board Members: Aye.

Diane Bramich: How close to the line is the fence?

Attorney Havens: In the revised application he identifies it as being 25 feet back from the line.

Chairman Malocsay: On Buttermilk Falls Road I think that would be from the center of the road.

Daniel Montgomery: I think technically the drawing shows part of the road at the edge of it.

Attorney Havens: His property isn't in perfect alignment with the road. Part of it is way off the right of way and part of it is within the right of way.

Chairman Malocsay: Anyone else from the public? Public hearing is closed. And if we don't have any other comments because this is replacing an existing gate, we'll go through the criteria.

Diane Bramich: A gate or a fence?

Chairman Malocsay: A gate.

Daniel Montgomery: I think there's a couple of feet of fence on one side. I just want to make sure everything's clear.

Chairman Malocsay: Yes.

Attorney Havens: In considering an area variance, the ZBA has to consider a five statutory criteria. Number 1, will an undesirable change be produced in the character of the neighborhood or a detriment to nearby properties be created by the granting of the area variance requested? The Applicant states no. He states as a reason for at least five years that has already been nearly identical. Six foot fence gate in place. Does the Board agree with the Applicant?

Board Members: Yes.

Attorney Havens: Number 2, can the benefit that the Applicant seeks be achieved by some feasible method other than the variance? The Applicant states no. And the reason given is it's the height of the fence. Does the Board agree with the Applicant?

Board Members: Agreed.

Attorney Havens: Number 3, is the requested variance substantial? The Applicant states no. And the reason given, the 6 foot fence gate already exists and is being replaced. Does the Board agree with the Applicant?

Chairman Malocsay: Numerically it seems like a lot, but anytime we've gone from 4 to 6 feet, we have not said it's substantial.

Diane Bramich: It's not changing.

Aaron Ubides: I agree.

Chairman Malocsay: I agree but the variance has to go from the 4 to the 6 because that's what's allowed. We're replacing the fence as is, but the variance still is from 4 to 6, is that correct?

Attorney Havens: Correct. And so does the Board feel that the variance is substantial?

Board Members: No.

Attorney Havens: Question 4, will the proposed variance have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district? The Applicant states no. And the reason given, "For at least 5 years, there has already been nearly identical 6 foot fence gate in place". Does the Board agree that it will not have any adverse effect or impact?

Board Members: I agree.

Attorney Havens: Is the alleged difficulty self-created? The Applicant states no for the reason, "The existing fence was in place before I purchased the property."

Board Members: Agreed.

Chairman Malocsay: Any further deliberation?

Board Members: No.

Chairman Malocsay: Would someone like to make a motion?

Diane Bramich: So moved.

Glenn Ehlers: Second.

Chairman Malocsay: That would be a motion to grant as advertised?

Diane Bramich: As advertised.

Chairman Malocsay: All in favor?

Board Members: Aye.

Chairman Malocsay: Motion carried.

PUBLIC HEARING OF Kraftify Holdings, LLC. – regarding property located in the OI zoning district at 251 State School Road, Warwick, NY 10990, and designated on the Town tax map as Section 46, Block 1, Lot 37 for an Interpretation of Town Code §164-46B(5) and 46E regarding whether or not the applicant's expansion plans are subject to submission of site plan review and/or special use permit application before the Planning Board, or if a Building Permit may be issued without review, and, if needed various area variances for front and side yard setbacks for proposed improvements.

Representing the Applicant: Levi Kool, Attorney, and Michael Kraai, Applicant

Chairman Malocsay: State your name and can you tell us about the application?

Michael Kraai: My name's Michael Kraai. These are copies of the mailings.

Mary Garcia: Do you have the originals?

Michael Kraai: That's what my attorney provided.

Chairman Malocsay: This has never been done before.

Michael Kraai: They were mailed to the Town.

Mary Garcia: There are no mailings in the file here.

Attorney Jeremy Havens calls Levi Kool, Attorney for Michael Kraai via speakerphone

Attorney Havens: Hi Levi, your client Michael Kraai is here with the Town of Warwick Zoning Board of Appeals. We didn't open the public hearing yet. We just started the meeting with respect to this particular application and we asked Michael to give us a brief summary of what they're trying to do.

