

Town of Sullivan's Island

Board of Zoning Appeals

August 11, 2011

Board Members Present: Chairman Jimmy Hiers, Vice Chairman Bachman Smith, Susan Romaine, Elizabeth Tezza, Carlin Timmons Absent: Susan Middaugh, Ward Lasso

Staff Present: Building Official Randy Robinson, Town Clerk Ellen Miller

Chairman Jimmy Hiers: Call this meeting of the Sullivan's Island BZA. Ellen, have we advertised in accordance with the Freedom of Information Act?

Ellen Miller: We have.

Chairman Hiers: Alright. Next, the approval of the minutes from July. Has everyone had a chance to look at those? They were long, and my apologies for that. And, I sent in one change and that is on page three third paragraph down, we started off with a hypothetical about a house facing the ocean and has two houses and so forth and then at the end of this paragraph the question was asked, if THE house was put together, and I had Ellen to add 2420 Jasper so that it's clear that we were no longer talking about the hypothetical house.

Susan Romaine: Yes, I asked that question.

Chairman Hiers: That was a good question. That's the one change that was made. So, do I have a motion on the minutes?

Ms. Romaine: So moved.

Ms. Tezza: Second.

Chairman Hiers: Alright. All in favor say aye.

All: Aye.

Chairman Hiers: Minutes are approved. [Approved 4-0 with Bachman Smith abstaining] And because of the semi-judicial nature of this Board, we have to ask anyone who is planning on speaking tonight to be sworn in, so please raise your right hand and follow Mr. Barr's lead and stand if you would. Do you swear to tell the truth, the whole truth, and nothing but the truth. Please say I do. Thank you. Alright. So we've got our case on the, perhaps the Wild Olive. So Randy, what can you tell us about this.

Randy Robinson: The restaurant, now Atlanticville at 2063 Middle Street has asked to make changes to the restaurant. They applied for a permit which I turned down because I felt that they were increasing the square footage of the restaurant. So they are appealing my decision for turning down the permit. The ordinance under permitted uses, conditional uses, prohibited uses in Section 21-50 of the ordinance, let's look at C – it says special exception in the CC District. This is the CC district. It says the use of a restaurant shall only be permitted on existing lots zoned community commercial in the block on Middle Street between Station 22-1/2 and Station 22, provided, however, that no new bars or restaurants may be established within 300 feet of any existing bar or restaurant. This restaurant is

outside of that district of Station 22 to Station 22-1/2, so that puts it as a non-conforming use. If you look at 21-150 B under expansion of a non-conforming use it says a non-conforming use shall not be expanded except to eliminate or reduce the nonconforming aspects. Probably a good thing next would be to look at the definition of a building. Go to a definition of a building that is a structure which is enclosed by a roof and by exterior walls along whose outside faces can be traced on an unbroken line for the complete circumference of the structure, which is permanently affixed to a lot or lots, and used or intended for the shelter, support, or enclosure of persons, animals, or property of any kind. And then you go to principal building square footage or building square footage principal and it says the entire square footage encompassed within the interior portion of the principal building measured from the outside of the exterior walls but not including interior space not useable as living space (attic or parking area beneath principal building) structures that are not used as living space, exterior porches and decks, and exterior stairs; so you don't count the porches, stairs, decks, like that, to consider the size of the principal building. The applicant has proposed to take the principal building which is the enclosed part, not the porch on front, and expand that. And the existing square footage, my calculations, and probably mine and the applicants are probably between 50 sq ft, something like that, mine might be a little bit off because I did it with a scale, but my calculations are of the existing is 1266 sq ft. The proposed is 2190 sq ft. And then the porches they plan on adding porch and deck out front, the existing is 517 sq ft and the proposed is 512 so they have a little reduction on the porches. In my opinion they are increasing the square footage of the principal building, or the enclosed interior space. The area on the outside in my opinion with the awning is a porch. It is not enclosed by exterior walls. They do have some curtains that they pull down in the winter time, but I've never considered that as an enclosure, that was just something to protect their customers during the winter time, and many restaurants do it, I have just not considered that an enclosure. I have some documentation from the file that this building was constructed in 1993. In 1996 Kent sent a letter to Mr. Clark that said that in a recent visit of your restaurant the seating capacity in excess of 56 allowed seats per 16 off-street parking spaces provided. And he goes on to say the requirements – one parking space for every four seats plus one space for each three employees of each shift. And it asked him to remove the number of seats (inaudible) and then I have another letter from Kent to Atlanticville in 1997 that speaks to some activity on the ground floor where they're having some kind of professional event on the ground floor and asked him to stop it (inaudible.) The proposed seating capacity for inside the new restaurant is 90. So that would definitely be in excess of the 56 originally allowed. Also I looked on the plan and it shows 10 parking spaces. Originally Kent says there were 16 parking spaces, so there is a reduction in the number of parking spaces also. And that's pretty much what I've got to say. I've got some other letters that concern the space down below (inaudible) FEMA that says what the space down there can be used for. (Inaudible) proposed plan and a plan that was brought to us in 1996 shows two coolers downstairs – only one was ever allowed – I don't know when the other one got in there, but (inaudible) – if you have any questions.

Chairman Hiers: They are allowed to have coolers downstairs?

Mr. Robinson: Yes, they were allowed. A cooler is – provided it's not attached to the structure and it is flood-proofed, FEMA will allow it in an A Zone. And the original cooler was put down there when it was an A Zone; I'm not so sure it is still an A Zone. That doesn't matter because that one cooler was grandfathered in. The other space (inaudible) according to FEMA below base flood elevation is to be used for parking, building access, and limited storage. There were two parking spaces originally underneath this building, and I am real familiar with this building because I was here when it was first

permitted, we had a lot of issues with this building. A good friend of mine built it, by the end of construction we were not good friends. Let's just leave it as that.

Chairman Hiers: Alright, thank you Randy. I guess we can go ahead and hear from the applicant.

