

**BOARD OF APPEALS
TOWN OF WINTHROP**

MINUTES OF MEETING

*Held on Thursday, June 10, 2010
Town Hall - Joseph Harvey Hearing Room
WINTHROP, MA 02152*

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Chairman Paul W. Marks, Jr. called the public meeting of the Board of Appeals to order at approximately 7:00 p.m. Also in attendance at hearing were the following Board Members: Darren M. Baird, Brian J. Beattie and Irene Dwyer. Also in attendance were Captain Ned Hazlett, Winthrop Fire Department and Board Secretary/Clerk, Mal Jones.

The following matters were heard:

AGENDA: Deliberation of pending matters and discussion of new and old business.

01.	23-2004*	200 Pauline Street	Luigi Guarino Remand	PM/BB/DB
02.	20-2008*	2-4 Highland Avenue	Terry P. Vazquez Petition to Modify	PM/BB/DB
03.	12-2010*	33 Nahant Avenue	Philip Baldi & Elizabeth Baldi	PM/DB/JR

***Continued from May 27, 2010**

#20-2008 - 2-4 Highland Avenue - Terry P. Vasquez - Petition to Modify -

Sitting: PM/BB/DB

Counsel James Cipoletta and applicant present.

[PM] New site plan. Changed pavement. Shows parking, lighting and

signage. We had motion to continue to deliberative session.

[DB] Plan is improved and as long as it gets built this way, I can stand behind plan with one caveat, still concerned about traffic coming out of side driveway. Don't mind it so much coming in, coming out still bothers me. Can probably get over it. If no one else has a problem with it.

[PM] That was the big concern the Board had first time around was traffic both in and out of that drive way, think more out than in. In you can gauge it better when you're coming down to get in, but going out is a different story.

#2 Condition was to amend to allow a 6 foot fence at the rear of the property to blend with existing fence of abutter.

[Applicant] Actually right rear at rear of right lot line.

[PM] Existing fence that comes down, going to extend that fence.

[Applicant] Extend it to rear.

[BB] By the barn.

[Applicant] Right.

[PM] That's fine. Don't have a problem with that. Also talked about to install an arborvitae fence in part of the lot at request of abutters. Think you have done some of that down at the beginning.

[Applicant] That's been done.

[PM] And the additional planting at the rear. You have a chain link fence back there. Are you going to do some additional planting back there?

[Applicant] Yes. Once the paving. Mike Carney still has to dig out right rear corner by fence and he's going to clean up back area in front of fence and there's going to be a planting area in front of that.

[PM] This shows a double thin line like a curve back there. You going to have anything like that that delineates the parking or have parking area separate from planting area?

[Applicant] Yes. I believe he's going to use some granite curbing in that it does pitch down from behind, need some kind of curb to keep pavement, which in this place is hard pack, but the pavement up against that and behind that there will be a planting bed.

[PM] Planting and fence per the memo.

Condition #3 on letter from Attorney Cipoletta had to remove live parking in driveway and allow right side driveway to be utilized as a second egress as recommended and approved by Traffic Safety Advisory Committee (TSAC). You're looking to make both ingress and egress, is that correct how you want to use it?

[Applicant] Yes.

[PM] Safety concerns that we do not agree with TSAC the way

they looked at it and that's just the way different opinions on it.

[DB] If it's a matter of keeping it open as a driveway and we put a condition on it, it's to be used for ingress into the site only, it's still going to be an enforcement issue realistically speaking and practically speaking, people may turn out of there, they may not, just depends. I would feel more comfortable just knowing the intersection and not being a traffic engineer, but having dealt with a number of complicated turns in my professional life as far as places that are high impact type level of service type of intersections be concerned with traffic turning out of there. Still a tough one for me, but at the same time, guess it's up to the Board because we have to be--either we're agreeing to change something or not. Think our decision has to be unanimous when it comes to modifying a variance. On that one if TSAC came out with a finding that they don't see that as being problematic, against my better judgment, they're the ones who are in a better position from an engineering perspective to be able to evaluate that, wouldn't necessarily submit my judgment for their professional judgment and I would reluctantly grant the relief requested as much as I don't necessarily agree with it, I don't have the background or experience or professional engineering background to say that they're absolutely wrong. Kind of hard to refute it, but at same time, we can make a decision if we still feel it's in the best interests and it would be substantially more detrimental than the way our decision is written to allow that to happen, we can certainly say we're not going to change it, but I'm not going to substitute my judgment for theirs at this point.

