

Section 76, Block 1, Lot 1.1

TOWN OF NEWBURGH: COUNTY OF ORANGE  
ZONING BOARD OF APPEALS

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*In the Matter of the Application of*

LAKE CREEK PROPERTIES, LLC AND LINGO  
ASSOCIATES, LLC [MCDONALD'S]

**DECISION**

*For relief as follows:*

- *An interpretation of Section 185-19 of the Zoning Ordinance of the Town of Newburgh permitting the reconstruction of a pre-existing, non-conforming use after demolition.*

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**Introduction**

Lake Creek Properties, LLC and Lingo Associates, LLC [McDonald's] seeks relief as follows: An interpretation of Section 185-19 of the Zoning Ordinance of the Town of Newburgh permitting the reconstruction of a pre-existing, non-conforming use after demolition.

The property is located at 65 North Plank Road, is in the B Zoning District, and is identified on the Town of Newburgh tax maps as Section 76, Block 1, Lot 1.1.

The property is presently improved by a McDonald's fast food establishment. Fast food establishments are not permitted in the B Zoning District. The current use is protected as a pre-existing nonconforming use.

The applicants have submitted a proposal to the Town Planning Board

wherein they propose to demolish the existing 5,600 square foot +/- existing McDonald's and replace it with a slightly smaller – 5,200 square feet +/- - McDonald's. It is also proposed that the “new” McDonald's will be located in a slightly different location on the lot than the existing McDonald's.

A public hearing was held on February 27, 2014. In order to remedy an error regarding the proper publication of legal notices in the official newspapers of the Town (*The Mid-Hudson Times* and *The Sentinel*) the public hearing was adjourned until March 27, 2014. Thereafter, at the request of the applicant, the public hearing was adjourned until April 24, 2014 and then again until May 22, 2014 at which the public hearing was closed.

#### Law

This application, and the interpretation it seeks, requires an analysis of the various provisions of Section 185-19 of the Town Code entitled “Nonconforming Buildings and Uses.” Specifically implicated in this application are the following Sections:

- Section 185-19(A)(1): **Alterations.** A nonconforming use shall not be enlarged, extended, reconstructed or restored, except in accordance with subsection B(2) herein, or placed on a different portion of the lot or parcel of land occupied by such use on the effective date of this chapter, nor shall any external evidence of such use be increased by any means whatsoever.
- Section 185-19(B): **Nonconforming buildings.** A nonconforming building, or a building housing a nonconforming use shall not be modified in any way described below<sup>1</sup>, except as provided in subsection C below:

(1) **Relocation.** A nonconforming building or structure shall not be moved to another location where

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<sup>1</sup> This Code provision is somewhat misleading as “modifications” are also expressly allowed in section 185-19(B)(2), as will be discussed hereinafter.

such building or structure would also be nonconforming, unless such movement would decrease the nonconformity;

- (2) *Restoration after damage.* A nonconforming building shall not be restored for other than a conforming use after damage of more than 50% from any cause, unless a prior nonconforming use is reinstated within one year of such damage; if the restoration of such building is not completed within said one year period, any prior nonconforming use of such building shall be deemed to have been discontinued, unless such nonconforming use is carried on without interruption in the undamaged portion of the building. No enlargement of the nonconforming building shall be permitted as part of an allowed restoration.

In this application, the proposal is to demolish an existing nonconforming use, a McDonald's, and replace it with the same nonconforming use albeit in a slightly smaller building and at a slightly different location on the lot.

### Background

After receiving all the materials presented by the applicant and hearing the testimony of Keith Cahill from Bohler Engineering, David Wisotsky of Bohler Engineering and Jay Myrow, Esq., at the public hearing held before the Zoning Board of Appeals, the Board makes the following findings of fact:

1. The applicants are the owners of a 2.791± acre lot (tax parcel 76-1-1.1) located at 65 North Plank Road.
2. The property is presently improved by a McDonald's fast food restaurant.
3. The applicant's proposal is to demolish the existing McDonald's fast food restaurant and replace it with a new, slightly smaller, McDonald's

fast food restaurant and to place the new McDonald's on a slightly different portion of the existing lot.

