

Present: Waterbury, Canonico, Walsh, Stambaugh, Betesh, Fisher, Clark, DeSalvo
Steib (Attorney)

Absent: Peterson

Chairman, Ms. Waterbury, 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. Fisher to adopt & memorialize the minutes of the June 2, 2010 meeting as submitted. All approved.

A motion was made by Ms. Canonico, seconded by Mr. Fisher to adopt the minutes & transcript of the June 9, 2010 meeting as submitted. All approved.

Mr. Betesh arrived at 7:40 pm

Appointment of Special Counsel:

A motion was made by Ms. Canonico, seconded by Mr. Fisher to appoint Mr. Michael Steib as the Zoning Board of Adjustment special counsel for Litigation, & the July 7, 2010 meeting.

Roll Call:

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

Negative: None

Planning Board Representative: none

Correspondence: none

Ms. Waterbury asked that all of the attorneys allow each other to speak one at a time in order to keep a clear record. She reminded board members that the Court Order indicates that we are to finish this evening and in an effort to accomplish that she is going to request that each side not to be repetitive and if she does we will stop and move on in order to get through our task this evening.

Ms. Waterbury asked the 2 members who were not present at the 6/2/2010 hearing if they have certified and listened to the meeting, Ms. Stambaugh and Mr. Fisher indicated that they did.

Azgara/Gorwin:

Continuation of Court Remand

Bl: 7, Lot: 1

Mr. Phillip E San Filippo, Esq represented the applicant.

Mr. San Filippo recapped the June 2, 2010 remand hearing:

- The board accepted & marked as exhibits A4 through A-12 (inclusive)
A-4 through A-7 are 3 aerial photos and a Certificate of Authenticity from the Monmouth County Planning Board
A-8, A-9, A-10, A-11: Minutes of 2 Zoning Board meetings & 1 Planning Board meeting & a resolution dated 6/13/1984, A-12 a Certificate of Authenticity of those records signed by the Board Secretary

Mr. San Filippo stated that after proffer the board was going to consider those items as evidence, that was not done on that evening but it was determined that they would be considered into evidence. The board also determined not to introduce into evidence certain aerial photos that were proffered by Mr. Forrester and they were exhibits B-1, B-2 & B-3, which were not accepted by the board.

Mr. San Filippo stated that the hearing was concluded and carried until tonight. He assumes that the board has had an opportunity to review exhibits A-4-A-12 inclusive, which are the aerials, minutes & resolution? All board members indicated that they have.

Mr. Steib suggested that Mr. San Filippo make his presentation as to what he thinks these exhibits show and then give the opportunity to give the counsel to address what their position is as to what they think they do or don't show. Mr. Leckstein stated that they also have a witness. Mr. Steib said that we will take that when it comes.

Mr. Dennis Collins asked Mr. San Filippo if there were 4 aerial photographs and a Certificate of Authenticity not 3:

- 1940, 1950, composite of 1961 & 1962 & 1969, B-6 was a Certificate of Authenticity?
Ms. Waterbury stated that B-2 was 1940, B-3 was 1957, B-4 composite of 1961 & 1962, B-5 was 1969, B-6 Certificate of Authenticity.
Mr. San Filippo agreed.

Mr. San Filippo referred to the aerial photos:

- A-4 is an aerial photo, 2 sheets, dated March 1974 and if the board was able to locate the area in question of the bowling alley on the corner Newman Spring Road & Laurel St & Henry St as well as the Red Bank Volvo to the west of Henry St. Aerial photo A-4 shows that, in fact, there are no cars what so ever parked behind the bowling alley building in the area which became to known as the "bull pen"
- A-5 dated April 8, 1981, 2 sheets, shows the area behind the bowling alley building which became known as the "bull pen" with approximately 6 cars behind the building.

- **A-6** aerial photo, dated April 14, 1986, 2 sheets, shows numerous cars parked behind the building and essentially are stacked behind the building without any indication of any delineated parking spaces, row upon row of vehicles behind the building.
- **A-8** Minutes of the Zoning Board of Adjustment meeting dated 9/2/1981 involving the application of Red Bank Volvo to expand the dealership which was located on the corner Newman Spring Road & Henry Street, which at that point in time were designated as Bl: 5, Lots: 34 & 35. There are some comments made by Mr. Richard Mathews who was the principle of Red Bank Volvo at that time, who was sworn & under oath and he is primarily discussing his dealership on Bl: 5, Lots: 34 & 35 but he is also discussing the ownership of Lots 16 & 17 in Bl: 7 and he has extensive testimony about the use of those lots and the parking on those lots and his ability to park on those lots to satisfy, what otherwise might be a parking requirement on the west side of Henry known as lots 34 & 35. He has some telling testimony in a response to direct questions notably on page 4 there is an exchange between Mr. Mathews and board members and the minutes say:

“Mr. Messina (attorney for the application) said there is additional parking on Lot 1 that you use, is there not? Yes, also our neighbor, the people that own the bowling alley we use that lot as well during working hours during working hours from 8:00 am to 5:00 pm it fits with them quite well because they don’t need that lot all. They only use it in the evenings for their bowling customers so through a verbal arrangement we maintain that lot. We plow it in the winter and do maintenance on it. We use it to some degree during the day. That lot probably takes maybe 10 - 12 cars average day. They can be customer cars, employee parking. Mr. Messina asked if there is parking on Henry Street as well? Yes, there is side street parking. Mr. Scott (board member) said you don’t put any inventory or repair cars in Lot 1, do you? No. Those cars are in and out of there from 8 a.m. to 5 p.m., they are out by 5 p.m.”

Mr. San Filippo said that the minutes of 9/2/1981 there are admissions by Richard Mathews, under oath, and questioned by his attorney as well as board members that, in fact, they don’t use Lot: 1 for inventory and repair of cars but they do have some casual parking of cars for employees and customers. Mr. San Filippo said that he would like to remind the board that when he made his presentation on September 2, 2010 they acknowledged that, in fact, there was some parking of customers & employees vehicles by Red Bank Volvo on this site, historically, over the years, but there was no inventory, there was no storage and no repair, and these minutes essentially, this testimony of Richard Mathews confirms that.

- **A-10:** Minutes of May 2, 1984, application from Red Bank Volvo, for the Auto Body Shop, located on Lots: 32 & 33, Bl: 5 also on the west side of Henry Street Mr. San Filippo read from the minutes where Mr. Mathews is testifying on behalf of Red Bank Volvo, referred to pages 9 & 10 where Mr. Mathews is being questioned by Mr. Messina (his attorney) :

“Mr. Messina asked Mr. Mr. Mathews, since the meeting before the Board of Adjustment in 1981, has the parking situation at any of your lots in this area changed? Not since the improvement. Have you experienced any additional parking requirements? no, nothing that wasn’t anticipated. State precisely what the parking situation is out at these lots now, what usage is for parking purposes? We have employee parking, our employees basically park in the bowling alley lot. They leave at 5 pm. We had this arrangement with Accera’s and then with owners bought it from the Accera’s and it has worked out very well. We just get along fine. That provides employees parking and some customer parking. We have an open storage lot and another lot that also is used for our customer parking and our storage. Mr. Messina asked if that is Lot 16 & 17? Mr. Mathews said yes. Part of that is fenced off and part isn’t fenced. The area that is not fenced off there is 14 parking spaces there, inside the fenced area there is 38.”