[PM] We can make a statement in there that we're concerned about the use of this and deferring to the TSAC.

[DB] If it becomes problematic, we can always revisit it.

[PM] Put a statement like that.

[DB] Petitioner isn't going to want it to be problematic. If there's a couple of accidents there, they're going to have to think about practically how it impacts their business and their liability coverage, having people get whacked coming out of there. I don't like the result, but I have a hard time substituting my judgment for their expert judgment.

[Counsel] I think Chief and DPW director had discussion not only in this case but generally had announced discomfort.

[PM] They had a difference of opinion on it.

[Counsel] One of overriding things they all had in common, they don't look real well on single access egress, single points of access and egress to any properties. I understand that it's tough, but if you close the driveway, you shift everything to the small private way at bottom of the public stairs, now you're making that problematic. Kind of discussion I had

with the Chief. I understand it's not an easy call. Tenants have been using that in past to skirt out and right up over hill for years anyhow.

[PM] We'll put something in there to so state that. Again, this is running with the owners of the building. Should that change, it will come back before us again at another time.

[PM] You talk about hard pack in the parking area for paving.

[Applicant] Partial.

[PM] I had a note here on the site plan that the driveway is going to be bituminous concrete. Is that correct?

[Applicant] Driveway and sort of semi-circular-shaped area behind the building where the handicapped is going to include, that's all going to be paved. There's a couple of spots where Mike Carney of Sea Coast for pad or lift is going to be concrete, but it's going to be basically hot top. There should be a semi-circle on that version of plan. To your right of semi-circle is paved. To left is hard pack.

[PM] Change to 6 parking spaces plus handicapped space. Handicapped entrance from rear parking is shown on plan.

[PM] **Condition #4** parking lot lighting. You have on plan here small wall pack light on 12 foot pole. Two of those. Going to go underground for power.

[Applicant] Yes. That will be done in conjunction with paving.

[PM] Approved signage in place in Quincy Path since 2008. We're going to leave that the way it is.

[Applicant] Yes.

[PM] **Condition #8** we talked about signage in front of the building and what you're going to do is you're going to put something on, lettering on a sign that will hang from the front of the porch.

[Applicant] You indicated that was your preference last time. Mark up from *Honan Sign* I believe shows letters on fascia below the second floor porch. You indicated your preference was to put basically put those letters on a sign hanging below that spot.

The following exhibit was marked:

Exhibit #1 Proposed Site Improvements & Handicap Lift
Dated March 21, 2010 Received by BOA on June 2, 2010

MOTION #20-2008 (Darren M. Baird) - to amend existing variance finding that none of these amendments are substantially more detrimental to the public good than the conditions initially imposed that they are related to. First condition is to amend Condition #2 that currently requires a 7 foot

fence shall be such that the area shall be properly illuminated for public safety and light will not shine on or interfere with adjoining properties to modify that condition to allow for a 6 foot fence at the rear of the property so that would be along the northeasterly boundary to blend with wooden fence of existing abutter and also to allow for the installation of an arborvitae fence in the part of the lot towards Highland Avenue where wooden fence currently ends. Condition #3 which currently reads that the two parking spaces in driveway be eliminated to amend that to allow for the installation and use of bituminous concrete driveway entering from Highland Avenue to rear of property allowing it pursuant to recommendation of Traffic Study Advisory Committee to allow that to be opened and used for ingress and egress to the back of the property by folks either residing at or coming there for business purposes not as a cut-through for other non-residents or users and should that become a hazardous intersection that the Board have the right to re-visit the issue and the allowance of that use under this condition; to also amend that condition to allow for hard pack parking area to the north of the semi-circular area that's currently labeled as being bituminous concrete paved and running north to the lot line for hard pack surfacing; to allow the current requirement for parking to be changed to 6 parking spaces plus a single handicapped space, the handicapped space to be located in the place shown on the plan immediately adjacent to walk way that gets to the wheelchair lift; and to approve the handicapped entrance from the parking area as shown on the plan submitted on April 8, 2010 at rear of building. To approve parking lot illumination pursuant to plans submitted to Board with regard to lighting on April 8, 2010 plan; to approve existing signage under **Condition #5** that is in place on Quincy Path and has been there since 2008. With regard to **Condition #8**, which currently reads building identification signage shall conform with similar types of professional businesses in area, such signage shall be reviewed and approved by the Board of Appeals prior to installation. Condition be modified or that our approval with regard to signage be such that existing monument sign be removed from front yard of property and that signage be on a sign hanging under building fascia below second floor with similar stenciled lettering as shown on photo that was submitted to Board of Appeals dated April 27, 2010 (mark as Exhibit).