Michael Kraai: Founder, Mike Kraai, Drowned Lands Brewery, I bought the former 251 State School Road in 2018, went through a 2 year renovation and have been operating for 5 years now. We were denied a building permit by the Building Department and requested that we go in front of the Zoning Board of Appeals as we have a setback. We also request interpretation of the specific code for use of the property. What we're intending to do is build a covered patio, increase amenities for the outdoor space, and improve the property landscape upgrades. We're not changing the use of the property. There's no additional water or electric usage. We're doing the same thing we've always been doing. The reason we're here is because the shade and the addition that we want to put on is within the setback limits.

Attorney Kool: I want to highlight a few items that are in current court and have implications to our submission for this request for an interpretation. There is a question of interpretation within the code. There's the utilization of a defined term for area of a building. That term is not utilized in the code section 164-25A(1)(a). That code section provides the term 'ground area'. It is our position that when we look at the totality of the plan, we step back that the proposed expansion does increase the ground area numbers, but it's below the 15% limitation or the 50% period for the application of the special permit. This expansion is not an increase in the intensity of the use; it is a relocation of certain seating areas. There's a lot of seating area that took place in the lawn, which will be removed and placed within a closed and more

confined area. We believe that the interpretation of the code with the 15% as set forth in the plan and as identified in my submission that we do fall within that provision. We would like to have determination whether or not it's the Board's position that we fall within that code provision.

Chairman Malocsay: Public hearing is open.

Attorney Havens: Initially when the application was submitted, a copy of the Building Department Permit Denial was not provided. The Applicant has subsequently provided the Permit Denial Letter along with the amended application. Orange County Planning Board GML 239 referral was made because the Applicant seeks an interpretation of the code and if the interpretation is not favorable, the area variances and the property is physically adjacent to State School Road, which would require referral to Orange County Planning. In Orange County Planning's review of the application, they commented that "On October 29th, 2024, your Board forwarded to our office a request for a zoning interpretation, which was submitted to your Board by Kraftify Holding LLC. The County's law department has determined that requests for interpretation from a zoning code of appeals are not subject to the requirements of New York State General Municipal Law 239 L through M and therefore not required to be submitted to the County Planning Department. We therefore defer from making any recommendation or comments about the matter." Also, I want to point out that the original submission included extensions of a proposed nature playground, sunken gravel seating area, and a covered gravel seating area, all slightly outside the boundary of the property. The revised submission and map moves all of the improvements within the physical boundaries of the property.

Attorney Kool: It might have been referenced in our original application but it's not in our supplemental site plan that the Applicant does seek to add significant supplemental landscape to unify the property further as well as to provide a visual bumper between the potential expansion and State School Road. Mr. Kraai, as part of that landscaping, those would all be native trees?

Michael Kraai: They would definitely be native.

Attorney Havens: Before the ZBA gets into deliberations or further conversation regarding the interpretation, the ZBA needs to consider SEQR. And because this is construction or expansion of non-residential structures in excess of 4,000 square feet, it doesn't meet any of the criteria for a Type 1 or Type 2 action. The excess of 4,000 square feet is based on the revised site plans that were submitted. There are 3 new covered areas that are currently uncovered. One is to the right near the front property line, that's a proposed covered outdoor dining area specified at 2,423 square feet. There's an existing uncovered patio adjacent to the back of the building to be replaced and covered with a new roof structure of 3,626 square feet. And there's a proposed covered outdoor lounge area for 943 square feet. Together it's 6,992 square feet of proposed new open covered patio and seating and dining areas. Would someone care to make a motion typing the action as unlisted?

Attorney Kool: Before we make that motion, I want to clarify that existing uncovered patio be replaced and covered with a new restructure. A portion of that patio is currently covered by a second floor deck and does exist as a covered patio. So I don't believe that is a completely accurate calculation of the square footage. Mike, do you have any information on how large the covered area is of that existing patio?

Michael Kraai: One thousand square feet is the covered portion that's existing.

Attorney Havens: At 1,000 square feet it would still be 5,992 additional square feet of covered patio. We're still almost 2,000 square feet above the 4,000 square foot threshold that makes it an unlisted action as opposed to Type 2. Any further comment on that question?

Chairman Malocsay: Do we have a motion on unlisted?

Bill Cerone: So moved.

Glenn Ehlers: Second.

Chairman Malocsay: All in favor?

Board Members: Aye.

Attorneys Jeremy Havens and Levi Kool discuss comments and questions regarding the application.

