

APPROVED

JOHN MAXWELL
Chairman

PHILIP AGLIETTI
Vice-Chairman

**TOWN OF CARMEL
ZONING BOARD OF APPEALS**



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*Director of Code
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ZONING BOARD OF APPEALS MINUTES

JANUARY 26, 2017

PRESENT: CHAIRMAN, JOHN MAXWELL, VICE-CHAIRMAN, PHILIP AGLIETTI,
ROSE FABIANO, WILLIAM ROSSITER, MICHAEL SCHWARZ

ABSENT: SILVIO BALZANO

<u>APPLICANT</u>	<u>TAX MAP #</u>	<u>PAGE</u>	<u>ACTION OF THE BOARD</u>
NL & M Holding Corp (Mazzola)	75.44-1-47	1	Heldover
Donald & Karen Byrnes	74.34-2-7	1-2	Granted.
Lesley de Hostos	75.42-1-56	3-4	Granted.
Angelo Senno Trust	44-13-2-2	4-13	Referred to Planning Board.

The meeting was adjourned at 8:22 p.m.

Respectfully submitted,

Dawn Andren

Application of NL & M Holding Corp (Mazzola) for a Variation of Section 156-15 and a Use Variance, seeking permission to complete second floor and add four apartments. The property is located at 936-942 South Lake Blvd, Mahopac NY 10541 and is known by Tax Map #75.44-1-47.

Code Requires	Provided	Variance Required
Mixed use-Not Permitted	Retail & Apartments	Use Variance
Front yard north – 40 ft	35.57 ft	4.43 ft
Front yard south – 40 ft	23.4 ft	16.6 ft
Side yard west – 25 ft	0.7 ft	24.3 ft
Parking – 30 P.S.	5 P.S.	31 P.S.
Parking – 10 ft x 20 ft	9 ft x 20 ft	1 ft width
ADA Parking	0 P.S.	1 P.S.
Side yard east – 25 ft	0.2 ft	24.8 ft

Mrs. Fabiano moved to holdover the application. The motion was seconded by Mr. Aglietti with all in favor.

Application of Donald & Karen Byrnes for a Variation of Section 156-15, seeking permission to retain pool w/deck and two sheds. The property is located at 235 Rockledge Rd., Mahopac NY 10541 and is known by Tax Map #74.34-2-7.

Code Requires	Provided	Variance Required
Pool w/deck – 10 ft side	5.3 ft	4.7 ft
Shed 1 – 10 ft rear	6.1 ft	3.9 ft
Shed 2 – 10 ft side	3.4 ft	6.6 ft
Shed 2 – 10 ft rear	7 ft	3 ft

Mrs. Karen Byrnes was sworn in.

Mrs. Byrnes stated that they have an existing pool and sheds that we've requested a variance and permits for that we'd like to keep.

Chairman Maxwell asked how long have the sheds been there.

Mrs. Byrnes responded that one of the sheds was a replacement of a pre-existing shed. We had no reason to think that we needed a permit because we were replacing something that didn't have a foundation with another thing that didn't have a foundation built onto it.

Chairman Maxwell stated so you realized you needed a permit?

Mrs. Byrnes responded the existing one that was there was just old and we tore it down and put the new one up in the same spot basically.

Chairman Maxwell then asked how long has the pool been there with the deck?

Mr. Byrnes indicated that they had purchased it from Orange County Pools.

Mrs. Byrnes responded eight years.

Chairman Maxwell then stated again, you didn't realize you needed a permit for it?

Mrs. Byrnes replied we had no idea. I've heard that you have to have them for the in-ground pools. Growing up, we never had permits. We used to take the thing down and put it up from where we used to move all the time.

Chairman Maxwell indicated, they'll never tell you because they'd potentially lose a sale. So I know you're in a tight lot and tight neighborhood. It looks like everything is screened in pretty well. There's no other property you can buy to bring it into conformance?

Mrs. Byrnes replied no.

Chairman Maxwell then asked, what would be the cost to relocate the pool, the deck and sheds to bring them into conformity.

Mrs. Byrnes replied I would have no idea what it would cost. There's nowhere to put them. Because of the size of the lot, we'd have to put the shed, without a variance, smack in the middle of the back yard.