Mr. San Filippo referred to page 11:

“Mr. Clarke (board member) asked if there is any limitation on how many people or any of your people can use the bowling alley lot? No, there is no limit. When you say you have a working arrangement with the owners of the bowling alley, does that arrangement say that you can use 6 spaces, 4 spaces or is just kind of a casual arrangement? No, there are still empty spaces on that lot when we are totally filled in as busy, as we can be at the height of our business day there are still empty spaces on that lot. There is also a large lot in the back of the bowling alley that very rarely gets used. That we don’t use but it is also owned by the people that own the bowling alley.”

Mr. San Filippo stated that the import of Richard Mathews’ testimony in 1981 & 1984 represented by the minutes which are A-8 & A-10 essentially are admissions by him that they were not storing cars on Lot 1, they were not repairing cars on Lot 1 and they were not storing any cars or using the area behind the building, the large lot behind the building which came to be known as the “bull pen”.

Mr. San Filippo stated that the import of the photos is important because we know from the Deed Records of the County Monmouth, and they were sited in his original request for determination, that Richard Mathews bought this property in November of 1984, he bought the bowling alley property. If you compare the photos from 1974 when it was owned by the Accera and 1981 when it was owned by Sachlban & Servino the people who it from the Accera’s and then you look at the number of cars that were stacked into that lot in 1986, 1 ½ years after Richard Mathews bought the property (November 1984), he would submit to the board that you cannot come to any other conclusion that the “bull pen” started after Richard Mathews bought this property in November 1984 and it didn’t exist at any time prior to that time. In fact, his own testimony in 1981 and again in 1984 as reflected by the minutes is that he was using Lots 16 & 17 for the storage of motor vehicles, part of it was fenced part was unfenced. That was essentially where he was storing his cars, and he was using the bowling alley property for some customer and employee parking during the day time hours 8 am to 5 pm. He would submit to you that is the import of what you have seen in the photos and once you have read in the minutes. He is not going into any great depth of Lots 16 & 17 because we are not here to talk

about them. We are here to talk about Lot 1 and if you look at the sets of minutes, there are very very few references to Lot 1. If there are they are telling how they were used. They were not used for a "bull pen"; they were not used for the storage and inventory of motor vehicles, which substantiates essentially your determination on December 2, 2009.

Ms. Waterbury asked if there were any questions from the board? There were none.

Mr. Dennis Collins, Esq. represented Richard Mathews
Mr. Michael Leckstein, Esq. represents Red Bank Volvo
Mr. Marc Leckstein, Esq. represents Red Bank Volvo

A motion was made by Mr. Walsh, seconded by Mr. Fisher to open the meeting to the public. All approved.

There were no comments/questions.

A motion was made by Mr. Betesh, seconded by Mr. Walsh to close the meeting to the public. All approved.

Mr. San Filippo stated that the purpose of the remand was to have the minutes, aerial photos considered. The purpose of them bringing the request for determination was to determine if in fact it was a preexisting non conforming use which existed on this property in 1948 when the Ordinance was adopted. Essentially there is no proof and there has no proof by Red Bank Volvo that they had cars parked on this property in the bull pen area at any time prior to their arrival in town in 1953, by opening the showroom at the corner of Henry and Newman Spring Rd. There were no cars parked there and they cannot substantiate the fact that there were cars parked in the area behind the building, and used by them for storage and inventory.

Mr. Collins stated that the board will hear evidence to the contrary of what Mr. San Filippo just said.

Ms. Waterbury asked Mr. Steib, part of what the board had done when we voted last time was actually to just vote whether ... it was a 2 prong, did we see any thing that granted permission from the board for parking to exist different from bowling alley use on Lot 1 and in the absence of seeing that the board needs to make a determination as to whether the parking predated the Ordinance, she believes that is what the boards actions were and had voted.

Mr. Steib asked if that was the December meeting? Ms. Waterbury said yes.
Mr. Steib stated at the last meeting the board decided as to what exhibits you would consider or would not. This meeting is to determine what weight you are going to give to those exhibits based upon the presentation of counsels.

Ms. Waterbury asked, when we are looking at these exhibits and putting in that weight, it is to see if its going to change or affirm the decision that we made last time that related to as to whether there was a prior approval granted by the board or (b) did it predate the Ordinance, is that correct? Mr. Steib said that is correct.

Mr. San Filippo said that there is one other thing.... Mr. Leckstein asked what is the color paper being passed around? Mr. Fisher said that it is a color map showing the block & lots. Mr. San Filippo said that it is an exhibit from 9/2/2009 meeting. Mr. Fisher said that he did not bring his, just refreshing his references on which lots we are talking.

Mr. San Filippo referred to:

- A-11, Resolution of June 13, 1984, granting Mr. Richard Mathews, Red Bank Volvo a use variance to expand the auto body shop on Lots 32 & 33. In reviewing the resolution you will not find anything in the resolution which results in findings of fact and conclusions of law that variance relief was granted to Red Bank Volvo to use Lots 16 & 17, much less than his clients property or Lot 1. There is no variance relief for the parking/storage of motor vehicles on Lot 1. But in order to advance the variance the board would have to make findings of fact and conclusions of law and that resolution is completely devoid of any such findings of fact and conclusions of law as to the storage and parking motor vehicles on Lot 1.

A motion was made by Mr. Betesh, seconded by Mr. Walsh to open the meeting to the public, for the additional information given. All approved

No comments/no questions.

A motion was made by Mr. Betesh, seconded by Mr. Walsh to close the meeting to the public. All approved.

Mr. Leckstein pointed out that the only people in the audience are clients, there isn't any public.

Ms. Canonico asked questions with regard to the aerials, and that Mr. San Filippo stated that there were no cars on photo 1, 1974, but she doesn't know if that is true, she sights lines, or things, that could be, maybe construed as cars because they are equally as blurry as to what she has as #2.

Mr. Walsh pointed out that the cars she is seeing are on Lots 16 & 17.

Mr. Steib suggested that the board can asses the exhibits and make comments after they have heard the full presentation from both sides. Then they will have a better perspective as to evaluate the exhibits.

Mr. Leckstein asked to see 1974 aerial photo. Ms. Waterbury asked that if he sees something that is a little bit clearer please pass it around. Aerials were viewed by board members.

Mr. Gordon Gemma, 60 Seneca Place, Oceanport, NJ Planner, sworn and gave his professional background and was accepted as an expert witness in Planning.