4. No members of the public spoke with regard to this application.
5. The applicant was referred to the Zoning Board of Appeals by the Town of Newburgh Planning Board pursuant to correspondence from their counsel dated October 21, 2013.

After hearing the testimony at the public hearings and considering the materials received by the Board and after viewing the subject site, the Board decides as follows:

#### **SEQRA**

Requests for interpretations are designated as Type II actions under SEQRA. {see 6 NYCRR 617.5(31)} As such, this application is not subject to review under SEQRA.

#### **GML 239 Referral**

This application is not required to be referred to the Orange County Planning Department for review.

#### **Interpretation Request**

The authority for the Board to render interpretations of the local zoning ordinance is found both in State Law and the Town of Newburgh local ordinance.

Section 267-b(1) of the New York State *Town Law*. Section 267-b(1) is entitled "Permitted actions by board of appeals." It provides as follows:

Orders, requirements, decisions, interpretations, determinations. The Board of Appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from, and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken.

Section 185-54 (A) of the Code of the Town of Newburgh further provides:

Interpretations. To determine, on an appeal from an order, requirement, decision or determination made by administrative official or, on a request by any official board or agency of the Town, any of the following matters: (1) The meaning of any portion of the text of this chapter or of any condition or requirement specified or made under the provisions of this chapter; (2) The exact location of any district boundary shown on the Zoning Map.

It is therefore clear that both state and local law specifically authorize the Board to entertain the application made of Lake Creek/Lingo Associates, LLC seeking the interpretation herein requested.

#### Discussion

As a preliminary matter, the Board notes that the use maintained by the applicant is a (1) nonconforming use inasmuch as fast food establishments are not permitted in the B Zone and (2) that this *nonconforming use* is located within a *nonconforming building* in view of the fact that the existing building has a front yard setback of 36.3 feet whereas the minimum required front yard setback is 40 feet. As a result of this, *both* the provisions of Section 185-19(A) entitled Nonconforming Uses and the provisions of Section 185-19(B) entitled Nonconforming Buildings must be analyzed.

Addressing the requirement of Section 185-19(B)(1) first, the Board finds that the relocation of the nonconforming building is permissible under the express terms of Section 185-19(B)(1) because the existing nonconforming front yard setback will be eliminated by the relocation of the building. Accordingly, the Board finds that the relocation of the building would *decrease* the existing nonconformity and this relocation is therefore in compliance with Section 185-19(B)(1) and is expressly permitted.

Addressing the requirement set forth in Section 185-19(A)(1) that a nonconforming use shall only be *reconstructed* in accordance with Section 185-19(A)(2) is more problematic.

Section 185-19(B)(2) of the Code is entitled "Restoration after damage." This provision of the Code provides that a nonconforming building shall not be restored for other than a conforming use after damage of more than 50% from any cause unless a prior nonconforming use is reinstated within one year of such damage. (*Emphasis supplied*).

The applicant proposes to *demolish* the existing McDonald's. At the public hearing, the applicant's representatives advanced the argument that *demolition* falls within the umbrella of damage from *any* cause established by section 185-19(b)(2) and that they are therefore entitled to "restore" the new McDonald's after they demolished the old McDonald's.

The interpretation before the Board thus turns on the meaning of the phrase "any cause" and, more specifically, if that phrase, read in the context of the Code provision at issue, encompasses the demolition of a building.

Consulting the Merriam-Webster online dictionary for a definition of the word "any" yields the following result:

The word "any" means –

*Every; used to indicate one selected without restriction;*

*All; without reference to quantity or extent;*

*Unmeasured or unlimited in amount, number or extent.*

An examination of the above cited dictionary definition of the word "any" thus leads to the conclusion that a fair meaning of the word is *without limitation*.

Significantly, in the Board's view, there is no limiting language in Section 185-19(B)(2) that modifies or in any way limits the phrase *from any cause*. Had the Town legislative body intended to exempt intentional demolition from the saving clause of section 185-19 (B) (2) they could have expressly done so. They did not.

Absent any modifying or limiting language, and based upon that fact that the phrase from "any cause" must be read to mean exactly what it says – that is a cause without any limitation on what that cause may be - this Board is constrained to determine that the intentional demolition of a structure constitutes "any damage" as that term is used in Section 185-B(2).

