

**ZONING BOARD OF APPEALS
MONDAY, APRIL 24, 2014**

Members Present: Susan Marteney, Matthew Quill, Stephanie DeVito, Scott Kilmer, Ed Darrow

Absent: Deborah Calarco, Mario Campanello,

Staff Present: Andy Fusco, Corporation Counsel; Brian Hicks, Code Enforcement

APPLICATIONS APPROVED: 33 E. Genesee St., 217 Grant Ave, 5 Morris St., 313 N. Seward Ave

APPLICATIONS TABLED: 23 Perrine St.

Ed Darrow: Good evening. Welcome to the City of Auburn Zoning Board of Appeals. I'm Board Chairman Edward Darrow. Please silence all cell phones. Tonight we will be hearing 33 E. Genesee St., 217 Grant Ave, 5 Morris St., 23 Perrine St., 313 N. Seward Ave and any other matters that may come before this board.

First we will be approving the minutes of our February session. Any additions or corrections or deletions to those minutes? Hearing none, seeing none they shall stand approved as read.

Mavis Tire, please approach.

33 G. Genesee St. – use variance to expand a pre-existing, non-conforming use.

Richard Pierce, 3975 Amber Rd., Syracuse: I am the engineer of record for Mavis Tire Company. We had previously sought and been granted a variance for the non-conforming property. I understand that my appearance here is simply for the SEQR.

Ed Darrow: It was my understanding at your last appearance when we discussed it, when I asked if the short form SEQR was being done you had confirmed to me that all that was being taken care of by Planning and Brian (Hicks) had said that was to be the fact. What has changed since then?

Andy Fusco: If I can speak, Mr. Chairman. What happened here is the timing of the Mavis application was such that it was going to come before us as the Zoning Board of Appeals before we had enough time to be able to coordinate the SEQR

review. Were that creates a problem is because both the use variance approval by this board and the site plan approval by the Planning Board are both actions as define by law. For either board to have acted before the SEQR was conducted would be premature. I apologize for not being here last month, I took ill a month ago in the afternoon, too late to even call or even do anything about it. I would have explained it at that particular time.

Since our meeting last month the Planning Board has conducted a SEQR. What we had intended to do was to have both boards to conduct their own review, which is perfectly legal to do that if you have an unlisted action, which this is. You don't need to coordinate. Since the Planning Board has now conducted a SEQR and issued a negative declaration, what I think the best thing for us to do tonight, especially since the staff did not provide you with the paperwork that was needed to be provided, for whatever reason. I think the best course of action tonight would be to have a motion and a second to defer to the Planning Board for SEQR. The found no negative environmental impact and they issued, therefore, what is called a negative declaration, which I realize is new stuff to the new members of our board but I apologize for that as well. And then having deferred to the Planning Board and to their findings regarding the SEQR I would then ask for a second resolution ratifying the decision that you came to last month granting the use variance for the addition to the Mavis Tire building.

Does everybody understand what I've said? Are there any questions?

So we'd be actually asking for two resolution: a) a resolution to defer to the Planning Board and join in their negative declaration regarding SEQR and then once we've completed that a second motion ratifying the previous decision that we came to last month regarding the use variance.

Ed Darrow: At this time if there are no questions or discussions about the SEQR for Mavis Tire the chair will entertain a motion that we defer to Planning for the short form SEQR for Mavis Tire, 33 E. Genesee St., that we voted on last meeting.

Matthew Quill: I'll make that motion, Mr. Chairman.

Ed Darrow: We have a motion, do we have a second.

Scott Kilmer: Second.

Ed Darrow: All those in favor? Roll call.

All members vote approval.

Ed Darrow: That motion has been approved that we defer to Planning. Now the chair will entertain a motion that we adopt and ratify Planning's...

Andy Fusco: No, we ratify our own use variance decision from last month.

Ed Darrow: We're not ratifying the SEQR review?

Andy Fusco: No.

Ed Darrow: Okay. That we ratify our use variance decision from last month.

Matthew Quill: I'll make that motion, again, Mr. Chairman.

Scott Kilmer: Second.