[PM] We have mentioned in here plans received April 8th. On set of drawings, there was a title sheet, A-1, A-2, A-3. On A-1 site plan, it is showing entire site as bituminous concrete pavement. Does not show a line on it for hard pack. Is that the wish?

[Applicant] The one submitted at last meeting is the one that is the final one and that changed lighting or added lighting and clarified paving.

[DB] Let me amend motion to reference set of plans that are dated on the face of them March 21, 2010, not bearing a revision date, but were received by the Board on June 2, 2010. Think we should mark and stamp these as being approved by Board of Appeals and also amend motion to under Condition #9 reference instead of plans dated September 25, 2008, reference this set of plans so there is no confusion at Building Commissioner's office when they go in to pull permits they need, this is the current operative set of plans, make reference to March 21st plans received by us on June 2, 2010 and on file with us, will make sure Building Commission has a copy. We will amend #9 to put date of plans.

[Applicant] The one that shows hard pack and two 12 foot pole lights in back is the correct one. Actually plan of March whatever, but was amended, updated and submitted.

[DB] There was no revision date on it so that's why.

SECOND (Brian J. Beattie)
VOTED All in favor.

#12-2010 - 33 Nahant Avenue - Philip Baldi & Elizabeth Baldi

Sitting: PM/DB/JR

Counsel James Cipoletta and applicant present.

[Plans submitted].

[John Rich not present].

The following exhibits were marked:

- Exhibit #1** Correspondence from Attorney James Cipoletta dated June 1, 2010
- Exhibit #2** Richard Salvo, PE Plans updated May 11, 2010
- Exhibit #3** HVAC Enclosure Location

[PM] Question on site plan. Is it showing grades?

[Counsel] This one does show the grades. Dropped those off a couple of weeks ago at Clerk's office.

[DB] Don't think we can take testimony.

[Counsel] No. Want to at least want to make sure

[DB] We have what we need.

[Counsel] Yes. You gave me two things to take back. Want to make sure that they're the correct things.

[Review of plans]

[PM] Based on this, I think this is what we needed. We had to have a plan like this. Just seeing it for the first time, but other person is not here to do it. Will have to take a look at it and continue to 24th.

[Counsel] If this is the plan that the BI said he saw, but didn't have a copy of, this is the plan. The other thing the Board asked for was a description of how the air _____ was going to be contained and buffered.

[PM] There was a question that was brought about these going underneath the deck. Did they say they didn't have enough ventilation underneath there to do that?

[Counsel] They couldn't do that so what they did is they're building an enclosure around it such as would be similar to the deck, just for purposes of containing the units and green screening around it. This is on the westerly side away from Mr. Komarek's house on the opposite side.

[PM] We'll look at this here and come back with it on the 24th.

MOTION to continue by agreement of parties to **June 24, 2010**.

#23-2004 - 200 Pauline Street - Luigi Guarino - Remand

Sitting: PM/BB/DB

[PM] Last time we had discussions with regard to 200 Pauline Street. Several questions. We heard from abutters, from Mr. Guarino and his attorney and we continued it to a deliberation session on the 10th and that puts us here tonight. Not taking any testimony, here to discuss this and deliberate.

[DB] In looking and thinking about testimony we received last time and really thinking about this one a lot. Important for us to go over what the testimony was both by Mr. Guarino and by abutters relative to use of this property over time. From what I gleam from it was that and reading the papers too that historically the old 6-bay garage that used to be at the back of the property was used both by owner who resided on the property prior to Mr. Guarino buying it and was also so in part used in part in connection with the residential use of the structure, but also used and leased out to third parties who parked cars and stored things there,

parking and storage and those sorts of things were going on there. You really had two uses. You had the accessory use which was probably the primary use to the residential and then you had this other commercial related use which was allowing other people to park things there or store things there. Mr. Guarino comes along. He buys the property, doesn't reside in the property, never resides in the property. Over time these other third parties move their stuff out. The tenants never have the right to use the garage. He starts using it for his personal use as well as allowing other people to use the property to store things, whether and may be I misheard this, but may be some other people heard this in a couple of instances, he lets friends keep things there for free and doesn't charge them and then I think he later said may be he charged a couple of people to keep things there, so if you take that altogether, one thing is absolutely clear to me and that is he has never resided on this property and he has never used this garage in connection with the use of the residential use of the property. To me there are two distinct uses going on in that property: his use as the owner of the property but not residing there of the garage and then the residential multi-family use that's going on there with the two-family because that's a two-family right?