Bill Barr: I would like to introduce y'all may know Reggie Gibson [architect] And Sandra ____ [from architectural firm] This is Doug Godley. Doug has a contract to purchase the restaurant from the existing owner who is Fred Creger who has an LLC that operates it right now. If I may I'd like to give a little history. I think Randy has, I don't object to the Code section which Randy has indicated, but I think that this case presents an interesting legal question about the statutory interpretation. I keep in my book since I've been around awhile and actually sat on this Board for years and years, and I can go all the back to the origin of man in my book with various statutory provisions that first started restaurants and originally it just said restaurants were allowed in the commercial district. And it just came all the way through and as Randy stated this property was used and started to be used as a restaurant in 1993. The statute was first modified in 2005 and in 2005 what they did is they said ok, from here on out, it would only allow restaurants from between 22 and 22-1/2 period. Which basically made Atlanticville and Sullivan's non-conforming uses at that time. And in 2008 what they did was they extended that a little bit and said ok, still between 22 and 22-1/2 but no restaurant shall be built within 300 feet of another restaurant. Now, I don't know how long a block is, but that effectively precludes another restaurant between 22 and 22-1/2. The restaurant statute goes on to say that it allows porches and decks in the front and basically what has happened and it doesn't restrict what you can use those porches and decks for, so basically what is happened over the years is those porches and decks are additional seating. And, as far as I can tell there has been no restriction as to the use of the porches or decks for additional seating. I'm not sure, let me backup, Randy indicated this restaurant was first the Island Boy, and when the Island Boy was first built, if y'all remember it was actually a little fruit stand down below, and over the years the fruit stand had certain activities and Atlanticville, or what it was called at the time, had certain activities. At one point in time they started to use the fruit stand for other purposes. I am familiar with some of the letters that Randy has indicated between Kent and former owners, Andy Ward was the original owner; he sold it to Jay Clark, and Jay now, I guess he got several (inaudible), so he moved to the Isle of Palms and operates a restaurant down there at the marina. Anyway, through a series of owners and Mr. Creger now owns it. Now, the two statutes as Randy has stated, they are correct, are 21-150; 21-150 deals with non-conforming uses, but 21-151 deals with non-conforming structures. What I would like to do is to try to get the Board to understand that this is a conforming structure. The composed additions to the structure meet the zoning code. It meets the setbacks, it meets the lot coverage and correct me if I am wrong, he will I'm sure, but it meets the lot coverage and all those things. We are not going to have to get a variance to change the structure. Some of the purposes of changing the structure are really livability issues. I don't know when the last time you've been in here they got small bathroom and relatively large bathroom, but one of the additions is to create a set of new bathrooms which will then become ADA compliant. From a square footage standpoint if Randy says what we're doing is we're increasing the size of the structure by, I think he said 1,000 sq ft by enclosing the porch which he doesn't consider to be part of the principle building, I'm not going to really argue about that because I really don't think changing the size of the structure is relevant unless the size of the structure was, unless the structure was a non-conforming structure which it is not. Now we get into the section which really is the meat of this case and the meat of this case is whether or not, and the only thing we're really here before you tonight to ask you to make a decision on, is whether or not this is an expansion of a non-conforming use. 21-150 says, and again it is a non-conforming use because of the 2005 statute which basically almost legislatively (inaudible) completely

made it unable to compete with the guys down the street. I was driving down the street coming in, and the people at Poe's are pouring out all over the grass, and across the street at Station 22 they are sitting up there on the porch and things like that, and so essentially those people down there have the advantage over any other restaurant now outside of that area because we can't compete with that because of expansion of a non-conforming use. I would like to correct one thing that Sandra brought to my attention today. It's that we originally stated that the existing seating in this restaurant, and this was something Mr. Creger told us was 140. And I think the application shows 140. And I said well, and so Sandra went over, we counted the seats and it's 127 seats is what the restaurant now seats and including the porch and including the interior. And for your information, and I'm sure y'all have been there, the porch is actually heated and cooled. They've got a blower out there probably that cools off that area and makes it tolerable even in this heat. So, I want to, I want to differentiate again between non-conforming structure, non-conforming use. The use of this property as built is a restaurant. That's it. Randy take is that what we're doing is we're increasing the size of the restaurant. Well, that doesn't really mean anything if we have increased the size of the restaurant because in keeping with that, and this is my position really, is that the use of a restaurant is measured by its capacity, by the number of seats you can seat in a restaurant such as this. And so, the mere fact that we're taking a porch which is now heated and cooled and we're enclosing it and we're going to have the same number of seats on that porch, or less seats on that porch after this renovation to this building as before, we haven't changed the capacity of this restaurant at all. We haven't changed the use. We haven't increased the use, we haven't expanded the use. Now, if it was 140 seats which is what it is right now, our proposal is to do 125 seats. Which is actually reducing the numbers of seats in the restaurant. In other words, we're trying to work with the Town to reduce the size of the restaurant which we believe is reducing the non-conforming use. And it is somewhat confusing the way the statute says you shall not expand a non-conforming use except to reduce it or eliminate it. Well, the only way I can think of we can reduce a restaurant's non-conforming use is to reduce the seating capacity. That's the big issue. We, Randy has brought up an issue concerning the downstairs coolers. That's really not before you tonight. The Godley's proposal is basically that whatever is downstairs and is going to be downstairs will be in conformity with the zoning code. I have, Sandra gave me a sheet and this is in an A zone, and in an A zone you can flood proof the downstairs, and if you flood proof the downstairs, which is concrete block built up to five feet with rebar in it, you can put a lot of stuff down there, which means we could have other coolers down there which would be the intent. At the present time the other activity which is taking place underneath the building is food prep. All of the food prep that takes place down there is on portable equipment. Portable burners, there's a sink set up, and all of that food prep, the prep of the food is getting moved upstairs. And of course if we move the food prep from roughly 1,000 feet downstairs, which is what it occupied downstairs, to the upstairs, you know, that eats up seating capacity. You'll notice also from the plans that you have that the upstairs is completely rearranged to be more aesthetically pleasing.

Bachman Smith: Bill, before you leave that point of seating, I had written down that seating was now 56 spaces and is proposed to go to 90.

Chairman Hiers: I've got a question....(multiple talking) Let's clarify that.

Mr. Barr: I think, I would like to clarify it also because I don't know what kind of permit was issued never that says ok you can only have 56 seats here. Can Randy address that?

Mr. Robinson: Yeah, I mean it was based on the square footage of the interior portion of the restaurant.

Mr. Barr: But is there a statute or an ordinance that says that you cannot have more than 56 seats?

Mr. Smith: No, it's probably an ordinance that says that you can have so many seats per square foot of the restaurant area, the eating capacity area, and

Mr. Robinson: What it was all predicated upon was the number of parking spaces. We used to have a number of parking spaces. You had to have one parking space for every

Mr. Smith: four cars, I mean four people.