Mr. Gemma stated that he has reviewed the file in this case, the boards file and you were present at the last meeting. He stated that he is familiar with the site, and that there was a bowling alley and a parking lot. The parking lot existed from 1929 or so.

Mr. Leckstein asked if he has examined the aerial photographs presented by Mr. San Filippo? He stated yes. Mr. Leckstein asked if any of the photos show parking in the bowling alley area? Mr. Gemma said yes. Mr. Leckstein asked all of them or just some of them? Mr. Gemma said some do and some don't, they show various parking throughout the area. Mr. Leckstein asked if there are some photos that there is no parking in the bowling alley? Mr. Gemma said there are photos that show no parking in what Mr. San Filippo has referred to as "the bull pen", there are some photos that show parking behind the bowling alley and the bull pen, so they so both.

Mr. Leckstein asked Mr. Gemma to explain what value or a particular photograph has as far as evidentiary with regard to a use or a continuing use. Mr. Gemma said a photograph is a snap shot of what takes for that one day when it was flown over by that one plane. The issue of abandonment, there is a 2 part test for what is abandonment. The first part is an overt act to abandon something, the second part of the test is an intent to abandon, obviously the photo cannot show intent, all it can show is one day. He proffers the board to take into cognizance the famous case Salary vs. Babinsky (in audible for correct names) it says that even though someone did not use a stable for 26 years did not proffer the intent to abandon the use of the stable for horses. He would say that the photo's just exists for that day what existed. You cannot take a photo and say that shows the intent to abandon, there has to beinaudible.....)

Mr. Leckstein asked even if there is testimony of a particular time of whether something has been used or not, is not necessarily an indication of abandonment? Mr. Gemma said you have to show intent to abandon. He may not be using is today, or that week or that year, but I didn't intent never to use it for that use. You have to be careful when you have evidence like this and try to use it show intent, there has to be more than that.

Mr. Leckstein asked Mr. Gemma you did read the minutes & resolution, is that correct? Mr. Gemma said yes. Mr. Leckstein said that when there is a resolution and minutes, what will a court or what in audible.... will enforce? Mr. San Filippo objected to the question, what is he is asking Mr. Gemma to do is to express a legal opinion and not a planning opinion.

Mr. Gemma said that he can testify as a Planner, and stated that as a Planner what he is looking at, as a Planner and not a lawyer, if he was to look at both, to give an opinion as to what whether it is findings of fact or not, a findings of fact in a resolution is what you would look to and so the board made a determination, the board decided something. The minutes are something non pervaded transcripts of the secretary may or may not have taken down at that time.

Mr. Leckstein asked Mr. Gemma if he reviewed the minutes & the resolution of 1984? Mr. Gemma said yes, I reviewed both that have been referred to and admitted as exhibits with reference to Mr. San Filippo.

Mr. Leckstein asked Mr. Gemma if he agrees with Mr. San Filippo's characterization as there is nothing no discussion or recognition in 1984 concerning parking on Lot 1, which is the bowling alley? Mr. Gemma said that it is absolutely wrong. The resolution of 1984 dated June 13, 1984 finding of fact #18, page 3, and was read into the record:

“The parking required in connection with the operation of the property as well as in connection with the operations lots 34 & 35 has been historically adequate through through the use of available on-site parking, adjacent on-street parking, parking provided in lots 16 & 17 Bl: 7 owned by the applicant across Henry Street from the property and use of the bowling alley parking lot across the street from the property.”

Mr. Gemma stated they had just stated Lots: 16 & 17 it would not have been needed to say “and the bowling alley parking lot”, but they said not on Lots 16 & 17 and the bowling alley parking lot, and in his mind, his opinion that says the parking and operation of the property have been using it, including the property not only Lots 16 & 17 but the bowling alley parking lot defined as Lot 1, which is a finding of fact that this board made and stated that it is “historically” using it, and that is a finding of fact. This was determined in 1984. Mr. Gemma said that it means that you made a finding of fact many years ago, an historic use of this property, and historic means more than a day, more than a week, and it certainly means that if that was in June of 1984, it was before the Mathews bought the property in 1984.

Mr. Leckstein stated that the minutes, at the same time, which were emphasized by Mr. San Filippo. Mr. Gemma said that there is one thing that he did not read. He read the minutes of May 2, 1984, page 11, and he stopped at a point, which was:

“There is also a large lot in the back of the bowling alley that very rarely gets use. That we don't use but it is also owned by the people that own the bowling alley.”

Mr. Gemma said that he should have continued ***“There is no limit, no numbers as such”***.

Mr. Gemma said that he should have continued, and the problem is when you pick and choose and use this to go back and interpret intent you get in trouble.

Mr. Leckstein referred to the photographs, and asked Mr. Gemma if he feels that there has been selection of photographs as far as the presentation which has been made, have you see other photos? Mr. Gemma said that Mr. San Filippo said “look at these photos of 1980, 1981, 1982 and up to 1984 no one is using the property in back of the bowling

alley, and in 1984 Mathews bought and is now using it. Mr. Gemma said I know that he didn't admit, but he had a chance to look at the photos that Mr. Forrester try to bring in and he said that he did not want to look at it. Mr. Gemma said that he saw that photo and the photo of 1969 clearly shows cars... Ms. Waterbury said now... Mr. Gemma said that you may be correct but he is not using that to prove there were cars there, I am using that to show the credibility and selective use of photos of Mr. San Filippo, and he believes when you show credibility enough I can goinaudible...on anything, and the photo clearly shows cars that he saw behind the bowling alley. That is the problem when you hand select and try to pick and choose the photos. There are a lot of photos, and unfortunately Mr. San Filippo would try and pick and choose aerials to make his point, and as an advocate that is a great thing, but a Planner trying to testify and to what the intent to show abandonment you can't do, I think the problem is its wrong, unless you are going to look at all of them, you can't just look at some of them.

Mr. Collins clarified Mr. Gemma's last point, you are aware of more than 4 aerial photographs from Monmouth County? Mr. Gemma said that he is aware that there are photos all over the place, photos from 1970, 1969 from Mr. Forrester; you cannot see some of them.

Ms. Waterbury asked Mr. Gemma, we noted earlier when we were dealing with the original approval that we had a 2 prong part that the board was looking at: 1 part was to see if the board had an evidence of the town granting an approval for them to have a shared allowance of parking on Lot 1, and she asks Mr. Gemma as a planner did any of the information in the aerials or in the minutes or resolution that were presented offer in your mind that they had approval from the town to do the parking?

Mr. Gemma referred to finding of fact #18 seems to indicate that a "historic use" that may or may not something and in 1984 this board made a determination that historically it had been used, and it continued it to be used, it did not say that you cannot use it, it stated that its historically been used. He doesn't know what proofs were offered in 1984. But, certainly the board made a determination at that point, that it had been a historic use, he doesn't know if they said that proves a pre existing or not but this is something that you can clearly point to that says you have been using 16 & 17 historically, and you have been using historically the bowling alley, do I find anything that I saw conclusively that you use, no, but certainly in '84, which is prior to 2010 this board made a determination that it had been historically use and it did not say you couldn't use.

