

Present: Betesh, Canonico, Walsh, Stambaugh, Waterbury, Fisher, Clark
Forrester (Attorney)
Cranmer (Engineer)
Absent: Peterson, Garley

Chairman, Ms. Peterson, called the meeting to order at, 7:30 p.m.
All saluted the flag, and the presiding officer's statement was read.

Minutes:

A motion was made by, Ms. Canonico, seconded by Mr. Walsh, to adopt the minutes of the October 7, 2009 meeting as submitted. All approved.

A motion was made by, Mr. Walsh, seconded by Ms. Canonico to adopt the minutes of the November 4, 2009 meeting as submitted. All approved.

Correspondence: none

Planning Board Representative: none

Unfinished Business:

Mt. Builders:

Bl: 22, Lot: 3

Adoption of Resolution

new single family home

A motion was made by Mr. Walsh, seconded by Mr. Fisher to adopt & memorialize the resolution of approval to Mt. Builders for a new single family home with conditions, as submitted.

Roll Call:

Affirmative: Betesh, Canonico, Walsh, Stambaugh, Waterbury, Fisher, Clark

Negative: None

NWDG, Inc:

d/b/a Collex Collision Experts

Adoption of Resolution

new freestanding sign

A motion was made by Ms. Canonico, seconded by Mr. Walsh to adopt & memorialize the resolution of approval to NWDG d/b/a Collex Collision for a freestanding sign as submitted.

Roll Call:

Affirmative: Betesh, Canonico, Walsh, Stambaugh, Waterbury, Fisher, Clark

Negative: None

New Business:

Azgara Bowl, LLC:
89 Newman Spring Rd.
Bl: 7, Lots: 1 (16, 17)

Determination pre existing non
conforming use

Mr. Forrester announced that he has reviewed service and finds it to be adequate and the board has jurisdiction to hear this matter. Mr. Forrester explained that the application is for a determination of a pre existing non conforming use.

Mr. Philip San Filippo, Esq represented the applicant. He asked if all board members have reviewed the application that he submitted on behalf of Azgara Bowl LLC, for clarity and understanding as to what his client is before the board for, and all board members indicated that they had.

Mr. San Filippo described in detail what the MLUL allows the board to do as part of the duties of a Zoning Board and read from the MLUL. Mr. Forrester agreed with all of the comments made.

Mr. San Filippo explained where he copulated his information from, Borough Ordinances, resolutions of the Planning Board and/or Zoning Board of Adjustment, County Files, which are all public records, and self authenticating. Mr. San Filippo explained that he will not presenting testimony from his client since the documents “speak for themselves”, and will paint the picture of what has occurred.

Mr. John Mercandante, Esq. Tinton Falls, NJ represents the owner of Red Bank Volvo who has an interest in the use with regard to the application. He explained that his client has an issue with the board proceeding with the determination, and explained why and referred to the Statute. He feels that Azgara is requesting a determination on property that his client retains an easement on known as the bullpen”, and gave some history of the property. Mr. Mercandante feels that Azgara doesn’t have any standing to come before the board for a determination on an easement which his client retains, which has been going on for decades, and he feels that this is an abuse of the Statute, and it was discussed at the closing. No one has objected to the use of the property, the town has no objected, the residents have no objected so it was left along. He feels that Azgara should be bound by the closing agreement that it would be left alone.

Mr. Forrester advised the board that Mr. Donlon issued a letter on 9/6/09.

Mr. Forrester marked the following into evidence:

A1: Application for Hearing dated 10/9/09, 24 pages attachments/exhibits A-M

A-2: Zoning Officer’s letter dated 9/6/09 10 pages

A-3: Ordinance #68, Revised Building Zone Ordinance Borough of Shrewsbury, adopted 12/7/1948 15 pages.