Therefore, based upon the foregoing, this Board determines that the applicant may demolish the existing McDonald's on the premises and thereafter construct a new McDonalds as proposed on the plans identified herein, subject to all other applicable code provisions, including the time frame for reconstruction set forth in section 185-19(B)(2) of the Town Code.

### **Decision**

After hearing the testimony at the public hearing and considering the materials received by the Board and after viewing the subject site and after analyzing the issues before the Board, the Board decides and does hereby determine the intentional demolition of the existing nonconforming McDonald's constitutes damage from any cause thereby allowing the proposed slightly smaller McDon-

ald's be constructed as proposed on the plans identified herein so long as that construction is in compliance with all other Code provisions including the time limitation imposed by Section 185-19(B)(2).

Dated: June 26, 2014



Grace Cardone, Chair  
Town of Newburgh ZBA

*By roll call a motion to adopt the decision was voted as follows:*

**AYES:** Chair Grace Cardone  
Member John McKelvey  
Member Darrin Scalzo  
Member Michael Maher  
Member John Masten

**NAYS:** None

**ABSENT:** Member James Manley  
Member Roseanne Smith



STATE OF NEW YORK )  
 )ss:  
COUNTY OF ORANGE )

I, BETTY GENNARELLI, Secretary to the Zoning Board of Appeals of the Town of Newburgh, do hereby certify that the foregoing is a true and exact copy of a Decision rendered by the Zoning Board at a meeting of said Board held on

June 26, 2014

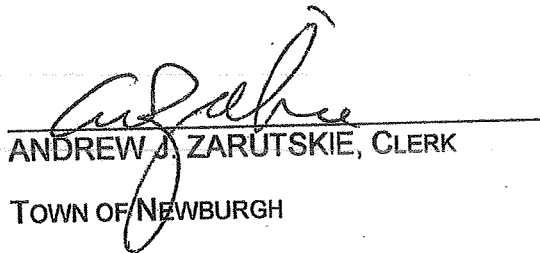


BETTY GENNARELLI, SECRETARY

TOWN OF NEWBURGH ZONING BOARD OF APPEALS

I, ANDREW J. ZARUTSKIE, Clerk of the Town of Newburgh, do hereby certify that the foregoing Decision was filed in the Office of the Town Clerk on

JUL 28 2014



ANDREW J. ZARUTSKIE, CLERK

TOWN OF NEWBURGH

ZBA MEETING – JUNE 26, 2014 (Resumption for decision: 8:42 PM)

LAKE CREEK PROPERTIES, LLC /  
LINGO ASSOCIATES, LLC.  
(McDONALD’S)

65 NORTH PLANK ROAD, NBGH  
(76-1-1.1) B ZONE

Applicant is seeking an Interpretation of 185 Attachment 11- Schedule 11 - Use Interpretation - to demolish and rebuild the existing drive-thru McDonald’s establishment.

Chairperson Cardone: Okay, we have two Reserved Decisions from last month. And the first one is Lake Creek Properties (/Lingo Associates, LLC.) that’s a McDonald’s they were seeking an Interpretation of 185 Attachment 11- Schedule 11 - to demolish and rebuild the existing McDonald’s drive-thru.

Mr. Donovan: The essence of the interpretation that they are seeking is an Interpretation of Section 185-19 that would allow them to demolish the building because a...and then rebuild a smaller building eliminating and existing non-conforming condition relative to a lot line and the phrase that they are focusing on is that they are allowed to restore a non-conforming a...use after damage from any cause and the interpretation is any cause is not...there is no limiting in there that the intentional demolition would allow the a...reconstruction of a new building after it’s demolished.

Chairperson Cardone: Do we have discussion on this?

Mr. Maher: It’s just a...on the word any, definition of, pretty much every use to indicate one selected without restriction, all without reference to quantity or extent, unmeasured unlimited in amount, number, extent, the word any. Based on that and that...and the testimony at the last meeting I’d have to say that a...any damage would be construed to include intentional demolition of the building. The fact that they are also by doing so reducing the size of the building and the non-conformities; I’d be a...willing to make a motion to approve it.

Mr. McKelvey: I’ll second that.

Ms. Gennarelli: That’s the interpretation that we’re approving that interpretation.