Mr. Collins asked Mr. Gemma, when the board made the finding of fact was it the same board? Mr. Gemma said not the same people but the same board. Mr. Collins which is the same entity that determines if that use was occurring, is that correct? Mr. Gemma said that is correct. Mr. Collins asked if it his knowledge that the Borough of Shrewsbury since June 13, 1984 prior to this proceed has taken any action to terminate that cross access parking? Mr. Gemma said not until the recent allocation of Mr. San Filippo am I aware, and I could be wrong, of any action taken by the board or by a Zoning Official by anybody ---in audible--.

Mr. Collins asked Mr. Gemma, in your experience as a Planner, if it is part of a site plan application, there is disclosed to a Zoning Board a non permitted use on the property, as a Planner, could you explain what ordinarily would happen if not permitted. Mr. Gemma said that if he would write a planning report on the context of an application, and there was a non permitted use, I would say in the Planning Report in the findings of fact, that it is not a permitted use --in audible-----, and you cannot do it anymore. Mr. Collins asked, in 1984 is it fair to say that the Zoning Board was aware of the cross parking arrangement? Mr. Gemma said that they made a specific finding of fact to utilize Lots 16 & 17 as well as the bowling alley parking lot, not really aware of it, being noted in the finding of fact. Mr. Collins asked is it fair to say that the finding of fact was important for their ultimate decision? Mr. Gemma said that you put the findings of fact in there, because that is the basis the decision is. Mr. Collins asked, if the board believed that was a non permitted use in 1984 should the board have done something? Mr. Gemma said that he cannot speak --inaudible-- but the normal course of events when you represent the board as a Planner, it would be safe that you have to take a action as to this improper use on a property and the board did not. The board just said its been a historic use.

Ms. Waterbury asked Mr. Gemma does the finding of fact grant an approval? Mr. Gemma said no, it's not an approval it is simply a finding of fact as to what has taken place historically. Now, you can define historic and you can define as to what historic means.

Ms. Waterbury said that the second prong of what we had was to determine that if we felt or from what we reviewed there was a vote that there wasn't official approval given through an action of the board, then the second prong would that we would have to see that it predated the Ordinance and therefore it would have been grandfathered type of event to occur, and she believes the date was 1948 and her question would be does the aerals, minutes or resolution, anything within there, as a Planner provide the board with the information to predate this to 1948?

Mr. Gemma said that the aerals themselves can, because it cannot show intent, it doesn't go back that far. He did not see an aerial of 1948. The only thing he can say is that in 1984 rather 2010 the board made a historic finding of fact. If it didn't predate it no, he can't tell you if he did look at it or didn't look at it. It's an --inaudible- that some how they said that it could or can continue is not an approval, but it's an --inaudible-- that they made a determination that some how it's ok. Otherwise they would have said don't do it.

Mr. Betesh said that you cannot conclude that. All you are noting is that the board had a finding of fact that they characterized it as historic, and historic could have been one day, it could have been 40 years or it could have been 80 years.

Mr. Gemma said that the point is this, and gets right to the heart of it. Its no more proper for him to conclude from this finding of fact that this was permitted or what took place in 1984 then it is to look at a bunch of aerals from 19080's or 1970's and say that it was abandoned or wasn't permitted.

Mr. Betesh said that wasn't the test, the test that they are looking for is whether or not it was pre existing at the time of the passage of the Ordinance, which we have heard no evidence to that effect.

Mr. Gemma said that there will be a separate hearing about that issue of pre existing non conformity, tonight the only he is aware and testifying to is the admissibility of certain evidence and to find what it means, as to anything else, he doesn't think that Mr. Leckstein or Mr. Collins were permitted to anything else, just these things.

Mr. Leckstein said just for the record their suit claims that 1948 was not the test, 1954 Ordinance was the test, but that is not before you that is before the Superior Court. They believe that was a total misrepresentation that 1948 was the test, this board was not aware of the 1954 Ordinance at the time of rendering their decision.

Mr. Betesh said that the issue whether a photograph can show intent to abandon or intent, clearly if we had photographs that showed cars in the bull pen, we would know that cars were being parked in the bull pen area, we are not seeing that. We are seeing it at certain periods of time, correct? Mr. Leckstein said yes you are. Mr. Betesh said that you cannot conclude that the -inaudible- is true? Mr. Gemma said certainly the testimony that was given submitted and admitted by Mr. San Filippo shows what he wants to prove, but he can say that he has seen other photos that prove to the contrary and it only goes toward the credibility of evidence that is presented. All he can say is that when you look at that evidence you can't jump up and say that it conclusively proves the point, it just proves that ---inaudible--. That is the point that I was making. Even Mr. Forrester could not submit, and the board could not look 1969 and he saw cars back there.

Ms. Waterbury said that it may show cars but we don't know whose cars they are. It would all be supposition, at least for herself. Mr. Gemma said that is why there is going to be another hearing and other testimony.... Mr. Leckstein said that they will be testifying unfortunately about another issue, rather than supplementing the record on your determination of December 1st because there was never an opportunity, which is debated, as to whether there should have been another adjournment so witnesses could have been...

Mr. Steib said that this issue has gone over from the last hearing for 2 hours, we should move on.

Mr. Gemma said that all he can hang his hat on in either direction is a finding of fact #18 in the resolution in 1984 that does imply, and on the grand scope of one way or the other at least they got something. Mr. Betesh said that they would certainly not take a position that was a granting of an approval. Mr. Gemma said I could not, that would be wrong.

Ms. Waterbury asked if there were any comments/questions from board members.

Mr. San Filippo asked Mr. Gemma if the resolution which was marked as A-11 contains 5 pages, are you familiar with it? Mr. Gemma wanted to make sure he had the same resolution, is that the resolution dated June 13, 1984? Mr. San Filippo said yes, it is. Mr. Gemma said that he had it. Mr. San Filippo asked if he read the resolution in its entirety? Mr. Gemma said that he read some of it; he cannot say that he knows it verbatim, he read through it, but certainly he cannot say that he cannot recognize every paragraph. He did read it in its entirety but cannot recollect every provision of it.

Mr. San Filippo asked if he recalls, when he read it in its entirety whether he saw any language in that resolution which spoke to the storage of cars for inventory on Lot 1 by Red Bank Volvo? Mr. Gemma said no, there is no language in it as such.

Mr. San Filippo said the only language which refers to the bowling alley is for parking? Mr. Gemma said that is correct. Mr. San Filippo said that is finding of fact #18? Mr. Gemma said yes sir. Mr. San Filippo said when you get to the resolution provisions on page 4, where the board grants relief, are you familiar with those? Mr. Gemma said yes he has them in front of him. Mr. San Filippo asked if he would like to take a moment to look at them, to refamiliarize yourself? Mr. Gemma said yes, he has them now.