Mr. San Filippo addressed Mr. Mercandante's comments with regard to his statement that Azgara doesn't have an interest in his own property and cannot before the board to request a determination of what is or is not permitted on his property is wrong. He explained that Mr. Mathews was involved in a cross easement agreement between Lots 1, 16, & 17 which he has to abide by. The issue here is whether the underlying ability to use someone else's property for a parking lot that is not associated with their use, was that permitted by use variance or was a pre existing non conforming use. He explained that there is no record a use variance issued to Red Bank Volvo or Mathews or any of their predecessor companies which had a car dealership on the other side of Henry St to use any portion of Lot 1 for parking of their vehicles when the other property was used as a bowling alley which is a pre existing non conforming use from the 1920's and had a use variance from this board in 1959 to expand the facility from 16 to 24 lanes, as indicated in the newspaper articles, as provided, since there was nothing in the Municipal records evidencing that a variance approval was on file.

Mr. Forrester stated that it is Mr. Mercandante's position that the application from Mr. San Filippo's client is a violation of the cross easements which run with the land which were recorded and as a result of the cross easements his client has a right to use the property (Lot 1) as the easement provides.

Mr. Forrester stated that it has to be determined if it is a separate use (storage of vehicles), was there ever an approval for the use, and if there wasn't an approval and it wasn't an approved use in the 1948 Ordinance and if it exists because there is a pre existing right to use the property or that there is an approval which was granted to vary from what is permitted.

Ms. Waterbury stated that there are 2 issues, the agreement between the two parties, and for it to lawfully exist it has to be acknowledged by the town as a pre existing non conformity or an approval must be granted. There could be an agreement between the two, but it doesn't mean that the town has to agree to it.

Mr. San Filippo stated that parties cannot contract to do something which is not permitted by law. They run risk that the activity will be declared unlawful and void. This issue is before the board because they could not find anything which indicates that Red Bank Volvo has a use variance approval to use a portion of Lot 1 for parking. It would have to be a use variance approval, referring to exhibit A3, a 1948 Ordinance states that a bowling alley is not a permitted use, the automobile dealership is not a permitted, and a parking lot unassociated with a permitted was also not a permitted use, so you cannot have a stand alone parking lot public or private on the property, which is not associated with the principal of the property. The bowling alley had to get a use variance, which is why Red Bank Volvo in 1981 applied for a use variance to expand their use on the other side of Henry Street in the same zone. The only way the parking of Red Bank Volvo anticipated by the cross easement agreement on a portion of Lot 1 (bull pen), the only way that is lawful is if in fact it predated the adoption of the December 7, 1948 Ordinance.

Mr. San Filippo is asking the board to make a determination based upon everything that they have read and what they may hear tonight, which is why they asked Mr. Matthews to be subpoenaed, because to the best of their knowledge there is no one else who could testify as to what may have happened prior to the 1959 use variance approving the expansion of the bowling to the Accera's to see if Red Bank Volvo was using any portion of Lot 1 in 1948 or prior for parking. If they were not it is conceivable that there isn't a pre existing non conforming use for their use of a portion of Lot 1 for parking. Proofs have to be shown that they have the right to use the property as a pre existing non conforming use from December 7, 1948.

Mr. San Filippo said that they will at another time, have to decide as to whether or not the cross easement agreement is lawful or void from its inception since the use that it is contracted for, in fact, is not lawful under the Ordinance.

Mr. San Filippo stated that this board clearly has the authority to make the determination, in fact, this is the only body that has the right to make that determination and if this issue were to go to Court without this board making that determination, he feels, that the court would say that they should go the Shrewsbury Zoning Board, and the Court would review that determination.

Mr. Mercandante gave his objections on the application. He feels that this board is not the vehicle to be used, and read from the statute.. Mr. Forrester addressed his concerns, and he stated that this is the board that the applicant should be before and that the courts would send him back to the "fact finding board". He doesn't feel that the land owner is bound by a determination. There has to be a determination made as to whether this is a use that entitled to continue on the property whether by Ordinance or by variance or by pre existing non conformance.