Chairman Maxwell asked if they had checked with the neighbors for complaints, issues or concerns.

Mrs. Byrnes replied the letters were mailed, the sign was posted. We have never had anyone complaining. When we put the pool up originally, (we have children) we put the fencing around it so it would be safe because it is a small lot and I didn't want people wandering in and jumping over the side.

Mr. Byrnes added the property is also fenced in completely.

Mrs. Fabiano asked why is this coming about now.

Mrs. Byrnes replied, apparently we were served with paperwork last summer. The reason it took so long to file everything – when we went to file the paperwork, it was brought to our attention that this was a problem. We couldn't find the survey we had when we bought the house. We work for a living too. It takes time to save the money to get the survey done. That's basically what the delay was – getting the money together, pay for the survey to be completed. That ended up being a lot more expensive than I could've possibly imagined for a piece of property that's so small. So it took a little bit longer and we had to wait until Christmas bonuses hit. As soon as we got that, we called the guy immediately, had it pre-arranged, he came right over, got it done, we had the paperwork submitted. In the meantime, we had everything ready to go; we just waited for the survey. Like I said, we had no idea there was an issue. Apparently someone went around. I know the new neighbors next door to us that we're friends with had inspectors next door when they bought the house because it was under work pending with the sale; it was a foreclosure. So my guess is that someone took a look and decided to check. It happens. We had no idea that there was any issue.

Chairman Maxwell asked if there was any input from the public on this application.

Vice-Chairman Aglietti moved to close the public hearing. The motion was seconded by Mr. DiTomaso with all in favor.

Decision of the Board:

Vice-Chairman Aglietti moved to approve the variance request. The motion was seconded by Mr. DiTomaso with all in favor.

Application of Lesley de Hostos for a Variation of Section 156-15, seeking permission to retain deck. The property is located at 5 Locust Ct., Mahopac NY 10541 and is known by Tax Map #75.42-1-56.

Code Requires	Provided	Variance Required
25 ft – front yard	9 ft	16 ft

Ms. Lesley de Hostos was sworn in.

Ms. de Hostos stated that she would like to retain her deck on her property.

Chairman Maxwell asked how long has it been there?

Ms. de Hostos replied, possibly over ten years.

Chairman Maxwell said there's no other property you can buy to bring it into conformance? The property is on two corners – right?

Ms. de Hostos replied yes.

Chairman Maxwell then asked what is the value of the deck approximately?

Ms. de Hostos replied, I wouldn't know. That's how I purchased it back in December 2013.

Chairman Maxwell asked it was never picked up in the title search or anything?

Ms. de Hostos replied there was a C.O. on file for a deck but I guess that when we closed in 2013, they felt that the C.O. already existing in a file had satisfied any concerns. It wasn't until last month while we're in the process of selling our home that the new buyers actually ran a title search and we discovered the violation for the deck. Hence which is why I'm here today.

Chairman Maxwell said okay-you're selling.

Ms. de Hostos replied, yes.

Chairman Maxwell addressed the consultants, then just get through the file I guess, right.

Mr. Carnazza replied, if I remember correctly, on the permit it said the exact dimension it was approved for and this is larger and a separate deck on the front of it.

Chairman Maxwell stated then this just never got picked up.

Mr. Carnazza replied, it went through the title, it slipped through.

Chairman Maxwell then stated, I noticed that faces the lake side so obviously it's more enjoyable to view the lake from *(there)*.

Ms. de Hostos replied yes.

Chairman Maxwell then stated it's not common to have a deck in the front of the house but I would see that's the reason why.

Ms. de Hostos replied, I guess so. It's been there, according to the MLS records as far as it can go back-since 2004, the double deck has been in existence with similar dimensions.

Chairman Maxwell polled the Board resulting in no questions and then asked the public for any input on the application.

Vice-Chairman Aglietti moved to close the public hearing. The motion was seconded by Mr. Rossiter with all in favor.

Decision of the Board:

Mrs. Fabiano moved to approve the variance request. The motion was seconded by Vice-Chairman Aglietti with all in favor.