Ed Darrow: We have a motion and a second. Roll call, please.

All members vote approval.

Ed Darrow: That should take care of your short form SEQR and use variance for Mavis.

Anything else, Counselor?

Andy Fusco: Thank you for your patience.

Ed Darrow: Thank you.

217 Grant Ave

Ed Darrow: Please approach. Please let us know what you'd like to do. And give us your name and address for the record.

John Montane, Allied Sign Co., Syracuse: I represent Rue 21. We have a space on the main pylon sign that they are asking to be able to put faces in. They have an under canopy sign which is standard along the whole plaza, they would like to put their name on in front of their door.

Ed Darrow: You're requesting an area variance for the four additional signs, is that correct?

John Montane: Four additional signs? Does the pole sign count as two?

Ed Darrow: My question for Codes; is there any square footage in this or is it strictly being an area variance for four additional signs?

Brian Hicks: The square footage is allowed, there isn't an issue with that. It's just the number of signs per street front. So we're looking for four additional to the two existing there now.

Ed Darrow: Thank you, Brian.

Do you have anything else to add, sir?

John Montane: Any questions from board members?

Board members: Of the four signs, two are going on the canopy and two are going on the pylon out front by the street?

John Montane: Yes, the sign is already there on the canopy at each store front, they just want to put their name on it. It's not visible by the street, it's only visible up and down the walkways.

Ed Darrow: Any other questions from board members? You may be seated sir but we reserve the right to recall you.

Is there anyone else present wishing to speak for or against this variance?

Seeing none, hearing none I shall close the public portion so we may discuss it amongst ourselves.

Thoughts?

Scott Kilmer: I don't think it's terribly out of keeping with what everybody else has over there.

Susan Marteney: He keeps the scale the same, the graphic, the text.

Xxx: As he said unless you're walking down there you really can't see it's there. The big signs on the pylon out front would help.

Susan Marteney: Everyone else has the same signage.

Xxx: I don't see any major problems.

Ed Darrow: Chair will entertain a motion.

Susan Marteney: I move to approve the area variance for Rue 21 at 217 Grant Ave space 13.1 by Anchor Sign Inc. of Charleston, SC for four additional signs on the street frontage because the applicant has proven the following five elements:

- The area variance will not produce an undesirable change or detriment to the character of the properties in the neighborhood, and;
- The benefit sought cannot be attained by any other method other than an area variance, and;
- The area variance is not substantial, and;
- The area variance will not produce an adverse impact on the environment of or physical conditions in the neighborhood, and;
- The applicant's difficulty was not self-created.

Ed Darrow: We have a motion, do we have a second?

Xxx: Second.

Ed Darrow: We have a second. Roll call please.

All members vote approval.

Ed Darrow: Your variance has been approved. Please see Code Enforcement for any necessary permits.

5 Morris St.

Ed Darrow: Please approach and give your name and address for the record and tell us what you'd like to do.

Mike Pisano, 5 Morris St.: I'd like to add a second shed to the back southwest corner of my property for added storage. I didn't realize when I bought my house that the basement is inadequate storage due to dampness and gets real wet and floods. I've lost a lot of property. I purchased a shed when I first bought it but it definitely wasn't the right size, everyone knows how that goes. Financially I couldn't do a larger shed at that time. I'd like to purchase a second six by eight shed for my lawnmowers, tractors and work equipment.

Susan Marteney: Are you sure you don't want a bigger shed?

Mike Pisano: If you want to pay for it.

Susan Marteney: Your lawn mower looks like it's going to take up the whole shed.

Mike Pisano: No, it fits. Six by eight is more than enough.

Susan Marteney: Okay.

Ed Darrow: Any other questions from board members?

Scott Kilmer: I have a question for Brian. Brian, is this more of an issue of the number of accessory structures rather than the square footage?

Brian: Yes, he's only allowed one.

Scott Kilmer: So it's not a square footage issue. Okay.

Susan Marteney: I have a question about the concrete block stuff going on under the back area.

Mike Pisano: My back patio?

Susan Marteney: Yeah.

Mike Pisano: I'm putting a small wall around my patio.