Mr. Mercandante feels that his client should make an application for a variance since he doesn't feel that this is the venue under the statute to ask for a negative declaration under the statute which is what Mr. San Filippo is requesting... Mr. San Filippo stated that he is not asking for a determination.

Mr. San Filippo read into the record the entire Statute of 40:55D-68 Non conforming structures and uses. He also read 40:55D-72 through 75.

Mr. San Filippo stated that the determination will influence where the building is located and also the parking. If the underlying use by Red Bank Volvo is not either approved by use variance or is not a valid pre existing non conforming use, then his client will not be able to use Lots 16 & 17 because the cross easement will not have validity and it will influence where the building and required parking is situated. That is what they are trying to determine, they are not trying to deprive Red Bank Volvo of what the cross easement stated, they are trying to determine if they also have the right to use Lots 16 & 17 under the same cross easement. A determination has to be as to whether the uses are lawful uses on Lot: 1. Lots 16 & 17 is not before the board only Lot 1.

Mr. Forrester explained that land owners cannot allow a use which is not permitted within the zone. The municipality clearly has the authority to provide for permitted uses. If you do not comply with the Ordinance for permitted uses it is NOT permitted. You can do anything you want. You can sell the lot for a hotel, but it doesn't mean you have the right to build a hotel on it. This property has been zoned as B1 since 1948 which doesn't permit bowling alleys, car dealerships or parking lots.

Mr. Forrester stated that it is his opinion there is no question that this board has jurisdiction to determine whether this is a pre existing non conforming use. There is no other place that they can go. If they go to court the Judge will remand it back to this board.

Mr. San Filippo explained that this board granted a use variance for the bowling alley use to be reinstated on the property, subject to a site plan approval at a subsequent date, with conditions imposed.

Mr. Cranmer suggested that the board should look at several basic concepts:

- He asked Mr. Forrester if he feels the board has jurisdiction and authority to act on Mr. San Filippo's request?
Mr. Forrester said absolutely it would be his recommendation to act on the application, no matter what you call it, an interpretation or a certificate of non conformancy.
- Did Mr. Donlon's letter make a finding that the use of parking vehicles on Lot 1 by Red Bank Volvo is restricted in the zone, and do you feel that it is an interpretation?
Mr. Forrester said yes. It is his opinion that the letter states "...the property lies within the B1 zone, the prior bowling alley was destroyed by fire and it was a non conforming use". Which means that any use on Lot 1 associated with the bowling has gone away. Mr. Cranmer feels that the letter states that there is no approval for this use and it is a use not permitted in the zone.
- Mr. Cranmer stated that there was a use variance granted to Gorwin/Azgara granted by this board for a bowling alley/family recreation and other uses on Lot 1. He referred to the parking/outdoor storage of vehicles and there was no testimony to the use of parking/outdoor storage and there was not a use variance granted for that use. Mr. Mercandante stated that his client did not receive adequate notice for the hearing. Mr. San Filippo stated that he was within the 200'

Mr. Cranmer feels that the board now needs to hear testimony as to when Red Bank Volvo started parking there and did it pre date the Zoning Ordinance which rendered the use unlawful. If there is an affirmative finding that there were parked there prior to 1948 then, he feels, they would be able to continue to use the lot.

Mr. Cranmer asked if the board feels that the parking of Red Bank Volvo was an ancillary use/accessory use to the bowling, since you cannot have 2 principal uses on a lot. Mr. Forrester did refer to the discussion by the board several months ago where the board would not make an advisory opinion, but from what was going on there are 2 principal uses, a business use which is unassociated or the storage of vehicles which is not connected with the bowling alley use. (see transcript for detail discussion for other applications that have already been dealt with by this board).