Application of Angelo A. Senno Trust for an Interpretation that the conversion of a commercial storefront (with 2 residential units) to 2 additional residential apartments was more restrictive in the alternative; applicant seeks a use variance to permit a four family structure. The property is located at 19 Fowler Avenue, Carmel NY 10512 and is known by Tax Map #44.13-2-2.

Sara Kaplan and Michael Senno, children and Trustees of Angelo A. Senno Trust were sworn in. Bill Shilling, Esq. was also at podium.

Mr. Shilling addressed the board and stated this property is located on 19 Fowler Avenue. It's a 2 ½ story building. Its zone is residential. Currently, there are four units, all one bedroom, on the site. The property is serviced by town water and sewer. It is a neighborhood that is predominantly now multi-family and it was predominantly multi-family at the time my clients' father purchased the property. The prior use, at the time of my clients' purchase, consisted of a mixed use. It was a two family upstairs and downstairs was a retail, tile and leather store. That use was in existence at the time of my clients' purchase which was 1976 and they changed it to a four family in 1977. What we're requesting is an interpretation of 156-47(2) of your code that the conversion from a mixed use (store front & two family) to a four family is a more restrictive use and in the alternative, we're looking for a use variance standards for an expansion of a pre-dated non-conforming use. In support of what we're seeking, I've submitted an affidavit from Sara Kaplan, an affidavit from William Finney who is the President of Dew Construction and is a licensed contractor in Putnam County. We've submitted an affirmation of John Porco who is a retired attorney. He was a partner with Mr. Senno when they purchased the property. I submitted a memorandum of law and I submitted, per your requirements, floor plans and the survey. The facts of this matter, in the 1970s, Fowler Avenue was in the last stages of what was a mixed use neighborhood in that there was a funeral home and still is a funeral home now, there was a rental car and a used car establishment, a gas station, there was an appliance rental, retail and of course the tile store which my client purchased. There were many multi-families at that time. The site was owned by somebody named Steven Usalak who used the downstairs as a store for his tile work and upstairs were two 1 bedroom apartments. My client, Mr. Senno (deceased) and Mr. Porco purchased it in 1976. Mr. Senno was an accountant but he had a great deal of knowledge of the construction trade and people. He was the one that did the actual day-to-day planning and purchasing and was, according to Mr. Porco, the one who was responsible to get the necessary permits. Mr. Porco was really just the financial part of it and he was bought out by Mr. Senno a few years after the purchase. They did have several investments together. The records show that in 1977, after my clients' purchase, the commercial use stopped and that the residential apartments were placed in the place of the store down below. All the bills were kept. I have them in the file. It went on until 1983 when the Building Inspector issued a violation letter. On the violation letter, there's a note that says, "Porco called, now is a four family and requested an inspection". After that, there's nothing in the file. Mr. Senno passed away in 2014. Mr. Porco doesn't know what happened and why necessary approvals weren't gotten. There's nothing else in the record in your Building File with the exception that it passed fire inspections in 2015 and 2016. In Mr. Porco's affidavit, he said that it was Mr. Senno's responsibility to get the permits; he believed Mr. Senno did, in fact, get the permits. Mr. Porco confirmed he was aware of 63.11(1) which allows a non-conforming use to

switch to another non-conforming use as long as it's more restrictive. I can only guess that Mr. Porco's thinking all was good because when you change from a commercial mixed-use to all residential, in my mind, it's almost per-se more restrictive. So that may explain Mr. Porco's thinking that it was taken care of. As I said, Mr. Senno died in 2014 and there's no explanation as to why that approval wasn't gotten. Since 1977, the property has been used as a four family. (Mr. Shilling refers to illustration.) This is the front of the building and the two entrances serve this one downstairs and one upstairs apartment, and in the rear, the same thing. This is a full shot of the building. You can see it's a pretty formidable building. It's large in size and I want to tell this Board that there are four meters for the four apartments. (Mr. Shilling then passes the diagram around.)

Mr. Maxwell stated it looks like there's five there?

Mrs. Kaplan replied the fifth one is the landlord's meter.

Mr. Senno stated no it's ours.