Mr. Robinson: You could have four seats for one parking space. So when they went into the business, they had seventeen parking spaces, or somewhere right around 17 spaces, and that's what said they could have 56 seats.

Chairman Hiers: So let's calculate the number of present seating capacity today on the count of someone who's just done it, so let's hear that number.

Sandra: 127

Mr. Barr: Maybe 130 if you squeezed a few chairs.

Elizabeth Tezza: Are you talking about inside and outside?

Mr. Barr: Inside and outside.

Chairman Hiers: and the deck

Ms. Tezza: I want to know what the inside capacity is.

Sandra: Ok, the side dining is 18. The bar inside is 11. The dining room inside is 51. And then outside dining is 36 and outside bar is 11.

Ms. Tezza: So that's 80 inside and 47 on the deck. Ok, that's where you get 127.

Chairman Hiers: So we've got 127 present seating capacity now, and with this proposed addition what, how many seats would you have?

Mr. Barr: 125.

Susan Romaine: And how is that configured? Does that also include these two decks that kind of...

Mr. Barr: Yeah, there's a couple of tables, there's a couple of tables

Ms. Romaine: Looks like there are a lot – one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen

Ms. Tezza: No, there are 35

Ms. Romaine: Oh, 35 outside? Ok, thank you.

Chairman Hiers: Randy, the parking, I've often heard it said that none of the restaurants on Sullivan's Island are in compliance with the parking, number of parking spaces, maybe with the exception of Station 22. Is that a true statement?

Mr. Robinson: We don't have the kind of parking requirements now that we did have back then (inaudible) that all changed to say that you had to have a parking consultant tell you how you were going to park

Ms. Romaine: So, the seating capacity doesn't relate to the parking anymore?

Mr. Robinson: Not anymore.

Ms. Romaine: ok.

Mr. Smith: Is there a problem with the parking that is proposed for this spot?

Mr. Robinson: Well only that they are reducing the parking from 17 spaces to 10 so they are reducing the number of parking spaces.

Ms. Romaine: But it no longer relates to the ordinance. Or does it?

Mr. Robinson: Well, no, they still would have to go to the Design Review Board with a parking plan in order to do this restaurant. They would have to have

Mr. Barr: Can we presume that whatever that is, we'll do that.

Mr. Smith: Where are you going to do it? You don't have the land.

Mr. Barr: Have to go park in your drive. (laughter)

Mr. Smith: (inaudible)

Mr. Barr: I have no idea, I really don't. Cause the parking issue, the decision that we're asking the Board to make would be conditioned upon whether it be downstairs be in compliance with what (inaudible) code, and whatever requirements there are for parking be satisfied before a permit could be issued to do what we want. Again, those are issues that I may or may not be able to respond to.

Chairman Hiers: Randy, let me ask you some other questions. This may be difficult because of timing, there is one other restaurant on this island that is outside of the restaurant district, other than this one. Correct?

Mr. Robinson: Correct.

Ms. Romaine: Sullivan's

Chairman Hiers: That restaurant, in my mind, that restaurant expanded x number of years ago because at one point it was, it was the old Mama's Tea Room floor and then they went over to the right into space that I'm sure I ate in there when it was Sullivan's and when it did not that space. Do we have any recollection of that expansion and when that occurred? Did it occur?

(multiple conversations going – it was Gruber's)

Chairman Hiers: It was earlier than 2005, I'm sure.

Mr. Robinson: It was way earlier. I don't even, I remember when Mama's Tea Room was there, and that section wasn't there, and then right around Hugo, was when

Ms. Tezza: I think it was (inaudible) it was just after

Mr. Robinson: you know, and it could have gotten slid in there or something, I'm not sure

Chairman Hiers: Before we go any further, I'm sure we're going to hear more from the applicant and have questions, but we've had, the Town has stated the problem in way he's interpreted it, and we had the applicant's presentation. Any public comment? From anyone? Ok. I wanted to see if anyone wanted to add to it. So we'll close the public comment section. Obviously anyone can certainly speak for the applicant, but I wanted to make sure to see if we had any public comments which we don't, so, Mr. Barr you can continue if, but I do have one question.

Mr. Barr: Yes sir.

Chairman Hiers: So, your contention is that this building is a conforming structure that has a non-conforming use because it is outside the restaurant district?

Mr. Barr: That is correct.

Mr. Smith: If that's the case why couldn't you just do anything you wanted to do?

Mr. Barr: That's my point. We could build everything we're asking to build but if we, and I think Randy, but in doing so when we go to try to renew our restaurant license; he's going to deny it. Because basically it's like he's using structure and the restaurant use as interchangeable, as intertwined, and the research I've done, this is common. I mean, some jurisdictions have statutes that have non-conforming uses and non-conforming structures all within the same statute, and so there's really an interchangeable idea, but on Sullivan's Island, it's not interchangeable. We've got structure statute; we've got use statute. And you can't mix the structure statute with the use statute. If the structure meets the zoning code we're entitled to a permit to build there. So the question is, but if I build it, am I going to lose my restaurant license because I have quote-unquote expanded the non-conforming use. Period. Now,

Ms. Romaine: OK, so the question basically is is the use being expanded?

Mr. Barr: Correct. Now Ms. Tezza raised an issue as to 80 seats inside, and then the area on the porch, but the statute allows the porch areas to be used for seating. If Station 22 didn't have a bunch of people sitting on the front porch right now, they would be standing on the streets waiting to get inside. If you couldn't have seating outside of the building, all those people sitting out on the grass at Poe's (FLIPPED TAPE 1)...which I am really am not prepared to address today, this building right now has 127 maybe 130 seats that have been grandfathered at least as an existing non-conforming use.

Ms. Romaine: Can I ask a question, Randy. On Sullivan's, you know several doors down, they just put up a bunch of outdoor seating to eat. Why wasn't that considered an unconfirming

Mr. Robinson: We don't break away outside seating.

Ms. Romaine: At all?