Mr. Cranmer asked if the board could make a finding of fact whether the use of the property or a portion for the parking or outdoor storage of vehicle is a permitted use or not. If it is not a permitted use then the applicant/applicants would be required to appear before the board to obtain a variance to continue the use. Ms. Waterbury asked whether it was a pre existing non conforming use? Mr. San Filippo said correct, not a permitted use. Mr. Forrester clarified and stated ...or permitted by Ordinance

Mr. San Filippo said that they are NOT applying for a certificate of non compliance; they are applying for a request for a determination of whether the use is a pre existing non conforming use. The zoning board has that authority to make the determination. He has searched the records and found nothing which indicates that they had a prior approval to use any portion of Lot 1 as an outdoor storage/parking, which were not associated with the use variance of Lot 1 bowling alley (1959 & 2009). Mr. San Filippo read the statute into the record.

Mr. San Filippo stated that if the board makes a determination based upon tonight's testimony that the use of Red Bank Volvo on Lot is a pre existing non conforming use, then he can take the determination and then can go forward with his clients site plan, since he now can use Lot 1 and Lots 16 & 17 under the cross easement. Ms. Waterbury said that the board is only working with Lot 1 and the next consideration will be with the court and not this board.

Mr. Mercandante asked if Mr. San Filippo is requesting a certification from the board? Mr. San Filippo said no, the board will adopt a resolution, and if it states that the Zoning Officer is directed to issue a certificate of pre existing non conforming use, because the board determined after a hearing that it is a pre existing non conforming use. He doesn't feel that the board can issue a certificate but can direct the Zoning Officer to issue it. The Zoning Officer cannot make that determination because too much time has passed.

Mr. Forrester said that if Red Bank Volvo never makes an application how is there going to be a determination made, if they refuse to participate in the application or make an application on their own, which then leaves Mr. San Filippo's client unable to develop his property due to intransigents of Mr. Mercandante's client.

Mr. Mercandante said that they cannot go back 60 years and they have not had any issues for 60 years. Why would they open this "can of worms"? Ms. Waterbury said because the "can" was open when the bowling burned down.

Mr. Mercandante said that the easement was recorded and anyone who purchases the property is bound by it, and it was addressed between Azgara & his client. Ms. Waterbury asked was it before the board? Mr. Mercandante said no.

Mr. Forrester said that the existence of the cross easement is a non start.... Property owners cannot effect the use of a property by their cross agreements. The use is the responsibility of the Municipality. The filing or execution of an agreement between property owners has no barring, does not bind under Article IV, Section 6, paragraph 2 under the New Jersey Constitution, which gives the Municipality the authority to regulate the use of land, and property owners cannot aggregate that. (See Transcript)

Ms. Waterbury stated that the board has any options but to consider that since there has not been any action by this board that would therefore give a “blessing” from the town. This is now the forum to do that.

Mr. Forrester stated that the board must make a determination as to whether what is being used on the “bull pen” portion of Lot 1 is permitted.

Mr. San Filippo explained that he has presented to the board everything that he was able to find that speaks to whether or not there was any type of approval which legalized the parking/storage of vehicles on the property for a use unassociated with the bowling alley use. He asked the Chair to use their subpoena powers, under the MLUL, to subpoena Mr. Matthews, because he feels he is the only person who could shed any light on this from the perspective of Red Bank Volvo. The board will have to listen to his testimony and make a determination if the use predated the December 7, 1948 Ordinance.

Mr. San Filippo stated that the best he can determine from the municipal records is that there wasn't a use variance for Red Bank Volvo to use any portion of Lot 1 for the storage or parking of vehicles. The only way it could be permitted would be if it was a preexisting non conforming use. Mr. Betesh said that the only vehicle that is available to you is to establish that it wasn't a pre existing non conforming use. Mr. San Filippo said that if Mr. Matthews can prove that it did exist prior to the Ordinance.