Susan Marteney: Okay. That's not going to turn into a shed or storage area?

Mike Pisano: No, that's my hang out, my patio.

Ed Darrow: Any other questions from board members?

Xxx: Mr. Pisano, I do want to commend you on your honesty. I love this one answer, "I own a trailer and I'm not the best at backing it up in the yard." I feel for you on that one.

Ed Darrow: Any other questions? You may be seated, sir, but we reserve the right to recall you.

Is there anyone present wishing to speak for or against 5 Morris St.?

Seeing none, hearing none I shall close the public portion so we may discuss it amongst ourselves.

Thoughts?

Scott Kilmer: It's not a very big shed.

Ed Darrow: I don't think you can get a more modest size for a second structure.

Susan Marteney: And it's a long, wide yard. Does it back up to St. Joseph's? I couldn't really tell what is back in there. It's not infringing on someone's back yard.

Ed Darrow: No. I don't see where it's a major problem. Maybe someday in the future he will just want one larger one.

Any other discussion?

Chair will entertain a motion.

Susan Marteney: I move to approve the area variance for Michael Pisano of 5 Morris St. for an additional shed accessory structure to be installed along with a first shed in his back yard because the applicant has proven the five following elements:

- The area variance will not produce an undesirable change or detriment to the character of the properties in the neighborhood, and;
- The benefit sought cannot be attained by any other method other than an area variance, and;
- The area variance is not substantial, and;
- The area variance will not produce an adverse impact on the environment or physical conditions in the neighborhood, and;
- The applicant's difficulty was not self-created.

Ed Darrow: We have a motion, do we have a second.

Scott Kilmer: Second.

Ed Darrow: We have a second. Roll call please.

All members vote approval.

Ed Darrow: Your variance is approved. Please see Code Enforcement for proper permit before obtaining your shed.

Mike Pisano: Thank you.

Peter Corning: We have a matter on the calendar, I think it's at the end of the calendar. My client, Mr. Aaronek, is not here. I've called him, he's ill. I would respectfully request an adjournment until next month.

Ed Darrow: That is not a problem. Board, all those in favor?

Andy Fusco: Hold on. We do have maybe some people here that wish to speak. Maybe we can open the public hearing and then continue it? So that maybe some people who wish to speak can do so and not have to come back?

Peter Corning: I would request an adjournment, Mr. Fusco.

Andy Fusco: Let me say this. This is an unusual case, if there ever has been one. This is for the two new members of the board we have here tonight. This is 23

Perrine St. which involves a proposal for a salvage business. This was heard by this board last year after a couple of adjournments and then the matter went to court and Judge Ark in Rochester, who heard the matter, a) asked the parties to see if they could go back to the drawing board and work something out and b) opined during oral arguments, after having read all the minutes, or not opined may be the wrong word, wondered aloud if we ever get a full board in this room. Which was embarrassing to say the least, for me, because now we have our applicant, or at least his attorney, back here again and we don't have a full board again tonight.

Ed Darrow: I understand but at least now we actually have a full board, we don't have any vacancies. We have one member who did due diligence and call me that he was ill, we have another member who is out of town.

Andy Fusco: I'll defer to the chair.

Ed Darrow: I feel that I would rather they get it first hand, spoken, rather than have to read it from the minutes on a matter that's already been to Rochester once. I don't want to have to see it go again.

Andy Fusco: It will probably end up there no matter what.

Ed Darrow: I understand it's a terrible inconvenience for those who have come to speak but I ask you please bear with us and if you can please return again our next meeting next month. Just that way I feel confident that we will have a full board. Is there anyone present who cannot make next month's meeting?

Xxx: I have a question about that Mr. Chairman. Next month's meeting falls on Memorial Day.

Susan Marteney: No, we talked about that last time. It's the Monday before.

Ed Darrow: I think I believe that we'll be fine.

Peter Corning: Okay. I apologize to anyone here. I, too, worked on it all day long so I appreciate their patience.

Andy Fusco: Let's hear what Mr. Long has to say.

Ed Darrow: Please give your name and address for the record.