Mr. Robinson: Yeah, I mean there is nothing in our ordinance to say anything about expansion of seating

Ms. Romaine: on ground

Mr. Robinson: outside. It just only deals with inside, and that's what I'm saying is they're increasing the size of the interior portion of this building, um

Ms. Romaine: but they're not increasing the seating according to their seating plan so how does that

Mr. Robinson: well, their seating plan on the exterior is not included at this point, and actually, the only non-conforming, I mean, what is legal, the legal non-conforming use is 56 seats. Any other seats that might be on the interior portion of that building are illegal.

Ms. Tezza: But that was in 2005, that means that they have to stay with the original and not with the adaptation since then. So that's like holding them to a different standard than what the other restaurants are

Mr. Robinson: Why?

Ms. Tezza: Well because

Mr. Robinson: None of the other restaurants have increased their interior space.

Ms. Romaine: Let's clarify this for a second. Up until 2005 you had two things that restricted the size, the number of seats in a restaurant, am I correct? One was the parking issue which is no longer an issue, for 1 car for each four seats,

Mr. Robinson: right

Ms. Romaine: and the other one was that per square foot. Now, the per square foot, don't leave me, the per square foot is no longer applicable, that was written out in 2005, right?

Mr. Robinson: right

Ms. Romaine: Ok, and the parking is no longer applicable as well because that goes to the DRB for a parking plan, is that correct?

Mr. Robinson: right

Ms. Romaine: So, the issue is enclosing, increasing, it is how you define that area that is used year round as seating by putting permanent walls up and not the plastic walls.

Mr. Robinson: That's basically it.

Ms. Romaine: Right

Mr. Robinson: Plastic walls that constitutes to me a porch. Right. And we don't regulate seating on a porch.

Ms. Romaine: Right

Mr. Robinson: Still. So

Ms. Romaine: But I mean but the interior

Mr. Robinson: (inaudible) ones that we don't regulate and they're making them legal if you approve this.

Ms. Romaine: But I'm not looking, ok, let me go back there again because I just want to see the current inside is 90, and it really

Ms. Tezza: The current inside is 80.

Ms. Romaine: Oh I'm sorry, the current inside is 80. Ok, so you're looking at increasing it by 10.

Mr. Robinson: The approved interior

Mr. Barr: What's the interior?

(multiple conversations)

Mr. Barr: Right now we have 80 and basically including the enclosure we're going to make, it's going to be 90.

Ms. Romaine: It's a 10 seat differential in terms of increasing use

Mr. Barr: Well, if assuming that the argument is as of Ms. Tezza adaptable?

Ms. Tezza: I want to clarify. I'm looking at your plan A101. Looking at the original inside, inside four walls, and the enclosed, the porch that you're going to enclose, that total is 90?

Sandra: No, that total is 127.

Ms. Tezza: I'm looking at this plan, what you want to build

Mr. Robinson: Proposed plan

Ms. Tezza: The proposed plan. It says 90 inside and 35 outside

Mr. Barr: That's right.

Ms. Tezza: what is the outside? Show me what the outside is. The outside of the enclosed heated and cooled space.

Mr. Barr: Correct.

Ms. Romaine?: It's the new deck.

Ms. Tezza: Ok, cause I can't count all these....this is shaded and I can't count the

???: That's 90.

Ms. Tezza: to here?

???: To here. To right here.

Ms. Tezza: got it.

???: And then on the old restaurant, which is

Ms. Tezza: I know

???: That's the 127.

Chairman Hiers: So, this is what we're going to call the deck

(multiple conversations)

Chairman Hiers: This is the deck upstairs. Looking at this, that deck, you've got room in front of the existing deck to park cars now

Ms. Romaine: and it's taken away

???: This (inaudible)

Ms. Romaine: You're going to put deck in front of there. Enclosing that porch is what they're trying to do.

Chairman Hiers: And that's not going to come into a front setback?

Mr. Robinson: You can go to five feet in the commercial district.

Chairman Hiers: Even though we're not in the restaurant district, we're in the commercial district.

Mr. Barr: the commercial setback is five feet. Whether it's a restaurant or a

Ms. Tezza: I have a question about the side setback because obviously this isn't on concrete because it's up in the air but how far away is this new addition to the lot line?

???: The red dash line, you can see it better on this on, is the setback, so we are well within the side yard setback.

Ms. Romaine: The side yard setback is five feet.

Ms. Tezza: At this part they are only three feet away to

(multiple conversations)

Ms. Tezza: I understand that. This is what I'm looking at. I want to know distance right here.

Mr. Barr: This red line. The setback is 5 feet and the building is....

Ms. Tezza: Ok, I couldn't tell on here, thank you.

Chairman Hiers: (inaudible) the parking lot

Ms. Tezza: It's the parking lot of the condos, but still I was

Ms. Romaine: there it is.

Chairman Hiers: on the other side you've got Angela Jones and the rear side you've got

Ms. Tezza: Yeah, because there's not a house there.

Ms. Romaine: this is the post office here

Ms. Tezza: No it's not the post office, it's the condos.

Ms. Romaine: Oh, it's the condos, and that's their parking lot.

Ms. Tezza: Completely illegal condos. I was just, this looked this it was right up on the

(multiple conversations)

Chairman Hiers: So we cleared up any questions you have about the side, front setbacks?

Ms. Tezza: Yes. I'm always worried about them.

Mr. Barr: You know, another thing to, and they're willing to do this in order to make this fly is that this is existing right now, and basically this is the area underneath the existing deck, porch, whatever you call it. And all of that use under there is going to be abandoned and it will not be used for another commercial use. In other words, we're not going to put a flower shop down there, or sell any kind of commodity down there. All of this cross-hatched in here, we had an office downstairs, all of this cross-hatched in here, is an area below the structure that we're giving up; completely giving up. And this under the structure that we're giving up is what a 1,000 square feet?

???: Yes.

Ms. Tezza: 1,030 according to your plan.

Mr. Barr: (inaudible) below

Ms. Tezza: But you don't use it now anyway, right?

Mr. Barr: Well, it's food prep, there's an office down there. Randy will say that, and all of this could become conforming by making it flood proof because we're in an A Zone. And again, we want if we're comply with flood damage prevention code and to the extent that we need to look back at parking, that certainly is going to be addressed.

Chairman Hiers: This is a split lot, isn't it?

Mr. Barr: Yes sir.

Ms. Romaine: I was going to ask that too. Does that have any effect?

???: No, I think the rear lot is owned by somebody else. There was a change in the ordinance where they used to have to be the same, and now they can be separately owned by (inaudible). When Mr. Ward had it, I believe it owned both of them and actually lived back there.