Mr. Mercandante stated that the 1948 Ordinance was amended by a 1957 Ordinance, which gave an extension under the 1948 through 2/1/1958 for any non conforming uses. Mr. Forrester said that the use had to be established within 1 year (exhibit D).The use had to be established that it was a pre existing non conformity and there isn't any indication that that was the case. Mr. Mercandante read from Section 5c of the 1957 Ordinance. Mr. San Filippo read the entire section into the record. (See transcript)

Mr. San Filippo said that if Red Bank Volvo was using any portion of Lot 1 (bull pen) from 1948 and they continued to use it through 1958 they could have expanded it up to that point, but beyond that they would have had to come to the board for a use variance. The Ordinance is clear that the use had to exist as of December 7, 1948 in order to be considered a pre existing non conforming use.

Mr. Forrester explained that a pre existing non conforming use is a standard, it means that it is established, it pre existed the Ordinance that doesn't permit it now.

Mr. Forrester said that the board should focus on what is a pre existing use. The board should make a factual finding that this is the use and whether or not it is permitted under the Ordinance.

Mr. Mercandante stated that even though Mr. Matthews is under subpoena, he must be here, but he wants to keep his objections on the record, and is not waiving any of those objections. Mr. Forrester said that his testimony is not a concession that the board is making the determination to hear this matter.

Mr. James Mathews, 491 Colts Neck Rd, Farmingdale NJ born 10/20/1948, and gave his history of Red Bank Volvo from recollection of what his father & uncle told him was the history of Red Bank Volvo from around 1952-1953. See transcript for his entire testimony.

Mr. Forrester marked the following into evidence:

- **RBV #1**- 1953 Dealership photo just prior to becoming a new car dealer (duplicate of exhibit C submitted by Mr. San Filippo)
- **RBV #2**- photo of dealership after 1955 before 1958 new Renault cars parked on the west corner of the bowling alley property
- **RBV #3**- west side of the showroom - Renault car - 1960 Grand Opening
- **RBV #4**- letter dated 5/29/1959 from Red Bank Auto Imports from Richard Mathews and the leasing of parking at the bowling alley, in conjunction with the expansion of the showroom (Exhibit H from Mr. San Filippo submission).

- **B-1**: GIS Aerial Photo of area from Monmouth County showing the parcel in question with the tax map lines showing the Bowling Alley, former Red Bank Volvo and surrounding businesses - showing the "Bull Pen" (orange color) and Lots 16 & 17 (aqua)

Mr. Fisher pointed out that the 5/29/1959 indicates that he took ownership of the property in 1952 and would not be operating prior to 1952? Mr. Mathews stated that the dealership was in Red Bank and moved to Shrewsbury after the war but doesn't know where. Mr. Fisher stated that the letter indicates that they took ownership to this particular piece of property in 1952. Mr. Walsh said that it was not relative to parking in the "bull pen" which is before the board.

Mr. Mathews described what the "bull pen" was used for. The parking was behind the building, dark and did not have any lights. Bowlers would not use the lot and parked across the street at the Foodtown lot. They shared what parking was available during day and what was available at night by using it as a "bull pen". In 1990 when his father died he became the operator of Red Bank Volvo and the Bowling Alley from 1990-1998 when he sold it to Gorwin Corp. So they parked the cars where the bowlers did not want to park and parked the bowler's car where it was lit and more convenient to get out of the

parking lot and into the building. The agreement between the bowling alley and Red Bank Volvo was going on since he was a little kid.

Mr. Mathews stated that he did not recall an incident or complaint by anyone as to how the two businesses managed the parking lots.

Mr. Forrester marked the following:

RBV #5- 10/9/1981 - letter from Leon S Avakian Inc. site plan review
#5 read requesting permission to park on Lot 1 from owner of
Lot 1

Mr. Mathews stated that currently employees are parking along Henry Street, Lot 1 for their parking.

Mr. Mathews stated that the bull pen is used for lease returns, new car storage & employee parking, used cars.

Mr. Forrester asked Mr. Mathews if there has ever been a variance application for parking on Lots 16 & 17? Mr. Mathews said yes.. Mr. Forrester said not the expansion on Lots 33 & 34. Mr. Mathews said yes, part of the application was an application for Lots 16 & 17.