Mr. Shilling further added so everyone has a meter. It's been inspected by the fire inspector; the property is serviced by town water; town sewer so there are only a limited opportunity for Board of Health violations in which case there are none. Today, on Fowler Avenue, it's almost exclusively residential and predominantly multi-family. The only commercial establishment that remains is the funeral home. All the other uses that I had mentioned, the retail appliance store and the car dealership and used car lot have extinguished. Back in 1976, the section was 63.11(1). Again, it says exactly what your code says today. It says that a non-conforming use can be modified and changed into another one as long as in the Board's discretion, it's more restrictive. I believe, with almost no doubt, if they'd have gone in 1976, they would've gotten the relief that I'm seeking today. Currently, the children of Mr. Senno are now looking to sell and for the first time have discovered through discussions with Mr. Carnazza that it's only recognized as two residential units. The issue of the law, we're seeking an interpretation that the conversion from the mixed-use to a four family is clearly more restrictive. The code then 63.11(1) is exactly the same as the code now which is 156.47(2) which say the same identical thing. That you can convert one to the other providing it's more restrictive. I submitted a memorandum of law to you. I talked about your interpretive powers. Only this Board has the power to interpret your code. I submitted cases to you that provide regulations are in derogation common law rights and ambiguity to be construed in favor of the property owner. In this case, what existed was a mixed use, non-conforming with a two family upstairs and a commercial downstairs converted to just a four family which clearly, by any standard, is a more restrictive use. It's more in keeping with the neighborhood now and it's more in keeping with the code. I think that being no one is here speaks volumes of the fact that this is how it has been for a long time. Nothing is going to change in the neighborhood. For forty years, it's been in existence. I've provided some cases for you that are on point that say converting from a mixed use to a multi-family is more restrictive in a residential zone. Most importantly, I've cited a case (Rosano) which says the Board must apply the law as it exists at the time of their decision. So, today's code is what governs your review, not yesterday's code. In this case, it may be moot because they're exactly the same. If you want to apply use variance standards, I'd be prepared to speak to it. I think it's easily met with regard to reasonable return. Returning this four family to a mixed use would be a very, very expensive endeavor. Dew Construction surmises it may be as much as \$200,000 to bring that back to what it was. I would submit to you, secondly, that there's simply no viable commercial user for that area.

Chairman Maxwell asked did you submit this memorandum from William Finney, correct?

Mr. Shilling replied yes.

Chairman Maxwell read from the memorandum, "I've reviewed the building and concluded that converting it to a two family with a commercial site downstairs would be approximately \$200,000

worth of work given the structural work required.” Structural work meaning what? What would you have to do?

Mr. Shilling replied I’m not terribly technical in these things but I know that there would be almost a complete need to gut the downstairs to convert it to office or commercial. I could get an elaboration but I asked him just to go through and he said it would be about \$200,000 to make it a mixed use again.

Mr. Carnazza said right now you have a two family dwelling.

Mr. Shilling replied legally I have a two family dwelling.

Mr. Carnazza said you’re looking first: for an interpretation that it was a two family with commercial I assume? I’m just trying to keep them on point because it’s confusing.

Mr. Shilling responded what I’m seeking is, while the act took place over 40 years ago, you govern your interpretation over today’s code but the act which I’m asking you to determine is more restrictive than an act which took place 40 years ago. That it was converted from a mixed use to a four family. In that regard, it’s a more restrictive use than it was so, that’s the nature of my request to you.

Mr. Carnazza stated in 1982 the map showed that as residential correct? The left side of the road was residential, the right side was commercial.