Mr. San Filippo said starting with the language that states:
Now therefore be it resolved, through the next 2 paragraphs, is there anything in the language of those 3 paragraphs, the resolution by the Zoning Board of Adjustment, which references the storage of automobiles for inventory by Red Bank Volvo on Lot 1?
Mr. Gemma said no. Mr. San Filippo asked, then there is no approval by this resolution of the storage and parking of motor vehicles on Lot 1 by Red Bank Volvo? Mr. Gemma said that when he responded to the question to Ms. Waterbury, he indicated it is not an approval, historic to store or park anything on Lot 1; it is recognition a historic finding of fact.

Mr. San Filippo asked if there is any language in that resolution, in any paragraph of that resolution, whether a finding or the 3 resolutions of what the board was approving, that there was parking or storage of vehicles behind the bowling alley. Mr. Gemma said that is an improper assumption, sir. Mr. San Filippo said to read the language, read all 5 pages and tell him if he finds anything which references the board's recognition of the storage of inventory of motor vehicle by Red Bank Volvo behind the bowling alley building on Lot 1? Mr. Gemma said no sir; there is nothing ...inaudible... just the parking.

Mr. San Filippo asked Mr. Gemma if he is aware that under the Land Use Law that minutes, in fact, are required to be taken and maintained by the Zoning Board of Adjustment? Mr. Gemma asked if he was asking him as an attorney or planner? Mr. San Filippo said Planner. Mr. Gemma said as a Planner he would say yes. Mr. San Filippo asked, as a Planner those minutes in fact are a record of what occurred at the specific hearing for which the minutes are kept? Mr. Gemma said that they are record as taken by the Secretary.

Mr. San Filippo asked Mr. Gemma is there any reason to believe that Richard Mathews, when he testified in 1981 & 1984 as to his use of Lot 1 for employee and customer parking, that he was being untruthful? Mr. Gemma said that he would have to assume, that since Mr. Mathews was under oath he testified under oath. Mr. San Filippo asked if we can further assume that when Mr. Mathews testified that he was not using the large lot behind the bowling alley that he was also being truthful?

Mr. Gemma asked Mr. San Filippo to point to specifically for an indication that he is not using it... inaudible.. Mr. San Filippo referred to page 11, May 2, 1984 Resolution, 15 lines down on the 1st paragraph when questioned by Mr. Clark (board member) "... there was also a large lot in the back of the bowling alley that rarely gets used. That we don't use but is also owned by the people that own the bowling alley." Do you think he was being untruthful when he testified to that? Mr. Gemma said that he has reason to believe that when he continued his testimony and said "that there is no limit or numbers as such", that it accurately reflects what the minutes reflected.

Mr. San Filippo asked if there was any language in any portion of those minutes which indicates that they were storing vehicles on Lot 1, either behind the bowling alley building or on any other portion of the parking area of Lot 1? Mr. Gemma said that he testified in 1984, at that time, there is no indication that he testified that they were storing in 1984.

Mr. San Filippo asked Mr. Gemma if he has read the minutes of September 2, 1981 in their entirety. Mr. Gemma said that he scanned them. Mr. San Filippo referred to page 4 (end of the 1st full paragraph), in response to a question by Mr. Scott (board member) "you don't put any inventory or repair on Lot 1, do you?" and Mr. Mathews responded "no, those cars are in and out of there from 8 am to 5 pm and out by 5 pm". Mr. San Filippo asked do you have any reason to think that Mr. Mathews was not being truthful that they weren't storing inventory of cars on Lot 1? Mr. Gemma said that he doesn't have any reason to believe that, September 2, 1982 they only spoke about those cars at that date, they weren't storing them.

Mr. San Filippo asked Mr. Gemma, you said you reviewed the Zoning Board of Adjustments file concerning Lot 1? Mr. Gemma said concerning this matter, right. Mr. San Filippo asked what files concerning this matter did you review? Mr. Gemma said that he had the opportunity to review Mr. Leckstein's files as he provided them to him, which included but limited to the findings in connection with the application challenging Mr. Donlon's determination, as well as some of the pleadings that were provided as well as the briefs provided, in context ...inaudible... Litigation.

Mr. San Filippo asked Mr. Gemma, so you didn't look at the Zoning Board of Adjustments files that are maintained here in Borough Hall concerning Lot 1? Mr. Gemma said no sir I did not. Mr. San Filippo said, I take it you also didn't look at any files contained within the Zoning Boards records here in the Borough Hall concerning applications by Red Bank Volvo? Mr. Gemma said no sir he did not.

Mr. San Filippo said that you testified that there has been a parking lot at the bowling alley since the 1920's? Mr. Gemma said based upon what he read in the files, obviously I was not there. Mr. San Filippo stated that Mr. Leckstein's files, which he had prepared in anticipation of Litigation. Mr. Gemma said no, I didn't say that. I said anticipated Mr. Lecksteins's files in the context of the application in front of the board, as well in the context of the challenge to Mr. Donlon, as well as the fact that he has been here for the last couple of meetings, and the colloquy back and forth as well as some of the discussions of Mr. Forrester on behalf of the board, and he did indicate that he went through the files at the Borough and the applications of Red Bank Volvo and the bowling alley.

Mr. San Filippo asked, you did not make any independent investigation of the Zoning Boards records concerning the bowling alley, and the parking lot at the bowling alley since the 1920's? Mr. Gemma said no I did not. Mr. San Filippo asked, you really don't know where the parking was in 1920's right up to the 1950's or even today, do you? Mr. Gemma said well, today there isn't any, but there is a parking lot. In the context of a review of Mr. Lecksteins files and the context of listening to the boards colloquy back and forth, and the context and listening to Mr. Forrester when he went through the files of the boards, he heard much discussion and testimony about where it was and where there was not parking over they years. In the context of the application that we have from Mr. Donlon and the application that we heard in front of this board as to his determination there in fact we had testimony provided by the parties that he is familiar with, and talked historically as parking at the bowling alley property. Certainly in that context he is familiar with the issue of bowling alley parking. Is he familiar with it personally, no. Did he review the board's files, no. Was he here for the last couple of meeting painfully listening to this, yes.

Mr. San Filippo asked Mr. Gemma, so you don't know what lots constitute the bowling alley at the time that the Ordinance was adopted in 1948, do you? Mr. Gemma said that he doesn't know, and first of all he doesn't know what Ordinance he is referring in 1948, his review of the Ordinance that there are a few Ordinances and he doesn't believe that the 1948 Ordinance that he is referring to is the one that prohibited parking ...inaudible..., but does he know specifically what the lot numbers where in 1948, no he doe not know at this stage. Mr. San Filippo asked, did you know that the 1948 Ordinance was the Zoning Ordinance of the Borough of Shrewsbury as adopted by the Mayor & Counsel? Mr. Gemma said that he understands that there was an Ordinance adopted in 1948 and he also understands that there were amendments to the Ordinance thereafter and in fact, one of the issues that they will discuss later, if he doesn't want to discuss it now, he is fine with that, is that the 1948 Ordinance allowed parking upon adjacent property, it did not prohibit Red Bank Volvo at the time from parking on an adjacent lot, being the bowling alley lot.