Mr. Forrester said that the resolution states “the variance was granted for the expansion of the building conditioned upon Red Bank Volvo continuing to own Lots 16 & 17, and it doesn’t state that there was a variance granted for it. Variance was submitted as part of Mr. San Filippo’s submission.

Mr. Forrester asked if there was a Red Bank Volvo Dealership in Shrewsbury?

Mr. Mathews said that Red Bank Volvo operates in Shrewsbury now, through its body shop. Mr. Forrester said no, is there an automobile dealership, do you sell new cars, do you have telephones and desks and recipients where you can meet people and sell new cars on those lots in Shrewsbury? Mr. Mathews said not on Lots 16 & 17 there is no facilities.

Mr. Forrester stated that the dealership does not exist any more on the westerly side of Newman Spring Road the new car dealership is in Red Bank on the northerly side of Newman Spring. Mr. Mathews said that if he has a new car that is totaled and they want to look at a new car they have to send them to Red Bank Volvo. Mr. Forrester said that they cannot process a new car or do they have a new car dealership on Newman Spring Rd on the southside? Mr. Mathews said that is, they are in Red Bank for that.

Mr. Betesh asked where are the new cars delivered to? Mr. Mathews said the bull pen or to the Red Bank location.

Mr. Forrester asked why is the bull pen fenced and not Lots 16 & 17? Mr. Mathews stated due to the cross easement they allow the bowling alley 10 parking spaces on Lot 16 & 17 after hours. Mr. Forrester said that it has nothing to do with the lease returns so the fence could come down tomorrow? Mr. Mathews said that is correct.

Break 9:40 pm to 9:50 pm All present at roll call.

Paul David Partywares:

Completeness

Riordan Dr.

Bl: Lot:

Mr. Edward McKenna, Esq. represented the applicant, he requested that the application be deemed complete and be carried to the January 6, 2010 meeting without further notice.

Mr. Cranmer referred to his January 28, 2009 and stated that the submission waiver must be approved by the board: existing manholes, sewer lines, fire hydrants be placed on the site plan within 200' of the site, which he does not have any concerns with reviewing the plans with the information that has been shown. If the board feels that they need additional information the applicant would have to supply the information to perform a comprehensive review.

A motion was made by Ms. Waterbury, seconded by Ms. Canonico to deem the application complete and approve the submission waiver.

Roll Call:

Affirmative: Betesh, Canonico, Walsh, Stambaugh, Waterbury, Fisher, Clark

Negative: None

Mr. Forrester stated that this matter will be carried to **January 6, 2010 without further notice.**

Continued:

Azgara Bowl:

Mr. Betesh summarized the application.

- 1952 there was a purchase of property on the southerly side of Newman Spring Rd at Henry Street
- Parking of vehicles was shown on photos along Henry Street
- Parking was done in the "bull pen" as well on Lots 16 & 17

Mr. Forrester stated that the first issue that the board needs to address is whether parking for new cars and rental returns for used cars for Red Bank Volvo is a permitted use.

Mr. Betesh asked if it was relevant that the business that is using the lot is in a different town? Mr. Forrester said yes to the extent that a municipal boundary can bifurcate a lot for a bifurcated use, but they would have to satisfy the zoning requirements in each town.

Mr. Forrester read into the record what the permitted uses are in the B1 Zone.

Mr. Betesh feels that it is clear that the use is not permitted in the zone.

Determination of a permitted use:

A motion was made by Ms. Waterbury, seconded by Ms. Clark to make the determination that the existing use (parking/storage of vehicles) is not a permitted use in the zone.

Roll Call:

Affirmative: Betesh, Canonico, Walsh, Stambaugh, Waterbury, Fisher, Clark

Negative: None

Mr. San Filippo referred to RBV #2, he asked if that was a 1958 photo showing cars on the easterly side of Henry St or Lot 1 on his clients property. They are new Renault cars on the Henry St. of Lot 1, Mr. Mathews said that is correct.