Attorney Havens: Item number 1: You identified that no prior Building Department permit had actually been denied and no denial letter was delivered and you took the position that while not requested, the failure to timely deny an application may constitute a de facto approval. Since your submission, I explained to you in consultation on revisions to this application that I respectfully disagreed, that would be the case if you were before the Planning Board and they failed to approve it within a specified 62 days. The same rule does not apply to the failure to issue a building permit. It does not constitute a de facto approval. Without the building permit, you'd still be precluded regardless, and it would be up to the Applicant to go back to the Building Department to get that. Item number 2: You made revisions where the front yard and the side yard were to conform to the fact that the front yard is actually facing State School Road as opposed to the parking lot and that the side yard would be where the main entrance in the parking lot are. I don't think there's any debate on that, correct?

Attorney Kool: Yes, that's correct. There may be question onto what is the front yard versus side yard, but for the purposes of this application we have no issue with adjusting that.

Attorney Havens: Item number 3: It's the Applicant's position that the proposed expansion does not represent 79% increase in floor area; the proposed expansion represents an increase of floor area ratio of 12%, and a lot area coverage increase of 13.1%. And it's your opinion that both calculations fall below the 15% threshold identified in the Town Code for the issuance of a special permit. The Applicant is seeking an interpretation from the Board to clarify the calculation for "ground area of the use" thereby enabling the Applicant to seek relief from the site plan review by the Planning Board pursuant to Town Code section 164-26B(5). So in comment to that I need to recalculate based on the square footage you just provided because I did not take into consideration the 1,000 square foot because it wasn't reflected in the plan.

Michael Kraai: I do believe there's an area on the plan that specifically has a calculation from the architect.

Attorney Havens: Yes, but I disagreed. There's 5,992 square feet of new additional covered patio a/o seating area in addition to what's pre-existing. The existing building according to your site plan has a square footage of 8,618 square feet. So the increase of 5,992 square feet would be 69.5% of the existing building size. My position was that the allowance you're seeking is based on an increase of 15% and you're using the term "floor area ratio", which specifically references the relationship between the building and the lot itself. Whereas the position that I took in my comments to the Applicant as well as the Board is that what we're dealing with here is the "floor area" of a building as defined under Town Code section 164-22. The floor area of the building as shown on the Applicant's plans is specified to be 8,618 square feet. Under section 164-22 for definitions of terms in the Town Code the floor area of a building defined

as any structure having a roof supported by columns or by walls and intended for the shelter, housing, or enclosure of persons animals or chattel), and therefore it would be my interpretation that the covered patio covered areas would constitute part of a building. The additional definition of floor area of a building is the sum of the gross horizontal area of the several floors of a building and its accessory buildings on the same lot excluding cellar and basement floor areas not devoted to habitable use, but including the areas of roofed porches and roofed terraces. So each of these covered patios would constitute not only a building, but the square footage of each would constitute part of the floor area of a building. And what I was referencing in your submission is you were referencing the ground area of the use. And what I'm trying to clarify is what we're talking about is the floor area of a building, not the ground floor area of use or the ground floor ratio. The floor area ratio specifically relates to the size relationship between a building and the parcel that it sits on. In this case we're talking about the expansion of an existing building with covered patios. If you left it open, it wouldn't be a building, but because you're putting a roof on it that sits on columns or walls, it constitutes part of the building and it constitutes an expansion of that building by 69.5%.

Attorney Kool: The term 'ground area' seems more aligned to lot coverage as opposed to building area. Our lot coverage goes from 24.3% to 37.4%, significantly under the permitted max in this zone. We're seeking an interpretation of those terms and whether or not the application conforms with the code for the special permit as the ground area that it covers has not increased by more than 15%. You <inaudible> lot coverage, water supply, stormwater runoff management, parking needs, traffic generation, zoning compliance and I did address those items and how the application does not impact any. Specifically, water supply were estimated to minimus increase in water usage 0.6%. Sewage disposal, there was no noticeable additional sewage disposal, which does not include additional bathrooms or facilities like that. Stormwater runoff management, we intend to decrease runoff by increasing the pervious area surrounding these uses and also create additional water runoff through landscape management. Parking needs, there's no expansion of the use. There's no increase in the intensity of the use.