[PM] Yes it is.

[DB] And then you get the testimony about that since he's acquired it. Before it was comings and goings of people who stored things there and had the garage or may be it was people who lived in one of the units, the owner that occupied the property, using it, but then after he acquired it, you had a number of people who may have had access to that garage, himself, people that stored things there like the two cars that were in there and other stuff, as well as apparently some under-aged people who like to go there and have a good time and make some noise and cause some disturbances in the neighborhood and type of use that's going on there for the storage of boats and the building of things that go on there, blowing out of motors and the this and the that seems to me that use is much different than the old sort of more passive storage use that was going on there where someone might pull their car in and out of the garage once in awhile or get something out of a storage unit once in awhile to something that's a lot more active and impacts the neighborhood a lot more. To me anyway there is an observable change in that use that has occurred since Mr. Guarino bought the property. That's just sort of where I've been coming out on this. I don't think it's in anyway accessory to what goes on there from a residential use perspective. To the extent it ever was, it's not now. I really do believe that there is a substantive change that has occurred there that is different in

kind than the pre-existing non-conforming use of the garage that the judge of the Land Court found to exist which is something that we have to deal with as a fact, but I think there is real change in kind that has happened there and, as such, that really because it is a qualitative change that because of the impact to the neighborhood and the way it's being used and all those sorts of things, I really do think that it's something that would really not be allowed because what's going on there is really a non-residential use, it's not in the same scope or of the same kind of the type of use that was being made there previously and, therefore, it's not the same non-conforming use and, therefore, it's a real change and so because this type of use isn't allowed, it would be something that would require a use variance and, even if someone could make the argument that somehow this is not a qualitative change in the non-conforming use, it's the impact and the type of use that is being made is at least certainly a change in degree of the use such that it's substantially more detrimental to the community and because it is substantially more detrimental to the community, I would say that there it would be something that would require, if it's substantially more detrimental, as a matter of where we are, we would say that it's not—I think we could say in that instance, it's not entitled to a special permit or a Section 6 finding under applicable law that somehow this change in degree is within the same type of use as the previous non-conforming use and, therefore, I think even then, the use that he is making there is not permitted. I don't necessarily have a problem with the structure, because the structure is what it is and I think it's dimensionally conforming so says the judge of the Land Court, but I don't think the use there is something that is conforming now.

[BB] I have to agree with Darren.

[PM] In my review of this I have been leading down the same road. Number one, non-conforming structure previous and the use of this is not pertaining to the house as a owner of the house is using the garage. There is no occupant of the house that uses the garage. It's used by owner of the property, who is not an occupant of the house. So, therefore, I think that I agree with Mr. Baird that the use of this even though it is similar, it definitely has changed. It has changed from an accessory to the house to a non-accessory and the other thing that they have done here is they've expanded a non-conforming building beyond the scope of what is allowed in the zoning by-laws. This building was expanded more than 25% of its floor area from what it was previous. The volume of it has changed, but the volume was not questioned at this point in time because there was some case before us where the volume of that

building was agreed to with the height of it. It was originally submitted as a much higher building. It came down to less than 16 feet and that's what they continued to build it at. We're coming down here to discuss this. It's a use situation now and how this is being used that we have to wrestle with and make a determination on.

[DB] And the other thing too that struck me was that the previous owner it's hard to know, if they were residing on the premises even if they were an owner-occupant and there were a number of different people using that garage for commercial purposes, they were on-site and they had the ability to control the comings and goings and deal with a sort of police and make sure people didn't have an impact on the neighborhood. We have an owner who is a non-occupant who clearly I don't know that he doesn't—it's somewhat clear to me based on the testimony—it's very clear to me based on the testimony that he is there when he's using the garage, otherwise he's not really there on the property. He's not policing it 24-7. He is not controlling access to it in a way that ensures a lessened burden of impact to the community and by not being there and not being on-site I think that alone is qualitatively different because he--this use sort of just does what it does at any given moment and without him there to police it and control the impacts to the neighborhood, I think it's a much different use and I think that if I had to guess, what the neighbors were saying about the impact, they were still being neighborly in their testimony. I think it's probably worse than we've heard. Based on the fact that all of the negative testimony that we got from the neighbors about the impacts, there wasn't one peep from the applicant refuting any of that. It's not like he said oh well that never happened or this never happened. It was you know the police came because the kids had a party or I was blowing out a motor and it went in the neighbor's back yard. There was never a well that never happened or oh yeah that was one time that happened. There was none of that. When someone doesn't rebut that type of testimony, it leads me to believe that there is a real impact that is going on here and that clearly they're not they don't have a defense because they're not really policing the property the way they should. I would have a real problem allowing that use to continue.