Mr. Shilling responded yes. Also, with regard to bringing back a commercial use, there’s no viable commercial user for that property. Thirdly, if you look at the nature of the building, it’s simply too large to be a two family and be profitable. I’ve provided cases to you that when you’re doing your financial review, if the neighborhood won’t change, the necessity of showing economic hardship is reduced. In this case, there’s absolutely no change in the neighborhood. The use has been in existence since 1977. Therefore, the nature and extent of the hardship is reduced under these circumstances. With regard to uniqueness, this is a unique history; modified forty years ago from a mixed use to a four family. I submit to you that it’s a town priority to extinguished commercial uses in a residential zone, which is what they did back in 1976. With regard to the neighborhood, that’s the easiest one. There is no change to the neighborhood. All multi-families are in the area, forty years in existence, no one here to oppose. A negative decision here would unnecessarily uproot and displace at least two families. I submit to you that Fowler Avenue is one of the few areas in our Town that is predominantly multi-family. It is certainly in the hamlet, and I would suggest maybe in the whole Town of Carmel. This is heavily multi-family and a place unique for people who have limited financial means. Self-creation is difficult to speak to because my client who would be able to attest to this is not with us any longer. In any event, there was a good faith effort made by Mr. Porco’s letter in 1983 saying ‘come and make an inspection’ but for whatever reason was never followed up. We don’t know. In conclusion, I’m saying you’re going to be achieving a Town priority which is the formal elimination of the commercial use and exclusively residential use with an area that is almost exclusively multi-family. It is more restrictive in the 1970s; it is more restrictive today by your code. If you are not interested in making an interpretation, I would welcome the implementation of use variance standards because in this case, I believe we need those standards. We’ll answer any questions you might have.

Chairman Maxwell asked if we determine that is the case (to go the route of a use variance), we would have to deny it and refer it to the Planning Board?

Mr. Carnazza replied for multi-family if you don’t get the interpretation. They would have to be lead agency before they could make a decision on this also.

Chairman Maxwell added they would deny it back to this Board back again.

Mr. Shilling interjected, if I could just respond to that. With all due respect, I don't know how the use that was terminated and the one that's implemented today is not more restrictive. I spoke with Mr. Carnazza the other day about the appropriate standard. If you build a deck in the 1970s, and you don't get it legalized, and you come to get it legalized today, you're being applied contemporary standards. Similarly here, there was a conversion made but nothing done. We're here today to get an interpretation as to the act that was done forty years ago. It's not an uncommon thing for Mr. Carnazza to apply in his work or for this Board to apply in your work.

Chairman Maxwell asked Mr. Carnazza you verified in your research that no one made that inspection for whatever reason.

Mr. Carnazza replied, no follow-up after that note on that notice of violation. That was the last note.

Chairman Maxwell added nothing by Marge Agor, at the time?

Mr. Carnazza replied the problem is what you said now; it's now a commercial zone. Fowler Avenue is commercial on both sides – zoning district wise; not use wise. In looking at the schedule of District Regulations, the mixed use is permitted. Multi-family is not permitted in the commercial zone. So either way, I think it sounds like it's a use variance. Because if it wasn't done legally, then interpretation that the conversion of a commercial store front with two residential units, the commercial store front wasn't legal that we can find. So; that means that the mixed use wasn't there – legally.

Mr. Shilling then said the mixed use was illegal use back then?

Mr. Carnazza replied would've been illegal because it was residential in 1982. I don't know about 1972. I don't have that map in my head. I had it on my wall until 2002. But either way, the four family is multi-family. One and two family are one and two family and that's a separate thing. When you hit three or more families, it becomes multi-family. If that's not a permitted use on this District Regulation Schedule, it's not permitted, so it's a use variance either way.

Mr. Shilling then stated that's why I came to this Board with use variance standards as well. I know that the typical review is how much is the rent, what are the taxes but there's another part of economic hardship which is unnecessary work to be done to convert it into something that has no viable purpose, no viable function. The construction to return it to a mixed use or even a two family is substantial and there's nothing to be gained and the economic hardship is reduced because the neighborhood won't be changed because it's been in existence for over forty years. My client wishes to mention, if you look at the photo there, immediately next door to my client is a six family.

Chairman Maxwell asked Mr. Carnazza if this structure (immediately to the right) is a legal six family that you're aware of or no?

Mr. Carnazza replied I don't know who is next to them. I didn't look at the lots.

Mr. Shilling then directed to Mr. Carnazza, I said to the Board that immediately next door to my clients' structure is a six family.

Mr. Carnazza responded, it may be. I just don't have that information in front of me. I don't want to guess.

Chairman Maxwell said I'll read your application; seeking permission to interpret that the conversion of a commercial store front with two residential units, to two additional residential

apartments was more restrictive. Whereas, Mr. Carnazza is stating that a mixed use is more restrictive.

Mr. Carnazza then said but I'm also stating the storefronts weren't permitted in my file.