Attorney Havens: I agree that the existing and proposed use is not prohibited in the zoning code. Item number 4 was that Town Code section 164-45B(1), which is relevant to alterations of non-conforming buildings and uses, prohibits the alteration or enlargement of non-conforming buildings, except that the Planning Board may permit an expansion not to exceed 15% of the existing ground floor area provided that the most restrictive bulk requirements shall apply to any such extension. If they find that this building is a pre-existing non-conforming building, then this provision, regardless of the permissive provision that says that the Planning Board wouldn't have to consider site plans under the other provision of the code, this provision would be a separate applicable provision that would still regardless of the interpretation of the other section of code, this one would still require at the least a variance if not site plan review. And so I want to offer an opportunity to answer any questions to members of the Board with respect to the pre-existing non-conforming status of this building.

Diane Bramich: I would say it is because of the age of the building. Those buildings have been standing there for over 40 years.

Attorney Havens: Technically and for the record, the lot lines surrounding this building weren't drawn until a subdivision map was prepared by the Town and submitted for recording in 2013 or 2014. It was one 700-acre parcel.

Diane Bramich: I would consider it pre-existing non-conforming.

Chairman Malocsay: I would be hard-pressed to see that any other way.

Aaron Ubides: I agree.

Chairman Malocsay: The Board appears to agree and I think we should move in that direction, assuming now that this is pre-existing non-conforming and it does change things on the application.

Attorney Havens: Would anyone care to make a motion determining this building is a pre-existing non-conforming building?

Diane Bramich: Yes. I make that motion.

Aaron Ubides: I'll second.

Chairman Malocsay: All in favor?

Board Members: Aye.

Chairman Malocsay: Knowing it was part of your case to say that that wasn't the case, that it wasn't pre-existing non-conforming so moving forward...

Michael Kraai: I don't think that was part of our case. I think it was more interpretation of the ground use. I thought that we acknowledged it was pre-existing non-conforming.

Attorney Kool: Correct. As Mr. Havens noted there's a subdivision in 2013 which created nonconformities. <Inaudible> an Applicant when they're created by <inaudible>. Just to that extent, we do believe that's within the Zoning Board's purview to grant the variance sought today. Our intention is not to further expand that nonconformity; we are not going to move closer to State School. I think it does indicate about two inches of additional encroachment on that right of way, which we'd gladly move another two inches away so that there's no question on an expansion of that.

Chairman Malocsay: That didn't seem to be what Jeremy had said that we're deeming this pre-existing non-conforming. We didn't have the discussion, but we're also looking this to be greater than a 15% expansion of the pre-existing non-conforming.

Michael Kraai: We think that is up to interpretation. I think Jeremy has a different interpretation than what we and the architect had. So I think the interpretation of the 15% is what's in question.

Chairman Malocsay: I believe even with his calculations, it's still a 15% expansion.

Michael Kraai: With his calculations, yes. Not with the lot coverage from our interpretation and the architect's interpretation. He's defining floor use and I guess this just made the argument that the ground use was not applicable, which I was not aware of. We did include that in our application. But to your point of floor use, I think that's still up for interpretation and we would defer to the architectural drawings. And also when I heard you read that code, I thought you said it was two stories. Your calculation was one-story. We have a two-story building. So you were using 8,000 square feet. It's actually a two-story building.

Attorney Havens: I'm using what's on your drawings.

Michael Kraai: I don't think our drawings define 8,000 as the ground use.

Attorney Havens: I'm taking it from your drawings. It's 8,616 square feet is what's identified for the building itself.

Chairman Malocsay: I had the older one and it's 8,622 square feet.

Michael Kraai: The building is much larger than that. I think that's just the first floor.

Glenn Ehlers: That's ground coverage.

Michael Kraai: It's just the first floor. That's not the square footage of the building.

Aaron Ubides: No, ground coverage. How much of the ground is covered.

Michael Kraai: So if you're going to use your calculation, you said both floors and this number that you're looking at specifically is just the first floor of the building. It's a two-story building.

Attorney Kool: I think that requires clarification. We're happy to provide the Board with a confirmation of the square footage. I certainly see where that would significantly alter the calculation.

Chairman Malocsay: Did you contact the Town about purchasing the property?