[PM] The other thing that I looked at is that the old garage when we went and had our site visit, you could see the size of the old garage. There was enough to put a car in there and may be walk on either side of it. It wasn't large enough to do any repairs in there. It was basically for storage. People might have rented it. They'd come down, open it up, took something out of it, took a car out and then probably put it back or if

somebody had something they stored in there. It's not like the conditions that we saw there where you go through a double set, a big door on either side. The whole thing is completely open inside, opened the whole thing up to be able to do any number of things in there which is different from what the original garage was intended for and that was to store automobiles back whenever it was constructed. I think we are looking here at a condition of usage, has the usage changed? How do we approach it going forward?

[DB] The more I thought about this the more I think the distinction between what's a motor vehicle and what's a boat and what's this and what's that isn't even necessarily that relevant frankly. It's the fact that this is a use that is now completely divorced from the residential use of the premises and it's being made by the owner, the person who owns the property, but doesn't reside there, doesn't use it in connection with the residential use and basically this isn't a private garage, it doesn't fit within the definition of a private garage under our zoning code. So what is it? The answer is while our zoning code says if it's not something that's specifically permitted under the code, then it's not allowed. So it's a non-conforming use no matter what way you cut it and at the very least, substantially more detrimental than what was there before and, therefore, shouldn't be permitted.

[PM] Want to review here and go back to Land Court. There were some statements in here on that.

[DB] Land Court specifically said.

[Reviews Land Court decision.]

[ID] Page 11 sets out what ZBA has to decide here.

[PM] This is the latest one from the judge.

[DB] Ms. Dwyer is right. Really the question that is before us is: (a) does the use reflect the nature and purpose of the pre-existing, non-conforming use when the by-law took effect. I would say no. There's no difference in the quality of character and degree of the use. I think there clearly is.

[PM] There is.

[DB] And if the current use is not different in kind in its' effect on the neighborhood, again I think it is, so they're not entitled under that Powers Chuckrin analysis under 40A, Section 6 to a special permit for the use of the addition, not for the addition itself, but for the use of the addition, and because I think there is a qualitative change in the non-conforming use and the use is not allowed by the zoning by-law, then it's prohibited and, therefore, if they want to come before us and seek a variance, they can come before us and file a petition for a variance, but it's a different use

and it's therefore not allowed by the zoning by-law and it's substantially more detrimental so they're not entitled to a special permit finding either.

[PM] Under this right here.

[DB] He says on remand, the ZBA must also address whether the addition is a change in the non-conforming use of the garage and the plaintiff must file an application for a special permit.

[PM] We're saying he has to file a special permit for use, not for the building itself.

[DB] No. I think we have enough testimony here to make a finding that doesn't require people to come back here again. Is a decision that they can either come back to use for a use variance or they can go back to the Land Court. Based on the site view and based on the testimony that we took on the record last hearing, I wouldn't be adverse to making a real decision here, not saying okay we found this, now file for a special permit. What our zoning code says about the special permit is in Section 17.28.030 which used to be 145, Section 44. D Changes. Says non-conforming uses of an existing structure may change by special permit provided they are not substantially different. Substantially different use is defined in our zoning code as a use which by reason of its normal operation would cause a readily observable difference in patronage, service, appearance, noise, employment or similar characteristics from the use to which it is being compared. I don't know how you possibly make the argument that what is going on there is not a substantially different use from what happened before. I don't think we ever get to a place based on the testimony we have and testimony that's in the record to issue a special permit for a change in non-conforming use. Because it is substantially different. We can't issue one if it is substantially different period. Because then you go to a variance standard. Are they entitled to a variance? That's not something we can dispose of. They can come to us and seek a variance. They don't have that petition in front of us. They could come to us and try to get a use variance. We'd have an open hearing and we'd hear on it and we'd hear from the neighbors and all that stuff, but I just feel like asking, dealing with this in a way that is less than complete as far as what we have before us for testimony and findings that we can make right now and what we can say as a matter of law about how we feel about this use would be not only unfair to the petitioner because he deserves to get a decision out of us as quickly as possible, that's as complete as possible, but frankly to the abutters as well. This has gone on long enough. This has gone on since--this is an '04 case. This has been in litigation for 6 years.