Michael Long, 149 North St.: My wife and I and some others have presented before about this particular case. We have retained an attorney and I have a letter I'd like to distribute to the board members so they may get a better background on it. I also have a letter I was going to distribute this evening and talk about some of the issues as I see them.

Ed Darrow: Distributing a letter wouldn't be a problem. Taking testimony, I do not want to open the public portion. A letter would have easily been distributed with our packets if it was present to Planning, so that I don't see as a problem but I'm not going to take testimony.

Michael Long: That's fine. I took two days off work to come here tonight.

Ed Darrow: I understand and I apologize but the applicant also has rights as well.

Approach and give your name and address for the record.

Harry Dow, 161 North St.: Not a permanent resident yet but as of the end of June will be. I have owned this property since last May. We were not made aware of this issue at all until this afternoon. We receive no notice of a public hearing or anything. We just happened to be here this week and able to attend this evening to share with you. I'm really concerned about the possibilities of...

Ed Darrow: Sir, don't go in to the area of anything that would constitute testimony.

Andy Fusco: Sir, is it possible for you and your wife to attend the meeting next month?

Harry Dow: That's the issue I wanted to bring up. We live five hours from here. It certainly isn't convenient. What is the date of your next meeting?

I don't have my calendar with me. I'm still under full time employment, somewhat gainfully. I can't say at this point. It does represent an issue to us. Thank you.

Andy Fusco: You have a written document in your hand?

Harry Dow: Documents that were handed to me today.

Andy Fusco: Did you bring any paperwork with you tonight that you'd like to share with the board members?

Harry Dow: No, all I brought was my hand written notes relative to what I wanted to say about the hearing.

Andy Fusco: If it is in fact impossible for you to attend next month would it be possible for you to give us a written statement of your thoughts?

Harry Dow: Absolutely but I'd rather deliver them in person.

Andy Fusco: We'd rather have you in person as well. Welcome to Auburn. But you can understand the fact that the applicant has taken ill.

Harry Dow: Yes, I have been ill a time or two myself. May I ask a question about the case?

Andy Fusco: You may.

Harry Dow: I just became aware of this case today. When did this case initiate?

Andy Fusco: This is actually a different proposal than the one that was heard last year. This board heard a proposal last year that ended up going to court and has not been decided one way or the other. The applicant has now, following the direction of Judge Ark, has now resubmitted an application which appears to me, and this will ultimately be something this board will have to decide, but it appears to me as a different application than what was heard the last time. So the technical answer to your question, sir, is it just started. The practical answer to your question it's something that is about eight months old.

Harry Dow: You mentioned in your comments to the new members of the Zoning Board that this had previously been adjourned a couple of times prior to last August's hearing.

Andy Fusco: What we traditionally do on this board is that when we have either four or five members present, we are a seven member board, as a courtesy to our applicants when we have four or five members present we will allow our applicant a continuation of a month or so to be able to get a full board. The reason being, if you only have four members here it has to be a unanimous vote to pass, so just out of fairness we'd like to have six or seven people here. Now last year we had, as the chairman alluded to, we had a problem with attendance, there's no question about it. Thankfully we have new members, our attendance has been better, our mayor has seen to personally take this problem under his own wing and get people on this board who are dedicated to serve. As the chairman said, he has all the confidence in the world that we'll have six or seven people here next month and I have no reason to doubt that. I think but for unexpected illness we would have had six people here tonight.

Harry Dow: The information that is critical to my thinking is when was this request first presented to zoning? We purchased our house in May of 2013 and I'm trying to determine whether this was an issue in place when we made our purchase and we were not properly informed.

Andy Fusco: I don't know if I can answer that question. I think the deliberations by this board were after that May 2013. I don't have the actual dates.

Ed Darrow: Sir, if you like, copies of our minutes are available on-line and also at the City Clerk's.

Alicia McKeen: Just another issue, announcements are sent to the neighbors within a certain area of the subject property. If you fall outside that area you won't get notified.

Harry Dow: Can I respond to this? We are within about 135 feet of the back side of this property.

Alicia McKeen: Notifications are only sent within 100 feet of this property.