Chairman Maxwell replied, right – as the record shows.

Mr. Shilling added so it was a non-conforming use-correct?

Mr. Carnazza replied agreed but there should be a note in the file. They got a building permit that said add to the back of existing two family dwelling. Not add to rebuild.

Mr. Shilling said I understand.

Mr. Carnazza furthered, not to rebuild the back of two story building with apartments and commercial. It was specifically two families.

Chairman Maxwell asked Mr. Carnazza, so it was illegally converted to commercial use.

Mr. Carnazza responded positively, "according to my file." It could've been before they bought it. Commercial or residential zone is illegal either way.

Mr. Shilling then stated that question I'm not sure about because I think that at the time she wrote the letter, the commercial use had been, it was in 1977 when my clients owned it. So, it became a two family in her eyes because the storefront had gone away immediately upon the sale. At least that's my interpretation of it. Now, downstairs, there's nothing but they recognize the two families upstairs. I don't think it's plausible, which I remember, all this time would've been illegal. I don't believe that. I don't think that's feasible. I think that the letter from Marge Agor said the store has been abandoned; you have a two family dwelling now. The problem is clearly this: the records are barren. We're all interpreting what might have been said and what might have been done. The bottom line is and Mr. Carnazza's interpretation is that the mixed use was not a legal use at the time and we converted it to a more restrictive use regardless of the zoning. It is a more restrictive use if you accept the fact that the storefront was legally there as a non-conforming use, then what we did is more restrictive. What was done then is more restrictive.

Chairman Maxwell asked the board members if they had any questions.

Mr. DiTomaso asked is the house fully occupied right now?

Mr. Shilling responded yes.

Chairman Maxwell asked all four apartments?

Mr. Shilling responded yes.

Mrs. Fabiano asked can I just get clarification on this? The only way this was legal, back in the 1970s – the entire building, was if it was just a two family house. That is the only way it would've been legal back in the 70s.

Mr. Carnazza replied that's the way I read my record and the accessor's record.

Mrs. Fabiano so it was in violation for fifty years? How was it taxed?

Mr. Shilling responded I don't have the tax records in front of me.

Mr. Carnazza responded the 1982 tax was residential, one family converted to two family before 82 I believe and you were allowed to do it up to 1982. That was the only thing that was recognized on the old card at that time.

Mr. Shilling stated my clients want me to say that forever that it has been assessed; it's been assessed as a four family for what that's worth. I understand Mr. Carnazza's interpretation but just as likely an interpretation is that when Marge Agor wrote that letter, it was after the closing took place and my clients immediately converted to a four family because Mr. Senno wanted to house his mother there. At that time when Marge wrote the letter, she says she recognized as a two family because there was the use below was abandoned/extinguished. If we take Mr. Senno and Mr. Porco's affidavit and words that it was a commercial establishment at the time of the sale and then abandoned and we agree that a mixed-use house is less restrictive than a four family, then the interpretation is sound.

Mr. Carnazza asked is that the non-conforming section of the code you're using? Is that what you're speaking about?

Mr. Shilling replied yes, Section 156-47.

Mr. Carnazza interjected because that's a variance that's required to be granted.

Mr. Shilling continued that's an interpretation where you can go from one non-conforming use to another provided it's deemed to be more restrictive.

Mr. Carnazza responded I don't have it in front of me, but I believe it says that the Board may, in its opinion, find it more restrictive and grant the variance. Not the interpretation.

Mr. Shilling countered, it's an interpretive statute. It's subject to their interpretation as to whether it's more restrictive or not. He said Section 156-47A(2) I think it is.

Mr. Carnazza read from 156-47A(2), "change to another non-conforming use without approval from the Board of Appeals and then only to a use, which in the opinion of the Board, is of a more restrictive nature." So they can grant the variance if it is interpreted to be more restrictive. It's not just an interpretation. It is a variance.

Chairman Maxwell stated so it goes back to, if it's going to be a use variance, we'd have to deny it and refer it to the Planning Board.

Mr. Carnazza interjected you don't have to deny it. What you can do is hold it and let them refer it to the (Planning) Board.

Mr. Shilling interjected what would the Planning Board's role be in a referral without a decision from the (Zoning) Board?