(miscellaneous background talk)

Mr. Smith: How are you going to, even though it's not before this Board, how are you going to deal with parking?

Mr. Barr: We're going to have to investigate it and do a parking plan that Randy said they're required to go to the DRB.

Mr. Robinson: Part of it had to do with valet parking.

Mr. Smith: The parking there's always the school, or the road on shoulder near the school that Sullivan's uses now. Is that leased by him, that's such that you couldn't park there too? It's open for everybody?

Carlin Timmons: In my thought the parking is that without, because you're not increasing the number of seating that it shouldn't make any difference even though, well those four that are eliminated, that's not significant, but that's not really a real issue

Ms. Romaine: But that's really not a real issue.

Ms. Timmons: Right, but the parking is a reality.

Ms. Romaine: But I would like to just bring up one more concern in case it comes back to us for some reason on a different level. Part of what we also are charged to look at is compatibility of mass and scale in a building. I have really no problem with this the way it's rendered except for the treatment of the front porch and how it is really in your face with the stucco, in fact, there's an ordinance about how you are not supposed to have stucco except on pilings.

Mr. Barr: I believe this has already been to DRB and approved.

???: No, and that's a point well taken. That's good to know, because we really were sort of going through this, and then we read the ordinance that said

Ms. Romaine: only stucco on pilings and it can only be four by four on a piling. I just wanted to bring that up now before you got any further....as an aside.

???: That's good to know.

Chairman Hiers: These are all really good points and questions, and I have two questions for Mr. Robinson. If this Board were to grant this, are they asking for a variance or we are asking to overrule zoning administrator, is that correct.

Mr. Barr: What I did which is what I've done before because sometimes overruling a zoning administrator has a greater impact than granting a variance and so I

Chairman Hiers: (inaudible)

Mr. Barr: excuse me?

Chairman Hiers: I was reading what you had

Mr. Barr: so the alternative, I said if the Board was still (inaudible) of granting us a variance, it would allow this particular activity to be done.

Chairman Hiers: If we granted a variance for the expansion, we would also have to face the possibility of this having to come back before us for use.

Mr. Barr: right.

Chairman Hiers: So, realizing nothing's off the record, but this Board has been pretty strict about granting expansions on non-conforming properties and uses. With the restaurant situation, we all know there is a parking mess out here, especially in the summertime, all that said, it does seem to me that this restaurant is outside the restaurant district that was declared in 2005

Mr. Barr: that is correct

Chairman Hiers: that was when that ruling was put it, so getting away from non-conforming use and non-conforming structure, do we have any recourse with the restaurant district (inaudible) prior to 2005 could you attack it from that angle? And get what you needed?

Mr. Barr: I think before 2005 we could have. Because there was no, I haven't studied the ordinances before 2005 as probably as thoroughly as Randy may have, but I didn't see anything prior to 2005 other than the parking issue that would have restricted what we did. We still could have added and enclosed, and then the only restriction would have been they would have said ok, we want to enclose the deck/porch whatever you want to call it. They say ok, if you're going to enclose that, then you are going to have that seating capacity in here, then you've got to figure out where to put you know one parking place for every four seats. And we would have had to face that. But I think that that would have been a condition for getting what we did, and that was figuring out where you're going to park the cars when they come out there. But those cars right now are there. They are right there, and they're there, and they're at Station 22, and they're at Poes; and so the seating capacity issues are not just relevant to our use, they are relevant to everybody's use because if you have a parking plan which I believe Marshall has, and Rusty Bennett has, because they are leasing properties around in order to fulfill that requirement, and if that's what Scotty has to do, then that's what he's going to have to do, in order to satisfy his own administrator that we've got adequate off-premise parking to cover what we want to do.

Chairman Hiers: On the question of expansion of a restaurant outside the restaurant district, if the Board is not careful we certainly could find ourselves in a position of having Sullivan's Restaurant come and ask for a second story.

Mr. Barr: Well you know, I thought of that because there is only one other restaurant, and y'all correct me if I'm wrong, and that's Sullivan's. The only way Sullivan's can expand is vertically or horizontally, moving over toward the dry cleaning business over there. But that clearly is an expansion of a non-conforming use. You can't get around it. If you go over 20 feet into the next use over there, and you add 30 more tables, you can't get around the fact that you have expanded the non-conforming use. Unlike here, I've got 127 seating capacity right now and I want to put 125. Whether they be on the porch or inside.

Ms. Tezza: So you're basing your argument on the fact that the non-conforming use you're defining as seats not square footage.

Mr. Barr: That's correct. Because one deals with the structure and one deals with the use. And the only way you can expand a non-conforming use is to increase the seating capacity. At least I submit that.

Ms. Romaine: Yeah, a restaurant is used for a lot of things other than just eating – bar space, walking space, I hate to say it but a restaurant is not just a seat.

Mr. Barr: I know but all the things that you just described make the restaurant more comfortable but don't necessarily expand the use of the restaurant.

Ms. Romaine: Your talking about patronage and the amount of use going on and we have, you know we've got a couple different things we've had before us – a vacation rental extension,

Mr. Barr: That's different.

Ms. Romaine: Well, no. It was a non-conforming use. Because it was a vacation rental and we denied the expansion because they wouldn't be able to get the vacation rental if they added onto the porch. You make more of a porch, you make more space. Isn't that correct?

Chairman Hiers: That's my recollection.

Mr. Barr: I represented Jenny Sanford on that application.

Ms. Romaine: I know.

Mr. Barr: And the vacation rental statute is completely different. The vacation rental statute says that the principle, you will deny a certificate of occupancy if the principle building has been enlarged. That's why we were denied, not because, I'm sorry.

Ms. Romaine: I'm just trying to clarify.

Mr. Barr: You know the rule is if the law is against you, you argue the facts. If the facts are against you, you argue the law. If none of it is against you then you're (inaudible).

Multiple conversations

Mr. Barr: That's an entirely different animal because it's a different (inaudible) side of the code.

Chairman Hiers: The other case that I remember that we had was the Applegates. I looked at that. That motion we allowed an expansion there

Mr. Barr: We swapped. We swapped legal non-conforming use downstairs to upstairs is what we did.

Chairman Hiers: We had extraordinary and exceptional conditions on the cistern which was the ground floor that floods and makes the bottom floor uninhabitable, so basically they were willing to give up the 500 square feet on the bottom and move it upstairs.