Susan Marteney: What is your address?

Harry Dow: 161 North St.

Andy Fusco: Let's just say notice is not an issue since you're here, you obviously know about it. One of the practical aspects of this as it's explained to me is that when we're doing the notices of people within a certain footage, as it varies from application to application, we pick the center point of the property and go within whatever the appropriate radius is of that. This particular piece of property is somewhat unique, it's very long and very narrow. So while you may be 135 feet from one of the edges you may not be 135 feet from the mythical center point of the property. That is a notice issue that I haven't had to defend in court yet but that's the way we do it. I'm not about to change that right now.

Harry Dow: Thank you.

Ed Darrow: Thank you, sir.

Question only.

Rita Loperfido, 163 North St.: My question is regarding notice because I did not find out about this and I'm really close to where the proposed plan is, is there a chance that the board could send out more notices before next month's meeting?

Ed Darrow: The board doesn't send them out.

Rita Loperfido: Who sends them out?

Alicia McKeen: I do. I send the notices out per code, that's what I'm required to do so that's what I do.

Ed Darrow: They come out of Planning.

Rita Loperfido: Is there a chance that it can be a little bit more than enveloping?

Ed Darrow: You have a personal notice from me. The fourth Monday of next...the third Monday of next month we will be meeting on this. You have a personal invitation.

Rita Loperfido: So your suggestion is we should go house to house to notify everybody of what's going to happen in the middle of a neighborhood.

Ed Darrow: As our Counsel has spoke to, we have a center point and then everybody as required within 100 foot of that center point is notified.

Rita Loperfido: I'm curious where exactly is the center point on this long, narrow piece of property? Can anyone tell me?

Andy Fusco: Ironically a computer does it, it's computerized and the computer determines what is the mythical center point of the property and then, as explained to me, but the computer determines the mythical center point of the property and then determines the properties within the radius of the mythical center point that is entitled to notice. This is not something I have had to defend in litigation yet, it may end up coming before a court someday, but there's the answer to your question. It's actually generated by a computer program.

Rita Loperfido: So we kind of lost the people. We're back to the computer.

Andy Fusco: Again, it's a lot like this fellow here, you may be within 100 feet of one of the borders of the property but not within 100 feet of the theoretical center of the property.

Rita Loperfido: I was just hoping maybe we could get some direction from the board to stay in the scope of the notices so that...

Andy Fusco: You have notice that we're going to be here the third Monday of next month. Can you please join us?

Susan Marteney: We don't have any legal standing to do it differently.

Alicia McKeen: Legal notices are also published in the paper every month.

Ed Darrow: Members, all those in favor of adjourning 23 Perrine St. until May 19th, aye.

All members vote approval.

Opposed? None. Ayes have it.

Counselor, 23 Perrine St. has been adjourned until May 19th.

313 N. Seward Ave

Ed Darrow: I apologize for that delay. Thank you very much for your patience. If you could please give your name and address for the record and tell us what you'd like to do, sir.

Randy Russell, 313 N. Seward Ave: I'm seeking permission to build a garage at the end of my driveway instead of building a small garage, because I know everyone as soon as they build one is going to want something bigger, I'd like to build a 20x24 garage but I want to make it gable roofed so it's like a barn style so I'll have the upstairs storage. With the lawn mower, rototiller, you name it, I have a lot of toys and tools, I'm a wood worker too, and my family room has been taken over by my wood working machines, and cellar too. To get everything out of the house into the garage would be good, it would get the sawdust out of the house too which the wife would really appreciate.

Andy Fusco: May I interrupt a moment? Mr. and Mrs. Long had wanted to submit a document in the last case and they didn't have the opportunity to do that. Could they do that now and let the record reflect that?

My apologies sir.

Is that the only copy you have?

Michael Long: [inaudible]

Copies distributed

Ed Darrow: Thank you, sir, I guess this is what happens when we go out of order.

Andy Fusco: I think the record should note that Mr. Chatfield was not able to attend tonight as well so this adjournment may well help both sides.