Mr. San Filippo asked, do you know if Red Bank Volvo was in operation in 1948? Mr. Gemma said that obviously it wasn't Red Bank Volvo it was the prior auto user, he doesn't know the name of it, doesn't remember off the top of his head. Mr. San Filippo asked if he knows when the Mathews Auto Group started their dealership at the corner of

Newman Springs Rd & Henry Street? Mr. Gemma said that he doesn't recollect specially. Mr. San Filippo said, if he told him 1953 would that surprise you? Mr. Gemma said that he indicated that he didn't recollect it. Mr. San Filippo asked if he has any reason to think that that was not true? Mr. Gemma said that he would always trust him no matter what he would say.

Mr. San Filippo asked Mr. Gemma if he knows if the Accera's owned the area behind the bowling alley in 1948? Mr. Gemma said that he doesn't specially recollect, but again he would trust him. Mr. San Filippo asked, do you know if they owned the area behind the bowling alley in 1954, which is the Ordinance that Mr. Leckstein has told us is the operative Ordinance? Mr. Gemma said, again he doesn't recollect specifically.

Mr. San Filippo said, if I were to tell you that they did not acquire the area behind the bowling alley until 1955, would that change your opinion as to whether the property behind the bowling alley could be used for parking?

Ms. Waterbury asked Mr. San Filippo, how does that all tie to this evidence that we are suppose to be hearing?

Mr. Collins said that we are talking about evidence of the 70's proffered for abandonment, we are not talking about the 1950's, he doesn't understand.

Mr. San Filippo said that it was proffered to show the fact there was no pre existing non conforming use, they were not using it for parking in 70's or the 80's.

Mr. Collins said that we were remanded for limited purposes. Ms. Waterbury stated that is why she is bringing it up.

Ms. Waterbury asked Mr. Steib, it is her understanding that the board is here to look at the aerials, the resolution, and the minutes, and unless she can tie to those 3 she would be inclined to have us move to a new form of questioning. Mr. Steib said absolutely.

Mr. San Filippo stated that Mr. Gemma indicated that there appeared to be no action taken by the Borough of Shrewsbury to stop the non permitted use of storage of vehicles on Lot 1 in response to question from Mr. Collins. Mr. Collins objected to the question because it assumes that it was a non permitted use. The question was that they did not perceive it as a non permitted use at the time of ---inaudible---. Mr. San Filippo said that is fine. Mr. Leckstein said that it was a commentary on the resolution.

Mr. San Filippo asked Mr. Gemma, it is your opinion is that was no action by the Borough of Shrewsbury involving of parking of Red Bank Volvo's vehicles on Lot 1 after the 1984 resolution? Mr. Gemma said that it is his understanding, other than the activities which is the context of this hearing today; as a result of the fire --inaudible-- he is not aware of any actions by the Zoning Official or any other third party --inaudible-- of Red Bank Volvo on the bowling alley parking lot.

Mr. San Filippo asked Mr. Gemma, in his professional opinion, as a Planner, does that lack of action by the Borough rise to the level of an approval of that activity on Lot 1, the parking and storage of vehicles by Red Bank Volvo? Mr. Gemma said no, of course not.

Mr. San Filippo asked Mr. Gemma, in his professional opinion as a Planner, is the Borough has been stopped in any way or prevented from taking any action to enforce its Ordinance? Mr. Collins objected to the form of the question.... Mr. Steib said that he is not here for that purpose; he hasn't been qualified as an attorney it's a legal question. Mr. San Filippo said that he had nothing further.

Mr. Fisher asked Mr. San Filippo, in Mr. Mathews testimony that you read from the board minutes, he kept referencing that in 1984 is there a historic context to the use of that lot in the question, where Mr. Mathews is referring to not using the lot for storage in the back, is that question asked in the historic or is asked if he was currently using it.

Mr. Collins said that is a question for a witness not for lawyer. That is a question for a fact witness where an expert witness like Mr. Gemma that is testifying about absolutely improper and he knows that Mr. San Filippo does not want to become a witness. He has advocated what these things mean or said. It is the board's determination when you read the minutes and in conjunction with the resolution that memorialized those things that said it was historical, but it was...inaudible....

Ms. Waterbury said that she thinks she heard Mr. Gemma say "that in the present day", when you were answering Mr. San Filippo's question, and that is how he answered on how it was being parked, is that what we heard? Mr. Gemma said, he said that he did say at that day, at that time, that is how they were being parked.

Mr. Gemma suggested looking at the May 2, 1984 minutes, page 11, and the colloquy about storage. He is not sure what they are referring to, and for anyone who wasn't there what that means about storage, not storage, did he abandon the storage, its hard to say because it's not a verbatim transcript.

Mr. Betesh said that part of the testimony is talking about storage of parts and things of that nature, not storage of vehicles, and that is the context that he has seen in all of these minutes, the word storage only appears in these minutes in the context of storage of parts. He has never seen it in the context of storage of parts. He has not seen it with the context of storage of vehicles. He has looked for it and has not seen it. Mr. Gemma said that he feels that on page 11 they may be talking about parts, then they go onto to parking, he cannot tell you. Mr. Betesh said that he just hasn't seen anything that talks about...there is a lot of discussion on different activities, he has never seen in any of these materials the words "storage of vehicles", he just hasn't seen it, did you see any where? Mr. Gemma said when they talk about parking, its used for parking, its for outside storage, and in turns its accessed into the rear yard, he doesn't know if they are talking about storage of cars storage of parts, he can't tell you. Mr. Betesh asked, so there is storage, and parking and parts and there is cars, and there is inventory.

Mr. Collins asked Mr. Gemma, in reading these (not verbatim) minutes in 1984 was the distinction between parking inventory cars or parking customer cars or parking employee cars, is that distinction discussed at all? Mr. Gemma said that he cannot tell the difference. Mr. Collins said that we are making the distinction today, was there any indication that the board, back then, was making such a distinction? Mr. Gemma said reading the words --inaudible-- tell you what the intent was, and he is certainly not going to try to tell you what the intent or the knowledge base of the people in 1984 was, you can't.

Mr. San Filippo pointed out that in 1982 & 1984 minutes at the top of page 10, he read that Mr. Mathews said "we have an open storage and another lot that is also used for our customer parking and our storage" Mr. Messina asked if that was Lots 16 & 17 and the answer was "yes part of that is fenced off and part isn't fenced. The area that is not fenced off there is 14 parking spaces there, inside the fence there 38". Mr. San Filippo pointed out that later on page 10; Mr. Mathews refers to the storage of vehicles on Lots 16 & 17.