[PM] That is what the judge is trying to direct us to suggest us to come

back and reach an agreement here that would be good for both the owners and abutters here and make a decision on this and I think that's what we have to now sort this out and say what direction we're going to go in.

[DB] We have to be very clear so there's no confusion at the Land Court if this ends up back there about what our findings are that lead to our decision. Whatever form the motion takes, the motion here, the proposed findings and based on that, here is what is proposed as a matter of our decision. Daisy-chain it all the way down so it's a clear record. Any other facts stand out to anybody in what we heard last time?

[BB] Threatening the neighbors didn't seem to help the matter and there wasn't really a denial on that.

[DB] Right. [Reviews prior Minutes]

[PM] One thing that came out is that from Mr. Guarino that they rent the space for boat storage and for vehicles. That was something he had said that he does. He's doing boats and cars in there and using as he said for his entertainment and hobbies. Those things in my mind stand out in the way that the garage was reconstructed to be able to do hobbies. He says he has a hobby in there he does with rocks. That's in a side room. The height of the garage—the height that's in there is 15 - 16 feet high is much larger than required for storage. There's a couple of bays that were built above the level of car storage for storage of other items that were there, but it's a much larger structure, it's almost as big as some houses you see in town. That's what stood out to me on this, looking at this and talking about the usage.

[ID] Since I'm not voting on this, if it's alright for me to speak as far as deliberations. I was focusing on procedure. Ultimately the Land Court decision that sparked this is a denial of competing motions for summary judgment and then it's been remanded, pages 11 and 12, on remand, plaintiff asserts unilaterally that the addition is not a change in the non-conforming use. However, this is a question for the ZBA and remains unanswered. We have had testimony and a view and plans on that. On remand, the ZBA must also address whether the addition is a change in non-conforming use of the garage and then the next paragraph, if they find that the use one reflects the nature of pre-existing use, that's kind of moot, but that there is no difference in the quality and character and degree and that the current use is not different in kind then it should allow the special permit for the addition. However, if this test reveals a change in the non-conforming use, such use may only continue if allowed by and consistent with the by-laws and a finding by the ZBA that it shall not be substantially more detrimental than the existing non-conforming use to

the neighborhood. That's basically our marching order from the Court, to find those facts that will if this case goes any further in litigation will help the Court continue. I think we've done that. We've taken the testimony. We've seen the property and legal briefs from opposing counsel. I don't think there's any question in my mind that it's substantially more detrimental to the neighborhood. It's not a passive in and out garage use anymore. It's a shop.

[PM] Right. There's definitely a change in there. Going by the items that are listed in the remand order here. Use reflects the nature and purpose of the pre-existing use when the by-law took effect. Use is definitely different from the pre-existing use is basically what we have agreed to here. There is no difference in the quality or character and degree of the use. I don't agree with that. We all understand that and say the same thing. There is a difference. And #3 that the current use is not different in kind in its effect on the neighborhood. Again, we've agreed that is not the case. It is most certainly different in its effect on the neighborhood because of the size of the building and because of the activities in there, what has gone on in there.

[ID] I would point out procedurally if you go onto the next paragraph. It says in the event the ZBA determines the addition is a change to the pre-existing, non-conforming use, the addition's use will only be allowed if determined to be consistent with the by-laws and this discussion of whether a boat is a vehicle only comes into play if we decide that the addition is not a change.