Mr. Carnazza replied all uses of land except one and two family dwellings require site plan approval from the Planning Board.

Mr. Shilling countered, my question is this: we go to the Planning Board uncertain as to what the Zoning Board is going to do.

Mr. Carnazza replied that's correct.

Mr. Shilling added, they could make a decision this evening but I think the Zoning Board has the right to make a decision on interpretive matters and then send it to the Planning Board for whatever of site plan or site plan review, whatever it is.

Mr. Carnazza responded they can interpret do area variance but not use variance because a use variance has to be referred to the lead agency. The Planning Board is the lead agency on that. They do the SEQR and they do everything on that.

Chairman Maxwell said so they'd have to file a site plan?

Mr. Carnazza responded to show that they had parking and other requirements that are on the site plan and then go forward from that. They can waive things, they can move it right along. Whatever it is, it's up to them.

Mr. Shilling then stated I would ask you under the circumstances in a complex that's been in existence for forty years, I would ask, respectfully, for the interpretive powers that an area variance to be granted. Requiring site plan approval, under these circumstances, strikes me as unnecessary.

Chairman Maxwell responded I go by the guidance of the Town Council and our Building Inspector.

Mr. Folchetti asked what's the area variance reference?

Mr. Shilling responded Section 156-47A provides that if, in their opinion, it's a more restrictive use, and then they can grant the variance.

Mr. Folchetti added it's still use in nature, that's the non-conforming use of section.

Mr. Shilling responded I don't think it is to Mr. Folchetti.

Mr. Folchetti added, I think the section title is non-conforming uses.

Mr. Shilling asked that 156-47 be read again.

Mr. Folchetti responded 156-47 is non-conforming uses I think.

Mr. Carnazza added, article V is non-conforming uses.

Mr. Maxwell read "change to another non-conforming use without approval from the Board of Appeals and then only to a use which, in the opinion of said Board, is of a more restricted nature.

Mr. Shilling responded, right; I don't think that's a use variance. I'll go back to the fact that I think it's primarily an interpretive power you have to determine whether you think that that use is more restrictive than what was there at the time it was replaced.

Vice-Chairman Aglietti said the entire section says, any type of non-conforming use of buildings or land, may be continued indefinitely but shall not be (then we go to 2) changed to another non-conforming use without approval from the Board of Appeals; then only to a use which, in the opinion of said Board, is of a more restrictive nature.

Mr. Shilling responded right. I don't think that compels one to apply use variance standards. I think it's an interpretation of this Board that it's a more restricted use. To me, that's not application of use variance standards, that's your interpretive powers.

Chairman Maxwell stated okay; so we have to make an interpretation first and whatever is decided, we don't have a choice, we'll have to refer it to the Planning Board.

Mr. Shilling asked are you saying that you can interpret it without referring to Planning or that.....

Chairman Maxwell responded you're seeking interpretation at the conversion of a commercial store front with two residential units to two additional residential apartments was more restrictive. The alternative, applicant seeks a use variance to permit a four family structure; so I'm reminding the Board, whoever's going to make an interpretation that this would have to be referred to the Planning Board if a use variance is determined.

Mr. Shilling responded if you determine that the interpretation we've requested is not something that you're prepared to do and you think it's a use variance question then you have to send it to Planning. But if your interpretation is that it is a more restrictive use, then I submit to you by any review, in a commercial use which was the store converted to residential, it almost per se, is a more restrictive use. It brings it more into compliance with code and more into compliance with the neighborhood.

Chairman Maxwell stated it's a sticky neighborhood because part of it is residential and multi-family and commercial.

Mr. Shilling replied there's really commercial component to that neighborhood anymore. He said I don't know anybody that would want to set up a commercial establishment there.

Chairman Maxwell, I don't know what that building is to the left but it looks like a commercial building with a dumpster/container. I don't know what kind.....

Mr. Shilling interjected the one that you have a picture of? The one on the side that you have a photo of?

Mr. Carnazza added Dean's Building. That's commercial.

Mr. Shilling replied that's the car.....

Mr. Carnazza clarified auto-repair shop.

Chairman Maxwell stated that's a commercial establishment so there is.....