Mr. San Filippo said that clearly Mr. Mathews was distinguishing between customer parking and employee parking and the storage of motor vehicles for his business on Lots 16 & 17 and not on Lot 1. Mr. San Filippo said that it is not accurate to say that they were not using, they were using Lot 1 for storage, they were not they were using Lots 16 & 17. Mr. San Filippo referred to page 11 (1/2 way down the page) Mr. Mathews was asked a question from Mr. Krohl, "how about the cars either your new or used cars or your cars that you are working on, are they parked on the street or not (referring to Henry St)? Mr. Mathew's response was "no, they are basically parking in our fenced area". Mr. Muscarell (board member) "the cars that you may repaired, if they are not able to be left on the site of the dealership, they are locked in the fenced area on Lots 16 & 17? Mr. Mathews responded "yes, and that fenced are has 14 parking spaces" Mr. San Filippo said, clearly they were storing cars, but they were not storing cars on Lot 1. That is what those minutes clearly --inaudible--.

Mr. Steib said that Mr. San Filippo started off, and he was able to make his arguments, and he understands that he is responding to a board members question, but he feels that it is the oppositions opportunity to make their presentation, then if Mr. San Filippo wants to do some rebuttal at the end, lets do that, otherwise its going to be a colloquy back and forth for the next 3 hours.

Mr. Collins said that they have made their presentation to a large extent noting to the board several items. First of all they are dealing with a finite number of pictures, and the board knows that there are mirade of more pictures that exist. Those pictures were proffered to show some sort of non use of the back area. You have the sworn testimony of Mr. Gemma to say that is not correct. That there is a 1969 photo that clearly shows cars there, we don't know if it was Red Bank Volvo or not. Mr. Leckstein said that we do not have the opportunity to bring in witnesses on this hearing because of the limitation. Mr. Steib said you just did.

Mr. Collins said that we are here to attack the credibility of the evidence and have the board have an understanding that number one this is a supplementation of the record by a person who won below. These documents are proffered for what appears to be the sole purpose of trying to prove, not that there wasn't parking on the bowling lot. Mr. San Filippo has made it clear that this is about the overnight storage of vehicles behind the building that was the proffer for the maps. The minutes are proffered to talk about the difference between parking and overnight storage, so we are not talking about using the parking across the street. The resolution he submits is despositive of an issue and he submits that he is going to disagree as to the legal affect because Mr. Gemma is a Planner but as an advocate a finding of fact by this board, first of all, he would submit, res judicata as to the issue. So in 1984 we are absolutely certain there was an historical use of that lot for parking. He would submit that you cannot over turn. Number two, that the 1984 resolution clarifies exactly what was going on because of the "miskkabrawl" it is was the minutes say as to storage, parking, this wasn't an issue back there. It only became an issue because this gentleman purchased lot and doesn't want to honor that agreement. Back then they weren't talking about everything that they were doing there. They were parking vehicles over there, on this lot and this lot. But the resolution in 1984 is very clear it says "the parking required in connection with the operation of the property" now there are several types of parking required that no one disputes related to the operation of the property, whether it be on site or off site. There is parking for employees, parking for customers, and parking for inventory. This resolution recognizes that "mishkabrawl" and talks about all the various areas that the parking in connection with the operation of the lot that was taking place. In 1984 this board made a determination that is binding today. For the Borough and now for you as a board 26 years later to say something different, belies the fact what occurred back in 1984. Our argument as to the evidence proffered is that in meetings --inaudible--- to try and say that there is no overnight storage, a mistake was made. We know when the Certificate of Authenticity, he asks you to review that, the Certificate of Authenticity talks about various documents that remember the petitioner Azgara Bowl is trying to prove a negative, they are trying to prove the absence of a use. If the document referred in the Certificate of Authenticity, the minutes from the 1950's, the other aerial photographs, if they showed an absence they would have been proffered, and that is a reasonable --audible--that you should make as a board as to what is going on here tonight. That you are seeing a piece meal approach, a limited approach, and what happened was by mistake this resolution got in, and this resolution completely under mines your finding in December regarding the historical use of the property and the parking that occurred over time. It absolutely should put a doubt in your mind, as board members, as to the correctness of your decision. That is combined with the fact that the person who won knows that record isn't good enough because that is why they wanted to come back and try to put more in.

Ms. Waterbury said that she takes offense to your offerings of those, because, first of all, she wants to offer to you that we are not here to discuss whether a gentleman's wants to adhere to an agreement or not. This board doesn't really care about that agreement because we are looking at it from a Land Use standpoint and from what we see as to whether there was an approval there, or whether it predated the Ordinance, whatever

Ordinance you guys are talking about, because we are talking about the 1948 one, and that has nothing to do with whether there is an agreement between the two of them, because you can have agreements of all kinds and the board can say that doesn't go along with our Land Use. We are not concerned as to whether he's interested in holding up an agreement or Mr. Mathews is not interested in holding up the agreement. We are interested in the land use aspect of this, and only that aspect of this, okay?

Ms. Waterbury said that she just wanted to bring that around.

Mr. Collins said doesn't want anything that he has said to give you offense Madame Chair, the reason why he brings that point is that they were here, as he said before, when it is his burden of proof to prove that it is a pre existing non conforming and this board allowed it to perceive in a totally different fashion. He didn't mean to give you offense but he can certainly ascribe as an advocate the reason why you are not seeing all the evidence. He can certainly ask you to infer that...

Ms. Waterbury said that they were remanded by the Judge to consider this evidence; we don't have the right to consider additional evidence by the Court. Because the Court said, from her understanding, and asked Mr. Steib if she is correct? Mr. Steib said that she is correct. Ms. Waterbury said that we are to consider, first of all, whether we were going to consider the information we are discussing tonight, and then if we are going to consider the information Mr. Forrester wanted to supplement the record with, we sorted that out, we got it down to these things and it is her understanding, and correct her if she is wrong, that we are to just consider this information, the aerials, the minutes and the resolution to see if it changes how we felt or voted on that particular night, and if it impacted those two prongs. The prong of whether of was there a prior approval and if not a prior approval did it go before the 1948 Ordinance.

Mr. Steib said that Ms. Waterbury is absolutely correct and "spot on" and your analysis of that and he feels that we should allow counsel to wrap up and he indicated they have concluded their testimony, so lets have them wrap up with their arguments. He is urging to advise what he thinks these documents say.

Mr. Collins said that he is agreeing with you, but what he is saying to you is that, and he agrees with you 100% in the sense that you are only to consider the evidence before you, but when you consider the weight of this evidence, one of the important parts of this board, is apply common sense, this evidence before you is not dispositive of the issue, in common sense he is asking to draw that the lack of evidence presented or the piece mean nature of the evidence presented goes to its credibility, and you should not consider, that is what he is trying to consider. He is not disagreeing with you that you should consider all of these other evidences. He is saying the lack of those things, should make this irrelevant to you, if not helpful in supplementing your decision either way. It doesn't prove what Mr. San Filippo is trying to make you find. That is the argument.