[DB] Because when you're talking about--there's two types of change under 40A, Section 6: there's a change in kind which is never something that's appropriate to have a Section 6 finding. If you find there is a change in kind, which means there is a substantial change that has occurred, then you can't make a Section 6 finding. If you find that there's a change in degree, you then get to the question of is it substantially more detrimental to the neighborhood? Even if we got to the point where we said okay well it's like the nature and extent of what was there before, may be it's a little bit bigger, may be it's an expansion, may be it's an extension, but it's not a change in kind, it's a change in degree cuz it's gotten a little bit bigger, or a little more intense. I still don't think that we could make a Section 6 finding here because I still don't think we can say that this use is not substantially more detrimental to the neighborhood than what was there previously. I don't think we can get there. At least I can't. So where that's the case, they're not entitled to a special permit. We've disposed of that issue as well. So either the answer is it's a change in kind which means you can come back and ask for a variance or it's

change in degree that's substantially more detrimental to the community and you're not entitled to a special permit, so you can come back for a variance. I think we can dispose of both of those issues tonight. I think we can go farther than the judge necessarily--the judge is basically saying tell us whether these things are the types of things that would be viewed as being appropriate for a Section 6 finding and that aren't substantially more detrimental to the neighborhood and if you tell me that, then I want it remanded so you can tell me whether you believe that or not. So I think saying not only do we think that it's a change in kind, but at the very least it's a change in degree that's substantially more detrimental, we've disposed of both issues in a way that's final or in a way that at least then we don't have to have abutters and petitioner come back here again. They can either go to the Land Court or come back to us with a use variance request.

[PM] Based on that thinking, you felt that answers the questions that are here on the remand.

[DB] Yes. Threshold question is is this a change in the non-conforming use?

[PM] Definitely is. Attorney Dwyer, do you follow and concur?

[ID] I do totally. I also want to point out back to page 11. If the ZBA finds that the use reflects the nature and purpose of the pre-existing use. Okay. We haven't done that but semicolon there is no difference in the quality of character and that this is not an either-either-either. We have to find all three things in favor of owner and the consensus of the Board we find all three of these conditions not in favor, that's a change of the nature and purpose of the pre-existing use, it's a substantial difference in quality and character and degree of use, then the use is different in its kind on the effect on the neighborhood. Emphasizing the and.

[DB] It is a conjunctive test.

[ID] It's not as if we find one of these things, he gets the relief. We have to find all three. We're not finding any.

[PM] He's saying if you found all three positive on here, you could come back and issue a special permit for the addition and we're not finding that in our discussions here. We're finding that these three items, we don't agree with. We're saying no to those so, therefore, we're saying we don't think we can issue a special permit. Three items pointed out to us on remand.

MOTION #23-2004 (Darren M. Baird) - to make the following findings of fact. First that based on testimony and documents we have, prior to Mr. Guarino acquiring the property, the property was at least in part

inhabited by the owner and that the original 6-bay garage located at the back of the premises was in part used by that original owner as well as leased to at least in part third-parties for the storage of motor vehicles and other things. Second that upon Mr. Guarino buying the property, he never resided in the property. He's always resided elsewhere. He moved out the third-parties that were renting space from him over time and moved them out and stopped that rental use as it had historically existed. After that occurred, at some point prior to construction of the addition, he took out walls in between each of the bays as well as the heating system and other appurtenances to the garage and then built the addition attaching to it; that the tenants on the property since Mr. Guarino's ownership have not had access to or the ability to use the garage in any way shape or form; that third-parties who use the garage other than Mr. Guarino the owner have access to the garage and to the things that they have in the garage; that Mr. Guarino uses the garage currently for not only storage of vehicles by third-parties for which he may or may not, sometimes charges rent, that he sometimes charges rent and at other times has not charged rent for storage of materials and motor vehicles in the garage; that he also uses it for his own personal use for his hobbies as well as entertainment purposes for himself and his family, including building of boats and rock sculptures and other things and that's the current use of the property. The use is independent from the residential use as it does not benefit the residential use or the occupants of the residential use at all. It's completely divorced from the residential use. Those are the findings of fact.

[PM] Would like to add something that's not on there. Rent space for boat storage as well along with the motor vehicles. You mentioned other along with cars. That was specifically stated that the space was rented for boat storage.

[DB] Amend finding not only cars and other motor vehicles, but boats as well.

[PM] Aside from this. If you've got motor vehicles in there, boats in there, the possibility of gasoline in there which would I think initiate some other action if you're going to store something like that with today's codes, you'd have to have some type of permits from the other authorities.

[DB] Sprinklers.

[PM] Boats on-site or in the garage when you get together with a group of them, that would be a serious consideration.