Mr. Shilling replied it's not in existence anymore. George Dean owned it and he's passed. I don't think it's operating anymore.

Mr. Carnazza added, people have been in looking at it but nobody's operated there yet.

Mrs. Fabiano asked could restrictiveness relate to the area that it's in? In other words, it would be more difficult as you've said to put a commercial use in there. So in that case, it's more restrictive to keep it as a commercial building.

Mr. Shilling replied I don't see it that way. I think restriction means the 'taxing' (not the literal taxing), the burden on a neighborhood when there's retail, when there are deliveries, when there are patrons; that which ordinarily occurs when there's a retail establishment. That is less restrictive.

Mr. Carnazza interjected as opposed to code less restrictive.

Mr. Shilling responded yes.

Chairman Maxwell directed to Mr. Carnazza, do we presently have a non-conforming use there?

Mr. Carnazza responded we currently, legally have a two family use there that I know of that my paperwork shows.

Chairman Maxwell then asked it's currently being used as a multi-family use so it is non-conforming.

Mr. Carnazza replied correct.

Mrs. Fabiano added, but either way, it wasn't legal because either if it was a mixed use, it was illegal and if it's a four family, it's illegal. So either way, it's been used illegally so, I don't know if it's non-conforming, it's just illegal.

Mr. Carnazza stated it originally was non-conforming because it was residential and you were not allowed to have two family in residential. It was a two family legal non-conforming; pre-existing non-conforming. It was okay to be there, it could remain forever. One store ended up there so whatever that was and however that happened, that's the first question and then the conversion from that store into the other two apartments is the other question.

Mr. Schwarz said so you're going from a two family, non-conforming to a four family non-conforming.

Mr. Carnazza replied they are going from a two family legal non-conforming to the additions or alterations I don't know how you would do it if the apartments are upstairs. That's what I mean. Something was there; I don't know what it was though.

Mr. Shilling added, I think, critical to your review, is to determine whether John Porco's affidavit and my clients' sworn testimony which I'd like to put him on for just a moment. I think critical to your review is to determine whether or not there was a store when my clients' father purchased the property, and I submit (I can't testify) that store was known to me, as a native of Carmel, a long time. I believe that store, with the apartment above was pre-dated, pre-existing, non-conforming, legal, pre-existing, non-conforming. Because it was there forever with all the other stores I made reference to like the appliance rental and things like that. Mr. Senno Jr. here was 18 when his father bought it and he took part in the activities there and he stripped the store. Maybe it's a jump that you're not prepared to take but if you take Mr. Senno's sworn testimony and Mr. Porco saying it was a store when they bought it, then I think that the interpretation that we're asking you to make is not a difficult step because it was there and because it's commercial use was abandoned and a residential use was put in its place. Again; I think critical to your review, is whether you believe there was a store when my client purchased it and it was abandoned the minute Mr. Usalak sold his building.

Mrs. Fabiano stated what you're suggesting is that we're going to give you two for one. You're putting two apartments but you only had one business. So we're really giving you more, as far as restrictions go, you're getting twice as much for your money.

Mr. Shilling responded, it is what it is now. We're saying that it exists now as two down and two up. We're asking for you to find that which has been in existence for forty years, The store, which took the entire downstairs, has now been broken into two 1 bedroom apartments and I think even with your analysis, it's still more restrictive, still more in keeping with the code and still more in keeping with the neighborhood.

Mr. Senno stated my grandmother was down in the Bronx; bottom line is he (Angelo Senno) bought the house because she could not drive and Fowler Avenue is within walking distance to churches and also stores. At the time when he bought it, the store was there and I helped this person, Anthony DiVento, who converted the store into the two one bedroom apartments. The two on the top were already there.

Chairman Maxwell asked the Board if there were any other questions.

Chairman Maxwell then asked if there was any input from the public.

Mrs. Fabiano moved to close the hearing. The motion was seconded by Vice-Chairman Aglietti with all in favor.

Decision of the Board:

Mr. Schwarz moved to holdover the application and send the applicant to the Planning Board for site plan review and referral. The motion was seconded by Vice-Chairman Aglietti with all in favor.

The meeting was adjourned at 8:22 p.m.

Respectfully submitted,

Dawn Andren