Mr. Leckstein said that is their summation. Mr. Collins agreed.

Mr. Steib asked Mr. San Filippo to respond.

Ms. Waterbury noted that since we had another witness, there is no one in the public, in which to open the public, the only people in the public are represented by attorneys on either side.

Mr. San Filippo said that he would like to remind the board that the request for the determination of whether there was a pre existing non conforming use was brought by his client based upon all the information that it was aware of in October of 2009 and resulted in a determination of December 2, 2009. The obligation to establish a pre existing non conforming use for that property to use for parking and storage of vehicles, in the absence of a use variance approval to permit that conduct on that property is theirs, its not mine, and we indicated in our filing that we couldn't establish prior to 1953, which is why we invited Mr. Mathews to present testimony or present exhibits or the like because we couldn't establish it prior to 1953. The board made that determination that based upon what they heard. What is before you this evening essentially supplements that, but it also bolsters the fact you made the correct determination on December 2, 2009, when in fact there was no pre existing non conforming use, which predated the 1948 Zoning Ordinance was adopted, not amendments, the Ordinance itself, which established the Zone Districts of the Borough and the uses permitted in the Zone. We pointed out then and I point it out to you tonight that the bowling alley wasn't permitted, nor was the automobile dealership in 1948, because it is not among those uses specially permitted by the Ordinance in the B1 Zone District where both of these properties are located. Thank you.

Ms. Waterbury said that both sides are done with their presentations of information and cross examination of each. She noted that there was no one in the public to give comment on this information that has been submitted.

Mr. Walsh asked for clarification, he read the Court Order and we are here to decide, at our last meeting we considered certain evidence, which we had the opportunity to look at and review, and now it's our vote tonight to decide if that stays as evidence?

Ms. Waterbury said that our vote tonight is to decide whether this evidence that was presented to us changes any decision that we made in the December meeting, is that correct Mr. Steib? Mr. Steib said yes.

Mr. Steib said that he would like to make a couple of comments before the board starts deliberation. He said that Mr. Gemma used the term "abandonment" several times during his testimony; he doesn't want the board to lose focus because this case isn't about abandonment. Although he understand that it was the objectors belief that perhaps some of these exhibits were entered to establish an abandonment, but what you did in December was to evaluate, (a) was there an approval for this use and if not (b) did that use pre date the 1948 Ordinance. He said 1948 because we have heard something about a 1954 Ordinance but that is not before you, because it was never presented to you. Your function was to look to determine whether, if there not a specific approval was there enough evidence to make you believe that there was a pre existing use that dated back to

the pre 1948 Ordinance. To keep focus he did not want the abandonment thing to get you off into the field some where.

Mr. Steib also said that Mr. Gemma did testify as to this 1969 photograph, it is his impression of what it was, it's not in evidence so you cannot look at it, and so you have to weigh what testimony was given in that regard to the extent that you decided not to look at that evidence.

Mr. Steib said that Mr. Collins made an argument regarding the 1984 Resolution and whether or not this factual finding constituted a res judicata determination as to the use of this lot. Certainly this board can look at the resolution and look at the findings of fact and say to yourself "do I find this a compelling finding of fact, does this change the way I think about what this case was about". It's a finding of fact, it was not a determination, it did not constitute an action of the board and therefore in Mr. Steib's opinion does not constitute a res judicata, which finalized that issue. The issue of pre existing non conforming use was not before the board on that application, it was a different application for a use variance for a different use, and the finding of fact was with regard to that application related to that use, not related to a question of whether we can track this back to 1948. Mr. Steib said that he wanted to put that into perspective.

Ms. Waterbury asked for comments from the board, there were none.

Ms. Waterbury said that she was one of the board member that had voted to take a look at the additional information and voted to carry the application on that particular night, in order to look at it, and the information that she was specifically interested in is the information that would be presented in the minutes and the resolution that is before us. As it relates to that if it had been carried that night, this is the information that she would have wanted to look at. The second thing that she wanted to offer was that in looking at the information that is here, she doesn't see in her mind that the 2 prongs, she doesn't see anything in pictures from 1984 which she is looking to see if she has a resolution that's says that they had a prior approval, so obviously pictures aren't going to give her that, and neither of the resolutions that we have before us is not one that, in her mind, offers that approval is granted by the board to do parking on Lot 1 as the conclusion and the approval that was granted by that resolution, it was a finding fact, but she doesn't see it to be an approval that was granted for that specific use on Lot 1. So when I go beyond that first prong saying, do I see that there is an approval and this information doesn't seem to change that in her mind. She will then have to look at the next part and say does this information that is presented give her the facts that show that it pre existed on that Lot prior to 1948 and she has to say that obviously pictures from 1984 & 1974 aren't going to say to her yes it was any kind of parking or even just bushes on there in 1948 cause the aerials are not 1948. Also when she looks at the minutes, which again from 1984 she hoped to find that Mr. Mathews had made such a testimony that stated that he had been parking on there since 1947 or some kind of finding of that, something more definitive then what was provided in the minutes or in the resolution, and she doesn't see that. Again, she is having a hard time having this evidence change her vote that related to, did this pre exist to 1948, she agrees that it may or offer that there some prior "historical" use

but it doesn't give her a definite date as to where that history went to, and without that it is hard for her to say that it would change this information, so she is offering those comments that she has.

Mr. Betesh agrees with Ms. Waterbury, he stated that he wasn't in favor seeing additional evidence, and now that he has it doesn't change the position that we took before. Clearly there was some "historical" use here, but we don't know the date we don't see any approvals, we don't see any zoning board granting approval anywhere in the records, nor do we see any evidence in any of the materials that have been submitted to us that is despositive one way or the other. We made a determination last October/November that was set forth in the resolution for December based upon the evidence that we had, that was a decision we made, and he doesn't see anything in this that changes that.

Ms. Waterbury asked if there were any comments from any other board members? There were none.

Ms. Waterbury said that the action that we would look to take tonight, Mr. Steib, would be whether we.... Mr. Steib said, it would be to reaffirm your prior resolution of denial.

Ms. Waterbury asked for a motion to reaffirm or not reaffirm the prior action taken based on the evidence that is presented to us tonight.

A motion was made by Mr. Betesh, seconded by Mr. Walsh for the board to reaffirm its decision from December 2, 2009.

Roll Call:

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

Negative: Canonico

Resolution 7/7/2010.....

Mr. San Filippo asked if the Appeal of the Zoning Officers Decision will continue on July 7, 2010 @ 7:30 pm. He was advised yes.

A motion was made by Mr. Betesh, seconded by Mr. Betesh to adjourn the meeting @ 9:15 pm. All approved.