Michael Kraai: I did. But the Town Supervisor at the time told me that there was very specific divisions that needed to be done the way that they subdivided the property when they purchased it from the County because they were gifted most of it. The Town wanted us to invest but they had their hands tied because the State was mandating how much acreage they could subdivide. So we came up with an agreement so we could use the property through an easement.

Attorney Havens: I helped negotiate the purchase of the prison from the State of New York on behalf of the LDC that bought it, developed it, and transferred everything to the Town. The State mandated that anything that wasn't within the bounds of the proposed improvement areas that were within these newly created subdivided parcels for improvement immediately around the buildings was to be used for 3 permissible uses: Town use, parkland, or historic preservation. There is a still continuing State prohibition on the conveyance of that additional property for any use that isn't Town related.

Chairman Malocsay: I could poll to see if the Board is agreeing with you on your interpretation. So if we do have it pre-existing non-conforming, we agreed upon that. The next is in wording of a motion that we deem this to be a 15% expansion and for the Planning Board for approval.

Attorney Havens: Let's hear what the other Board members have to say. If you want to make a motion on the interpretation issue as a separate item, anyone can make that motion. Whether or not this proposed site plan does require Planning Board approval now that they're standing here before the ZBA, is a separate issue and this Board has the capacity to determine. The first question that you want to articulate is whether or not the expansion applies. Whether or not, given the determination that this is in fact a pre-existing non-conforming building, there is a 15% expansion limitation under the provision of the Code that the Applicant says is controlling, which says that a special use permit approval site plan review and special use permit approval by the Planning Board shall be required for an expansion exceeding 15% of the ground area of the use. Does the Board agree with the Applicant that the only thing that governs here is the use and the expansion of that use does not exceed 15% of the square ground area of the parcel itself? Or does the Board feel that this is a pre-existing non-conforming building and the 15% expansion limitation under 164-45B(1) applies that no non-conforming building shall be structurally altered or enlarged, except that the Planning Board may permit an expansion not to exceed 15% of the existing ground floor area. And the question for the Board, which provision governs?

Chairman Malocsay: I want to make sure that I'm polling correctly. Your interpretation is what I had agreed upon but I don't know how the rest of the Board feels.

Attorney Havens: Which provision regarding the 15% expansion restriction applies? Is it the one that's applicable to expansion of a non-conforming building, or is it the one that's applicable to expansion of a use for the entire parcel? Is it 15% of the ground area of the entire parcel that the Planning Board would be governing in this particular circumstance? Or is it 15% of the existing ground floor area of the existing building?

Michael Kraai: In that section of the Code there's nothing that specifically states non-conforming or conforming. So my assumption would be referred to all buildings.

Attorney Havens: Correct. I need to add for the benefit of the Board one specific summary of legal interpretation. When you have a general law that is applicable and a specific law that is applicable, to the extent a specific law contradicts, contravenes, or supersedes the general law, then the specific law governs.

Glenn Ehlers: <Inaudible> within the last 10 years with a very similar situation that went before the Planning Board for site plan approval (Penning's) with a covered porch, same scenario, over 15% of the square footage, and then they went for a site plan approval.

Attorney Havens: I wasn't actively involved with it so I don't know.

Michael Kraai: We agree we need a setback variance, we're not disputing that.

Attorney Havens: Are we waiving the interpretation and just going for a variance? Because that's a completely different scenario.

Attorney Kool: No, we're looking for the interpretation and the interpretation then dictates the next step.

Attorney Havens: Does the Board believe that the provision of the code that the Applicant has referenced, 164-46B(5), provides that site plan review and special use permit approval by the Planning Board shall be required for an expansion exceeding 15% of the ground area of the use? Their position is their proposed expansion of the ground area of their use within the parcel is less than 15% of the ground area of the parcel, and that this is the governing provision. Does everybody feel that for purposes of the interpretation, what they're seeking is a determination, an interpretation by this Board that the Building Department made a mistake in denying their application and directing them to go for Planning Board review and approval because they shouldn't have needed that? Was the denial of their building permit erroneous by the Building Inspector? That's what the interpretation is here. Because under the Applicant's argument, if this provision governed and the non-conforming building provision didn't govern, then according to the Applicant they should have been able to get the building permit approved without going to the Planning Board for site plan review. They're not arguing in the interpretation that they do or don't need a variance. That's a separate issue, even though the building permit denial specifically states that they need a variance. I don't know how we're supposed to make an interpretation based on this denial letter that you can have a building permit without Planning Board review when you need a variance. Does each Board Member feel that the Building Department made a mistake in issuing a denial letter and should have instead recognized that the Applicant could have received a building permit for the proposed improvements without Planning Board review?