Mr. Barr: correct. That was a variance and again we were swapping legal non-conforming space downstairs for legal conforming space upstairs. And again, it dealt with a vacation rental statute that says that principle building shall not be enlarged, and we're not faced with that here.

Chairman Hiers: Randy, is this square footage downstairs legal?

Mr. Robinson: No.

Mr. Barr: If we make it flood proof it is. Correct?

Mr. Robinson: But it's not legal now.

Mr. Barr: I'm not arguing if it's legal now, but the proposal is to make it flood proof, to make the area down below that we are using, and it's only going to be used for storage, dry storage and cold storage, and a matter of fact there's another letter in there that I saw from Andy Benke to Fred Creger that basically said you've got a problem downstairs, but if you take the coolers and you flood proof them, you strap them down which is another way to make them flood proof, you strap them down then the coolers become legal conforming. At least they become legal under the flood damage prevention code.

???: But the commercial space in the front if it were made flood proof is also.

Mr. Barr: correct.

???: We can absolutely put a commercial use underneath that deck.

Ms. Romaine: As long as you flood proof it.

(multiple talking)

Mr. Smith: But you proposed not to do that.

Mr. Godley?: We're proposing not to do that. We're taking that off the table. We are not ever. If we can reduce the number of seats by two.

Mr. Barr: Mr. Creger had actually consulted with Kent and was looking to have wine store on ground floor where people who liked the wine they were drinking in the restaurant, they would go downstairs and buy a case or a bottle of that wine from the commercial activity downstairs. And again that would have been a commercial activity which would not be, there used to be a liquor store down on the corner for awhile, so a liquor store is not an illegal use. So again, we're going to give up any additional commercial use down below, we are going to restrict down below to flood compliant storage down below.

Chairman Hiers: Alright.

Mr. Barr: I don't know if, Mr. Godley and I were talking about this, you know, there is a difference between this restaurant. I think this restaurant is probably like Station 22, but it's not the (inaudible) like you see at Poe's now. It is more of a family place, they're really going to spice this place up, it's going to look nice, and it's going to be a place where you'd all be proud to go and have dinner. Mr. Godley lives down here with his children, and he plans to be here quite awhile and wants to be a good member of the community. So, I think I've beat this to death. (laughter)

Ms. Romaine: You did a good job.

Chairman Hiers: Well, any further questions from any Board members? Or Mr. Robinson?

Ms. Tezza: Randy, has a variance ever been granted on the basis of restaurant seating as opposed to square footage?

(multiple talking)

Ms. Romaine: Do we define a restaurant as the number of seats or do we define it as the whole square footage?

Ms. Tezza: Well, what Randy just said is I don't think it says in the Code whether you define a restaurant – I mean we only have what five , six....but would we be setting a precedent if we defined it by seating as opposed to square footage but in the absence of it saying

Mr. Smith: There are six restaurants.

Ms. Tezza: Six? Oh I'm sorry I can't count. That's why I'm an accountant.

Chairman Hiers: These two, (inaudible) you've got Dunleavy's, you can count Dunleavy's as a restaurant,

Mr. Smith: Seven then.

Ms. Tezza: Seven? Where do you get seven? Oh, Wild.

Ms. Romaine: Wild Thyme.

Mr. Smith: You've got High Thyme, you've got the one between that and Dunleavy's; you've got Dunleavy's, you've got Poes

Ms. Tezza: Taco Mamacita

Mr. Barr: See they have the advantage that they're not non-conforming.

Ms. Tezza: Right, we understand that.

Mr. Smith: You are always going to try to get it rezoned. That's what (inaudible) Barnes is in his grave now because they (inaudible) so bad. They had a whole empty lot behind him and he wouldn't let them park in it; behind Poe's now. You remember that.

Mr. Godley?: One thing about the seating issue is that it's based on square footage requirements, alright. In other words, you can't say you just can't grab a number six out of the air.

Ms. Tezza: No, I understand.

The architect?: Yeah, the additions that we've done look, are 90% bathroom to make them ADA accessible and kitchen. It's non-patron use space.

Ms. Tezza?: and better work environment.

Chairman Hiers: we need to see if the Board is prepared to make some sort of a motion and then we can discuss the motion further. So is anyone on the Board ready to make a motion?

Mr. Smith: You know, just to get it on the table, I would move that we find that the proper interpretation of the ordinance is that without expanding the seating area we would not be creating a problem that would require a variance. I think that we can, we know they're going to increase parking or they don't meet parking now, and they are telling us they've got to find it, and they've got to go to another Board to do it. If it's not our concern about what Board approves it, we can move on from the parking and the storage underneath, FEMA makes him waterproof it.

Ms. Romaine: Can I, can I, I just looked up the definition that we've got on page 95 of our definition of terms. It says where food and drink are prepared to individual order, ordered and served at the table, and consumed primarily within the principle building or in established outdoor dining areas. It doesn't mention the definition of all the other functions of the restaurant does, which is basically that side addition and it doesn't mention the lavatories, it doesn't mention the washing up,

Mr. Smith: Right.

Ms. Romaine: it doesn't mention the coolers in storage downstairs. I'm just saying that I think we need to look at that too

Mr. Smith: Well, I think it's, I'm glad you noted it because I think it's the kind of thing that we might need the specialist from Nebraska who knows about Atlantic Ocean property to come back. Obviously there are some holes in the ordinance.

Ms. Romaine: And that's one of them right there because it doesn't mention, this whole edition that they have isn't included in our definition of a restaurant.

Mr. Smith: I just think that

Ms. Romaine: it says consumed and prepared, ordered and served. Page 95

Ms. Tezza: Are you finished with your motion?

(multiple conversations)

Ms. Romaine: I interrupted him, I'm sorry.

Ms. Miller: I got the basic stuff but then when it got past the....

Chairman Hiers: Ellen, read us

Mr. Smith: Read this basic stuff see if that's good enough to get us by.

Ms. Miller: I have move that we find proper interpretation of ordinances that without expanding seating area we would not be creating a problem that would require a variance. We know that they have to go to another Board for parking...and the storage underneath, FEMA...

Mr. Smith: That's not too far...