Mr. San Filippo referred to RBV#4, letter dated 5/29/1959 which reads "that at present forced into leasing parking facilities on land owned by Red Bank Recreation Center on which there is to be constructed 6 new bowling alleys and have been notified by its' owner, Mr. James Acerra, of the termination of this agreement on his commencing construction".

Mr. San Filippo asked if this area was the area that is shown on RBV#4? Mr. Mathews said that he did not know. Mr. San Filippo asked if he knew if any part of Lot 1 or the bull pen was being used for the parking of his vehicles? Mr. Mathews said that the letter doesn't indicate that, but it wasn't spelled out specifically where those parking areas were.

Mr. San Filippo asked if he remembers the expansion of the bowling alley? Mr. Mathews said no, and he was 11 years old at the time. Mr. San Filippo said that the bowling alley was expanded in 1959 and he doesn't remember. Mr. Mathews said that he doesn't recall. Mr. San Filippo asked if the earliest would have been in 1953 when his father established the dealership on Henry Street on the westerly side or portion of Lot 1. Mr. Mathews said he only remember that they moved from Warf Ave after the war into Shrewsbury but doesn't know where.

Mr. San Filippo referred to the parking arrangement between Red Bank Volvo in 1962, and does he know if the arrangement included the bull pen or any other areas of Lot 1? Mr. Mathews said specifically the bull pen, since he had to keep it clean. Mr. San Filippo said that the earliest was 1962 that he recalled Red Bank Volvo using the bull pen when he was 14, but he doesn't know when.

There was a brief discussion on the October 9, 1981 letter from Leon S Avakian Inc. and the possibility of getting the minutes from the hearing.

Mr. San Filippo pointed out that the letter from Red Bank Auto Imports dated 5/29/1959 does not indicate that they were using the bull pen at this time and that he would have to terminate the parking when the bowling alley expands. He doesn't feel that looking at the minutes would give any additional indication that they were using the bull prior to this date.

Ms. Clark asked if anyone contacted the Dorn family for old aerial photos?
Mr. San Filippo said that he has and there wasn't anything available.

Mr. San Filippo stated that the determination that needs to be made by the board is whether the use (parking lot/storage) was permitted in the B1 Zone or B2 zone under the December 7, 1948 Ordinance. Mr. Forrester agreed.

Mr. San Filippo stated that Mr. Donlon has already advised that there was nothing which indicates that there was any sort of approval for the parking use on Lot 1. The only way that could be a valid use if it's a pre existing non conforming use. To make that determination the board has to decide whether in 1948 when the Ordinance was adopted was that a permitted use, if it wasn't a permitted use, then the next determination the board must make, based upon everything you have read or heard is whether that use pre existed December 7, 1948. A determination has to be made as to whether or not the 12/7/1948 Ordinance did not permit the use, parking independent of a limited use or permit the parking of a permitted use or permit a new car dealership as a permitted use. That must be done before the board can decide whether or not the proof were sufficient to establish that there was a pre existing non conforming use by Red Bank Volvo or Red Bank Auto Imports. Mr. San Filippo said that Mr. Donlon does not have the right to make the determination because it is beyond 1 year of the adoption of the Ordinance and the Zoning Board is the correct board to be in front of.

Mr. Forrester explained that Mr. Donlon does not have the jurisdiction, and in his opinion he has been here and stated it under oath, he cannot issue a Certificate of Non Conformancy if its more than 1 year after the adoption of the Ordinance. He has stated that it is not a permitted; he has indicated that he cannot find anything in the Borough records that establishes any type of Borough permission. Mr. Forrester stated that where a Certificate of Continuing Occupancy for a non permitted use was issued it does not give the owner the right to continue the use if it doesn't comply with the Ordinance.