Board Members: No.

Attorney Havens: That was five nays. The determination is a negative interpretation. The Building Department did not make an error in issuing the building permit denial letter. The Applicant has additionally requested area variances as an alternative to the interpretation if we found that we didn't agree with their interpretation. So considering the Applicant's request for area variances, the Board now has to consider whether we're capable of granting area variances they're requesting, or does this Board not feel confident in handling that because of special and unique circumstances relative to this application and would prefer to refer to the Planning Board for site plan review?

Board Members: Planning Board site plan review.

Attorney Kool: <Inaudible>

Attorney Havens: Levi, what you're asking is that the Board defer making any further deliberation until your architect has an opportunity to address the Board?

Attorney Kool: Yes. I'd also like to consult with my client to determine the course of action whether <inaudible> Planning Board or proceed seeking a variance from the Zoning Board based on what's been submitted.

Chairman Malocsay: I would think that that would be the best thing to do, absolutely.

Michael Kraai: I thought the Board unanimously agreed that there was not a more aggressive change of use, but then they still said that it had to go to the Planning Board. But that's not what the code is saying. So that's what I'm not following. Because the code says there's a provision in there that it can be approved if it's less than 15% given all of these factors, which the Board agreed on. And you didn't want to vote on that, but the Board agreed on it.

Attorney Havens: No, what the Board agreed on is that your use is not detrimental, it's a permissible use. Even the proposed expansion is not necessarily detrimental to the community. And we were focusing purely on a legal interpretation as to whether or not the Building Inspector made a mistake by issuing a denial of the permit.

Michael Kraai: But that would be based on the code.

Attorney Havens: Based on whether the provision you're citing regarding 15% of the use of the property is governing, or the other provision regarding 15% of an existing non-conforming building is governing. And by deeming that the Building Inspector did not make a mistake by denying the building permit, the Planning Board made the determination between those two provisions of the code as to which one governs. Your attorney requested that the Board hold the public hearing open, we adjourn for the next meeting to give you an opportunity to talk among yourselves privately, discuss it with your architect, maybe get your bulk table and the square footage updated on your site plan based on actual ground floor area as opposed to total floor area.

Michael Kraai: It sounds like that's up for interpretation as well. I guess we could come with multiple calculations.

Attorney Havens: I'm talking ground floor area of your building, not floor area of your lot. It currently says 8,600 square feet.

Michael Kraai: We are going to be much closer than the calculations you provided to the Board.

Chairman Malocsay: We're not making any decisions other than we said that it was pre-existing non-conforming. The interpretation says that it has to go before the Planning Board.

Michael Kraai: So we're not looking at the 15% because both of the sections that you mentioned said 15%. So is that relevant? If we want to revisit this conversation, is that the determining factor here?

Diane Bramich: The vote was that the Building Inspector was correct?

Chairman Malocsay: Yes. And it was to go to the Planning Board.

Attorney Havens: Yes. When seeking an interpretation of the code, the objective is to determine whether or not the Building Inspector made an error based on an interpretation of the law that this application should not have been denied. And since the Board determined that the Building Inspector did not make an error in denying the application, the interpretation part is done. Now we're looking at whether or not a variance is necessary and if so, which variances. Levi, we'll give you another opportunity next month to address this more pointedly. If they're right about 15% of the ground area as opposed to the building floor area, then they shouldn't have to go to the Planning Board.

Diane Bramich: If they need variances and this has to go before the Planning Board, we're stating that we wanted to go to the Planning Board for site plan approval. Variances may change.

Chairman Malocsay: That is correct. But usually they have worked something out where this is something that works and this is the variance that's needed.

Diane Bramich: I know, but they have to come back anyway next month. I would prefer not to give them any variances until after we see what is going to happen next month.

Chairman Malocsay: Absolutely. The meeting next month is the 31st.

Aaron Ubides: Can I make a motion that we keep this hearing open and continue to next month?

Attorney Havens: Correct.

Diane Bramich: Second.

Chairman Malocsay: All in favor?

Board Members: Aye.

Motion to adjourn by Diane Bramich, seconded by Aaron Ubides