Randy Russell: If permission is granted the garage will be built and the color will match the existing house right now so everything will blend in well. Both neighbors on each side have garages so it won't be out of place. As for the height, my neighbor two over has one about the same height so it won't be standing out. It will blend in well.

Ed Darrow: I understand completely because I had a two-story garage and I understand how valuable the second story is. The height is the real drawback. I also believe it has to do with the neighborhood. If it's a ranch home and you have a two story garage it's just completely unfitting in the neighborhood. If you have a two story home it tends to blend in more and doesn't look like an albatross. I can understand what you're doing here.

Randy Russell: And I just recently retired from corrections and purchased my retirement fishing boat which is another thing that will be in the back yard with a tarp on it so it would be nice to get it in the garage when not in use.

Ed Darrow: It seems here the only variance is the height variance. That you're going 20 feet to the peak instead of 15 which is code. Now, Brian, this is measured from the curb and not actual at the ground, correct?

Brian Hicks: It's from grade.

Ed Darrow: Grade at ground or curb?

Brian Hicks: Grade at location.

Ed Darrow: Any other questions from board members?

Susan Marteney: I have a question about the firewood structure. Is that considered a permanent structure?

Matthew Quill: It looks like a drying rack.

Randy Russell: It's on 4x4s, it's just like a lean-to shed to stack the firewood underneath. It can be moved.

Scott Kilmer: It's a wood shed.

Randy Russell: Yes, like a wood shed. There are no sides to it, it's all open.

Susan Marteney: Is it added in to everything here?

Scott Kilmer: Brian, would you count that?

Brian Hicks: I could but we would still be below the maximum allowed.

Susan Marteney: And the little grey shed, that's going to disappear?

Randy Russell: Yes, the last couple winters have collapsed the roof and I'm just going to get rid of that and everything is going into the garage. That will be gone.

Susan Marteney: Are you considering that little thing permanent or not? In the corner, is that considered a permanent shed?

Brian Hicks: It's not classified as a shed. It's just a wood rack.

Ed Darrow: Any other questions from board members? Sir, you may be seated but we reserve the right to recall you.

Is there anyone else present wishing to speak for or against this variance?

Hearing none, seeing none I shall close the public portion so we may discuss this amongst ourselves.

I see no problem at all.

Susan Marteney: We have signatures from several neighbors, they don't have a problem. And then the photo included, it's a nice packet, the photo of the neighbor at 321, they have a differently shaped but equally tall garage which isn't out of kilter with the look of the neighborhood. In the neighborhood there are many similar structures.

Ed Darrow: It's one of the things in our zoning that I've questioned, if it was with a ranch home I could understand. Any other questions, discussions?

Chair will entertain a motion.

Susan Marteney: I just have one question, I believe there was a discrepancy, that you didn't know exactly whether the allowance was one...someplace it said it might be more.

Ed Darrow: It's a five foot variance. Mr. Russell, could you please re-approach?

Susan Marteney: I don't want to make it so...

Randy Russell: You're talking total height? We're going with 20 foot high.

Susan Marteney: Okay, I just didn't want to say five foot and then have it be more than that and you get in trouble.

Randy Russell: We'll build to make sure it's what it's supposed to be.

Susan Marteney: Oh, in the application it states 'my garage height will be 18 to 21 feet', that's why I'm asking.

Randy Russell: That's my initial application, then I was called back...

Susan Marteney: Okay, I didn't want to give him the wrong variance.

I move to approve the area variance for Randy Russell of 313 N. Seward Ave of five feet for the allowed maximum for the height of a garage because the applicant has proved the following five elements:

- The area variance will not produce an undesirable change or detriment to the character of the properties in the neighborhood, and;
- The benefit sought cannot be attained by any other method other than an area variance, and;
- The area variance is not substantial, and;
- The area variance will not produce an adverse impact on the environment of or physical conditions in the neighborhood, and;
- The applicant's difficulty was not self-created.

Ed Darrow: We have a motion, do we have a second?

Scott Kilmer: Second.

Ed Darrow: Roll call please.

All members vote approval.

Ed Darrow: Congratulations, your variance has been approved. Please see Code Enforcement for any necessary permits before beginning work.