Chairman Hiers: We need to have a second

Mr. Barr: This is sort of, you know, the present definition of restaurant has the same sort of language, but then it goes on to say, primarily within the principle building or an established outdoor dining area. So, essentially we have (inaudible)

Ms. Romaine: So what are supposed to be voting on? I'm somewhat confused.

Chairman Hiers: Well, we don't know if we're finished with our motion yet.

Ms. Romaine: I'm sorry; I interrupted.

Mr. Smith: Well, if someone seconded it and then we could tweak it

Ms. Timmons: I seconded it.

Chairman Hiers: we have a motion and a second. Any discussion?

Ms. Romaine: yeah

Chairman Hiers: We have to, I think we're going to have to say whether we're overruling the zoning administrator or granting a variance.

Mr. Robinson? Can I just say the definition alsoit says non-conformities: uses, structures, lots, signs and other situations that came into existence legally and continued to exist as a legal non-conforming use at the time of adoption of this ordinance but do not conform to one or more requirements of this zoning ordinance, and what I am saying is the legal use in this building was 56 square feet, 56 seats at the time of adoption of this ordinance. Not 80.? Ok, so you know

Chairman Hiers; Well, why didn't the Town shut them down? To take them back to the 56 seat use?

Mr. Robinson: I don't [END OF TAPE 1]

???: [Beginning of Tape 2]Parking for four seats and that rule was abolished so now they're legal.

Mr. Robinson: Well maybe they should have gotten a parking plan for those extra seats which they haven't done so it's illegal. When the new ordinance was adopted if they had more seats than they were allowed, then at that time they should have come in and gotten a new parking plan approved at that time in order to become legal. They didn't do that.

Ms. Romaine: If they became legal now, if they went and got a parking plan and became legal for what their capacity is now and then came back. They came in compliance, in full compliance with existing laws now, is what your point is, if they came with a parking plan and got a parking plan that was approved by DRB existing now, would they then, then we could consider this without that parking issue and without all that (inaudible).

Mr. Smith: Susan, there seems to be that if we're concerned about the order of those things, let's take the bull by the horn and say we'll allow it subject to you going to get a proper parking plan as opposed to not doing anything and say go get a plan and then the other Board says well you go back to them and

Ms. Romaine: Exactly. That's what I was thinking. I agree.

Mr. Smith: I would accept an amendment to the motion that subject to

Ms. Romaine: getting a parking

Chairman Hiers: add that into the motion, Ellen, if you can, we'll probably have to reword , we'll have to vote no on this motion and resubmit I believe. The second thing, another thing in this motion we need to say whether we're overturning a zoning, overruling a zoning official or granting a variance.

Ms. Timmons: My inclination is to say we're granting a variance.

Mr. Smith: I could live with that.

Ms. Romaine: subject to

Ms. Timmons: We're part of Randy's team.

Ms. Tezza: Well, Randy denied

(multiple conversations)

Chairman Hiers: So the motion is a motion to grant a variance to, ok.

(multiple conversations)

Mr. Robinson: It's my job to

(multiple conversations)

Ms. Romaine: Well it's your job to show us all the loopholes that

(multiple conversations)

Chairman Hiers: I think we should vote on, we can't withdraw a motion I don't believe

Ms. Romaine: Can we withdraw

(multiple conversations)

Chairman Hiers: Robert's Rules. The motion's there.

Mr. Smith: I can withdraw my motion.

Chairman Hiers: can you?

Mr. Smith: Yeah.

Ms. Miller: withdraw the motion and the second.

Ms. Timmons: I withdraw.

Chairman Hiers: motion to postpone, amend, commit, question, table.

Ms. Tezza: No, we don't want to table it.

Ms. Romaine: Don't table it yet, can I ask one more question? Is there another legal reason prior to 2005 other than the 56 seats that we need to address?

Mr. Robinson: No. That's the big thing.

Ms. Romaine: That's the big thing.

Mr. Robinson: You know my big thing is

Ms. Romaine: The fact that they're non-compliant.

(multiple conversations)

Chairman Hiers: you can change your motion. We can change or amend, you can change or amend the motion, so that's what we're going to do.

Mr. Smith: Let's change the motion to comply with you do subject to your getting the parking plan approved that provides the necessary number of spaces

Ms. Romaine: for the existing restaurant

Mr. Smith: right

Ms. Tezza: ??

?: There's more seats (inaudible)

Chairman Hiers: I think that should be noted in the motion that this will result in fewer seats in the establishment that what are presently there.

Mr. Smith: right. And what is that (inaudible)?

Ms. Tezza: Two.

Mr. Smith: Two?

Ms. Tezza: Two. It goes from 127 to 125.

Mr. Smith: ok

Mr. Barr: May I suggest some other things to add to that? We raised these, I think they are legitimate, I think Mr. Hiers suggested subject to the parking plan, subject to our offer that there will be no commercial use on the ground floor.

Mr. Smith: It's not going to be an offer, it's going to be, if it's part of the motion it's going, I base it on whether Reggie and that other architect said, or the owner said, that I'm willing to make this commit to parking.

Mr. Barr: correct

Mr. Smith: and

Mr. Barr: flood (inaudible)

Mr. Smith: flood (inaudible)

(multiple conversations)

Chairman Hiers: See if you and Ellen can (inaudible) the motion and re-read and change and amend it and vote on it.

Ms. Miller: Ok, you want to grant a variance to whatever to accept their plans or whatever and then

?: we find

Ms. Miller: and then we find proper interpretation of the ordinance....all that in there?

Ms. Romaine: no. That doesn't, we've got to really word this well.

Mr. Smith: I don't think we need that.

Ms. Miller: You want to grant a variance to whatever subject to parking plan,

(multiple conversations)

Ms. Romaine: grant a variance and accept their proposed modifications to the restaurant that result you know assuming there is no commercial activity underneath and that a parking plan is approved by the town

Chairman Hiers: keep going.

Ms. Romaine: and

Mr. Smith: and that any work for storage under the building must be in compliance with FEMA regs.

(multiple conversations)

Chairman Hiers: as a result of this modification the number of seats will be reduced from 127 to 125.

(multiple conversations)

Chairman Hiers: Alright, let's see if you can read us that, Ellen.

(conversations)

Chairman Hiers: Well, we can approve it. We can grant the variance with conditions (inaudible) I don't know we can give conditional approval, I don't think

Ms. Tezza: I don't think that we can; there's no condition that we can

Chairman Hiers: If we give the variance, it's given.