[DB] That may not be a finding of fact. Something that we may put in

the decision somewhere. Other facts I would like to add to the findings of fact as part of motion would be that the use of the property based on testimony of abutters that it's a very noise use, at times noxious use with people fogging motors of boat in the yard and other loud, disruptive occurrences going on in the garage at hours later in the evening than are appropriate that disturb the peace, including parties, things going on there that go beyond the pale of what would be permitted to occur in a residential garage as well as some of the hobbies that Mr. Guarino undertakes that seem to produce quite a bit of noise and traffic in and out of the property at different hours that definitely has an impact on the neighborhood in a way that is different from the impact of just storage of cars coming and going in the old bays. Based on those facts unless someone has other facts.

[ID] Would like to add to findings of fact that the site view demonstrated that the present owner has constructed a bathroom facility, there's a lavatory, toilet and sink, and a small kitchenette facility at one end of the building which facilitates this social. Important because it is certainly a change. Don't have bathrooms in garages. Facilitates this social use of the place which has become a problem.

[DB] Add a finding that based not only on testimony but site view, amenities added to the garage since Mr. Guarino's ownership, including bathroom facilities and limited kitchen facilities on one end of the garage near the work room are not something that had historically been there in the 6-bay garage. Based on those facts, further motion that Board find that the uses currently being made of the garage are substantially and qualitatively different and different in kind than what was the pre-existing, non-conforming use found to exist by the Land Court and that based on that change-in-use because it is qualitatively different based on the obvious noise it's produced, hours of operation, what it's being used for for personal and entertainment and hobby use as well as being used for other enterprises that are completely divorced from the primary use of the property for residential purposes makes it a change-in-use that is qualitatively different and therefore a change in kind that is not permitted by the zoning by-law of the Town of Winthrop and, therefore, is not permitted on the premises. Further finding that even if a finding were made that this was not a change in kind, that this was a merely a change in degree from the pre-existing, non-conforming use, the use is substantially more detrimental based on the unrefuted testimony of the abutters that the use is substantially more detrimental to the neighborhood than the pre-existing, non-conforming use was and, therefore, it would be inappropriate to issue a special permit with regard

to the use. In closing, we were charged by the Land Court to address whether the use of the addition is a change in the non-conforming use. I think that the motion would be yes this is a change in the non-conforming use and it is a change that is different in kind on its effect on the neighborhood and it is not reflective of the nature and purpose of the pre-existing, non-conforming use and there is a substantial difference in the quality and character and degree of the use that's being made now from the pre-existing, non-conforming use and based on that I would say that the use is not permitted and it not a use that is appropriate for a finding of a special permit.

SECOND (Brian J. Beattie)

[PM] Based on what we've gone through and looked at and what the Land Court is looking for, that answers the questions we have before us.

VOTED All in favor.

[PM] If we've caught everything we've talked about. Question is whether a boat is a vehicle under the by-law. A question like that should be answered.

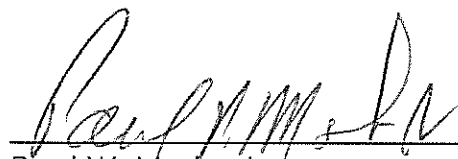
[DB] I don't think we get there. Reason why I don't think we get to the question of whether a boat is a vehicle is because irrespective of whether or not he had boats in there or not, based on the findings we made, the use of the property, the way it's being used in its' totality now as an entertainment, work shop, that's completely divorced from the primary use of the property and is different in kind from what was being done there before irrespective of whether it was cars, boats, trucks, whatever was in there, this case doesn't turn on the issue of boats that people previously focused on. Now that we have more testimony and testimony that wasn't before the trial court at the time the remand decision was made, our decision is actually broader than that which is it doesn't just turn on whether a boat is a vehicle, it turns on the totality of the use and decision is the fact that boats are being stored there to me is one more fact that shows that there was a change-in-use, but it's not the driving fact. I don't think we need to deal with it and I wouldn't deal with it. You don't get to the 25% increase issue either because dimensionally it's a conforming structure if he were to use it for things he's allowed to use it under the by-law. It's completely fine in that instance. If he used it in a way that he's allowed to use it under the by-law, great. It can be that big. It can be that dimension. The 25% is only if it is for with regard to use that is

non-conforming. The pre-existing, non-conforming use being expanded. We don't get there either on that.

MOTION (Darren M. Baird) - to approve *Minutes* of May 27, 2010.
SECOND (Brian J. Beattie)
VOTED All in favor.

MOTION (Darren M. Baird) - to adjourn.
SECOND (Brian J. Beattie)
VOTED All in favor.

Adjourned at 8:40 p.m.



Paul W. Marks, Jr.
Chairman