Randy Russell: Thank you.

Ed Darrow: Anything under housekeeping? Counselor?

Andy Fusco: Nothing more from me.

Scott Kilmer: Maybe it's a can of worms but could you keep us up to date on what happened in Rochester, Andy?

Andy Fusco: Yes. If you've seen Mr. Chatfield's letter it makes reference to an e-mail I sent to Mr. Long's previous attorney, Mr. Galbato. What essentially happened in Rochester is that Judge Ark did not decide the case. It was very clear he did not want to decide the case and kept imposing, if you will, on Attorney Corning, that he go back to the drawing board with a revised plan and see if he could get a fourth vote, basically paraphrasing what Judge Ark said. This new proposal, and I don't think I'm talking out of school, you all have the paper work in front of you, in my opinion the new proposal is different from the last one in that all of the scrapping activity takes place indoors and involves no automobiles. Those were two functions that are different about this application than the previous application. In deciding whether this should come back before us, I had to make a decision whether it was significantly different to be in effect a new application because as Mr. Chatfield indicates in the second paragraph, if there's going to be a re-hearing it has to be unanimous. I don't consider this to be a re-hearing, I consider this a new matter. Now what Mr. Galbato had asked me is if there's going

to be a new application shouldn't the old one have to be withdrawn? Isn't it two bites of the apple? The old one isn't decided and now there's a new one. My response to that was that I'm just doing what the judge told us to do. So in my legal opinion the new application is factually different than the old one as such to be a new matter, a different matter. I'm troubled, as is Mr. Chatfield and others that the old one hasn't been decided when the new one is on the table, but I just want to follow what the judge told us to do and this is, I think, consistent with what the judge's wishes are. Go back to the drawing board and see if there's a fourth vote. Whether they do or don't remains to be seen.

Ed Darrow: So are we going to be asked first, out of the gate, is there substantially enough change for this application to be reheard?

Andy Fusco: I think I'm going to instruct you as a matter of law that the answer to that question is yes. You can disagree with me.

Ed Darrow: I'm just saying it would be difficult to the newer members not having the history to be able to decide that.

Andy Fusco: In my mind's eye, the fact that this new application involves entirely indoor activity and no automobiles is a significant enough change to be a new matter. That's going to be my charge as a matter of law. Again, you may disagree, reasonable minds can disagree, I think that it's clearly in my mind different than what I had in my mind's eye last year. What we will do differently in this particular case, I think we've made a lot of progress. My hat's off to Susan doing a great job with the way we do our resolutions now. In these types of case however, where we know it's going to court, where there's attorneys on both sides, which happens four or five times a year, how we'll do this, however you all decide, I'll take the transcript or the minutes from our secretary and I'll actually draft up a resolution, a written decision, findings and facts and conclusions of law, to satisfy the four or five standards that Susan outlines in her oral resolution, and then we'll come back a month later and see if that meets everybody's approval. So that while we may in fact decide this thing on May 19th, the actual filing of the decision will be the written decision that we approve or maybe modify in June. So it'll take a little bit longer but we'll have a written document that will read like a court decision that we can all sign off on.

Scott Kilmer: So your intent would be to actually vote next month but to...

Andy Fusco: We'll know how we vote and then I'll take the vote and my notes of what you've said and actually the decision will be the written decision so the statute of limitations starts in June or maybe even July. I've done this a few times before and what will happen sometimes is that you get my written decision and one of you finds a possible discrepancy in what was said or meant. What I really want is a written decision that all of you can agree that is what was decided individually whether you voted for or against it. We'll want it to be carefully crafted to be able

to reflect the vision of the majority and the division of the dissent if it's not a unanimous decision which sometimes takes some fine writing because I don't always hear what's exactly in your mind. We'll start doing that for those four or five cases a year we know we're going to be sued. The written minutes satisfied our local judges but I'm in Rochester more than not these days and they hold us to a different standard than we're used to so I have to modify my method of practice accordingly.

Ed Darrow: Any other business? Motion to adjourn?

Scott Kilmer: So moved.

Ed Darrow: We are adjourned.

Recorded by Alicia McKeen