Mr. Mercandante asked Mr. San Filippo if it is his opinion if they could not apply for a variance at this point? Mr. San Filippo said that if its not a permitted use in the use and its was not granted a variance approval by any board then the only other way this could be a lawful use if it pre existed the adoption of the 1948 Ordinance, and Mr. Donlon cannot make that determination. Mr. Mercandante said or if they make an application for a use variance. Mr. Forrester said that is a different issue.

Mr. Forrester explained that Mr. Mathews of Red Bank Volvo cannot make an application for a use variance without the permission of the property owner, the MLUL states that you have to have a consent. Mr. Mercandante said that they have an easement document. Mr. Forrester stated that it will be litigated with the Superior Court, not here.

Mr. Forrester said that for 3-4 months there has been a request for Mr. Mathews to participate in this matter, and they refused. Mr. Mercandante said that is not correct. Mr. Forrester said that they did not want to participate in an application. A subpoena was issued to get him before the board.

Mr. Forrester stated that Red Bank Volvo does not have right to a variance applicant is not correct, they cannot get a variance determination on property that they do not own, without the consent of the property owner.

Mr. Forrester stated that the board has to make 2 decisions. His recommendation is that this does not go back to Mr. Donlon because they will be back here doing the same thing. The burden is on "them" to meet burden of proof, and if they have not....

Mr. Betesh said that they have to make a determination that if the Ordinance of 1948 rendered the storage of vehicles in the bull pen area non permitted, and did the storage of vehicles pre date the 1948 Ordinance.

Mr. San Filippo read sections into the record, page 8, Section 7.

Determination that the storage/parking of vehicles not a permitted use

A motion was made by Ms. Waterbury, seconded by Mr. Fisher to make the determination that the storage of vehicles not ancillary to a permitted use is not a permitted use, as stated in 1948 Ordinance, Section 7.

Roll Call:

Affirmative: Betesh, Canonico, Walsh, Stambaugh, Waterbury, Fisher, Clark

Negative: none

Mr. Betesh asked for any comments on the pre existing to 1948, since the earliest recollection was 1952.

Mr. Betesh stated that there is the question as to whether any thing happened subsequent to 1948 or 1952 to endorse the use by the Borough and nothing has been presented.

Mr. Fisher feels that it would be the responsibility of the individuals before us to come prepared with that information prior to tonight's application.

Mr. Betesh asked the board if they want to carry this matter in order to allow the parties to obtain any additional information or do they feel there is sufficient evidence before the board. Board members indicated that there was sufficient information.

Mr. Mercandante asked to have this application carried for further information

Mr. San Filippo objects to the request being granted. He stated that Mr. Mathews was subpoenaed 3 ½ weeks ago and had access to documents that he produced long before this evening, he knew this and aware of the application, noticed of the application. In fact if he acted diligently he would have acted long before tonight looking for minutes it would have been incumbent upon him to do what his client asked him to do and look at the records and see what is there, and to produce the documents that are at the Borough. He should have done the due diligence that he did.

Mr. Betesh stated that he asked the board and no one stated that they wanted to carry the matter. He asked for a voice vote to adjourn to carry, majority stated not to carry.

Determination that the storage/parking of vehicles did not exist prior to 1948 Ordinance on Lot #1 (Bull Pen)

A motion was made by Mr. Fisher, seconded by Mr. Walsh to determine that the storage/parking unassociated with the bowling on the bull pen lot on the bowling alley property was not a pre existing use prior to 1948 existed prior to the 1948 passage of the Ordinance.

Roll Call:

Affirmative: Betesh, Walsh, Stambaugh, Fisher, Clark

Negative: Canonico, Waterbury

Mr. Betesh stated that the board made 3 determinations tonight:

- The use is not a permitted use under the current Ordinance
- The use was not a permitted use in the 1948 Ordinance
- There was not sufficient factual evidence that proves that the use was pre existing at the time of the passage of the 1948 Ordinance

A motion was made by Ms. Canonico, seconded by Mr. Walsh to adjourn the meeting at 11:03 pm. All approved.

A copy of the certified transcript will be attached to these records.