Mr. Smith: I wasn't talking about that. I was (inaudible) getting the language

Chairman Hiers: cleaned up.

Mr. Smith: cleaned up. What I think we probably have to

Chairman Hiers: We're pretty close now.

Mr. Smith: (inaudible)

?: They're going to watch us struggle...

(multiple conversation)

Ms. Miller: You want to say grant a variance and accept the proposed modifications to the restaurant assuming no commercial

Ms. Romaine: (inaudible) conditions

Ms. Tezza: I think we have, the very first thing we have to say is because it is an illegal non-conforming use right now, I think we (inaudible) parking, I think we have to preface the entire thing with subject to the applicant's, the application to the DRB, or to whatever Town Commission for parking plans that covers their current usage, we will grant a variance for the expansion based on the modifications to the facilities that results in a decrease in seating from 127 to 125

(multiple conversation)

Ms. Tezza: I think it needs, I think Randy pointed out it's illegal right now so we have to say

Mr. Smith: Well, it's illegal and

Mr. Barr: It's a legal non-conforming

(multiple conversation)

Ms. Tezza: I think we need to cover ourselves here.

Chairman Hiers: alright, that's in the minutes, that can be in the motion, so we have an amended motion. Do we have a second to this amended motion?

Ms. Romaine: Can I hear the motion again because I'm

(multiple conversations)

Ms. Tezza: We're not going to vote on it right now. We're trying to second it so we can keep talking.

?: I'll second it.

Chairman Hiers: Alright, we have a motion and a second. Any discussion? So let's see if we can

Ms. Romaine?: Let's see if we can clean it up.

Chairman Hiers: Any more discussion?

Ms. Romaine: We need to clean this up. We cannot let this go on record as a motion. We're got to come up with the right

Chairman Hiers: Alright, well let's read it.

Ms. Romaine: Ok.

Chairman Hiers: I apologize, you're just trying to clean up

Ms. Miller: I don't even know; I can run the tape back.

Ms. Tezza: She doesn't know, we've totally confused her.

Ms. Miller: no really, I do not know, what you want in there.

Chairman Hiers: Well, we've got Bachman's motion and his part

Ms. Miller: (inaudible) grant a variance to accept the proposed modification to the restaurant assuming no commercial activity underneath, and the parking plan approved by the Town, any work for storage under the building is in compliance with FEMA, and then as a result of the modification to the number of seats reducing from 127 to 125. Then Elizabeth started out with

Chairman Hiers: Let's stop. Let's add

Mr. Smith: Jimmy, what, we may be missing the wording. We need to write (inaudible) appeal this decision, we could move on. But, because somebody may appeal it, the Town may appeal it, I would like to hear from Bill Barr as Counsel who is going to having a client harmed unintentionally if we put the wrong language in there. I think there is a consensus of what to do, we just need to get the right language.

Ms. Romaine: Yeah, right. Under 21-179 just to there are extraordinary and exceptional conditions pertaining to the property.

Mr. Smith: Right.

Ms. Romaine: Ok, that satisfies one. We need to say all this in the thing. Two, these conditions do not apply generally to any other property in the vicinity, except for one other,

Mr. Barr: Even then it's an entirely different from

Ms. Romaine: Three, because of these conditions the application of the zoning ordinance to this particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property

Ms. Tezza: Ok

Chairman Hiers: correct

Ms. Romaine: and four, the authorization of the variance will not be a substantial detriment to adjacent property or to the public good and granting of the variance will not harm the character of the district, therefore we would grant a variance subject to - what was it you wanted to say?

Ms. Tezza: Wait a minute,

Mr. Smith: subject to the applicant obtaining

Ms. Tezza: You can't put another motion out there when there's another motion on the floor

Ms. Romaine: no, I'm just trying to write it. We're still talking.

(multiple conversation)

Ms. Romaine: Therefore subject to

Ms. Tezza: the property coming in compliance with current parking regulations

Ms. Romaine: There you go. Why you're not starting

Ms. Tezza: I got as brief as I could get that phrase

Ms. Romaine: Good

Ms. Miller: in compliance with what?

Ms. Tezza and Ms. Romaine: current parking regulations

Ms. Romaine: and approval of a parking plan

(multiple conversations)

Mr. Smith: you have to go to the FEMA side of things.

Ms. Romaine: and, and, ok, parking

Mr. Smith: for any storage facility underneath the building it must be in compliance with FEMA regulations.

Ms. Tezza: are they in compliance with FEMA right now?

Mr. Robinson: To tell you the truth, they are going to have to be compliant with FEMA anyway

Ms. Tezza and Ms. Romaine: right, right

Mr. Robinson: got to have a parking plan.

Mr. Smith: I know they are but what you were telling us earlier is that we almost have to leave them in lurch of no decision, go to the Planning Commission first, and then come back? And what we're saying is, we just going to approve it subject to them getting permission.

(multiple conversations)

Ms. Romaine: So rather than having them bounce back between the two Boards all the time, we're trying to get it so they only have to do it once.

Ms. Tezza: That one little place does it.

Chairman Hiers: Any other changes or amendments to the motion?

Ms. Tezza: I think we're getting it.

Ms. Miller: So what, are we starting out with four statements

Ms. Romaine: yeah, we're starting out with the four statements under Section 21-179 B

Ms. Miller: and then subject to the property coming in compliance, storage issue, and we're not going to say anything about the reduction of seats?

Ms. Tezza, Ms. Romaine, others: Yeah, that's in the parking .

Ms. Miller: ok

Mr. Barr: Given the fact that the seating capacity of the restaurant is being reduced, we're not enlarging it, we're reducing from 127 to

Ms. Romaine: and adding it in there as justification

Ms. Tezza: and we hereby grant the variance

Mr. Smith: call the question

Chairman Hiers: We have a call for question. So, time to vote. All in favor of the granting

Ms. Tezza: You have to vote on calling the question.

Chairman Hiers: We have a vote to call the question. All in favor say aye. Aye. All opposed. (none) The ayes have it, so the question is called. So we have a motion and a second. All in favor of the motion to grant the variance say aye. All opposed. (none) The ayes have it.

Motion was made by Elizabeth Tezza, seconded by Susan Romaine to adjourn at 8:20 pm, carried unanimously.

Respectfully submitted,

Ellen Miller