Mr. Donovan: That’s, that’s correct.

Mr. McKelvey: That’s the interpretation.

Ms. Gennarelli: Okay. Roll call.

John McKelvey: Yes

Michael Maher: Yes

John Masten: Yes

Darrin Scalzo: Yes

Grace Cardone: Yes

Chairperson Cardone: The motion is carried.

PRESENT ARE:

GRACE CARDONE  
JOHN MC KELVEY  
MICHAEL MAHER  
JOHN MASTEN  
DARRIN SCALZO

ABSENT:

JAMES MANLEY  
ROSEANNE SMITH

ALSO PRESENT:

DAVID A. DONOVAN, ESQ.  
BETTY GENNARELLI, ZBA SECRETARY  
GERALD CANFIELD, CODE COMPLIANCE

(Time Noted – 8:46 PM)

ZBA MEETING – MAY 22, 2014

(Time Noted – 7:56 PM)

LAKE CREEK PROPERTIES, LLC /  
LINGO ASSOCIATES, LLC.  
(McDONALD'S)

65 NORTH PLANK ROAD, NBGH  
(76-1-1.1) B ZONE

Applicant is seeking an Interpretation of 185 Attachment 11- Schedule 11 - Use Interpretation - to demolish and rebuild the existing drive-thru McDonald's establishment.

Chairperson Cardone: Our next applicant Lake Creek Properties, LLC./Lingo Associates, McDonald's.

Ms. Gennarelli: Okay, on this one the paper had omitted the ad from the Mid-Hudson Times. So the ad was published, the Legal ad was published on March 19<sup>th</sup> so all mailings and postings and publications are in order.

Mr. Myrow: Good evening, my name is Jay Myrow, I'm an attorney with Blustein, Shapiro, Rich & Barone in Goshen, New York and I'm the attorney for the applicant in this matter. And I understand this matter is a...we haven't been representing McDonald's and except from the last time the Board met on this matter, I believe it was last November (February 27, 2014). A...this application is for an Interpretation and it stems from an application to the planning board a...which was a proposal for McDonald's to basically demolish a...their existing building and put up a new prototype basically to modernize their facilities. I believe the matter was referred to this Board from the planning board for an Interpretation as to whether McDonald's use as a non...as a legal non-conforming use could in fact be demolished and rebuilt pursuant to the terms of your Code and the applicable section of the zoning laws, Section 185-19 which a...applies to non-conforming buildings and uses. So I believe the issue is a...from our point what we're looking for is an Interpretation of the Code that would direct the planning board a...that in fact, demolition and re...reconstruction of the building is permitted under you Code and McDonald's has proposed basically to go from a...the proposal is to go essentially from a fifty-six square foot footprint to reconstruct...to actually a smaller building to essentially a fifty-two hundred... Did I say fifty-six hundred? I said fifty-six square foot? That's small. Okay, so from a fifty-six hundred square foot building to a fifty-two hundred square foot building. So a...but the reconstruction would not be exactly in the same footprint a...so we want...we would like to also interpret that when they do the rebuild it can be substantially in the same but because the design of the building is going to be different...it's permitted to actually modify and tweak the exact location of the reconstruction as to where...where it will be built. And I'm hoping that I'm stating everything that the Building Inspector might need to allow us to go forward in the planning board. So I think that's the scope of what the interpretations are that we need. So a...I would call the Board's attention to a...Section 185-19 of the Zoning Law, sub-section B-2 and I believe this is what we claim to be the authority to allow the building to be demolished and reconstructed and basically B-2 says that restoration after damage in non-conforming buildings shall not be restored or other than...for other than a non-conforming use after damage of more than 50% from any cause unless a prior non-conforming use is reinstated within one year of such damage. So the key points there are from any cause and we're asking the Board to interpret that to mean that an intentional demolition of the building will trigger a one year period to reinstate

the a...the use a...so long as we're not enlarging or otherwise a...unlaw...violating any other bulk setbacks. And in terms of...I would call the Board's attention to B-1 a...relocation in a non-conforming building or structure shall not be moved to another location where such building or structure would also be non-conforming unless such movement would decrease the non-conformity. In this case a...it's not necessarily the movement that's going decrease the non-conformity it's the fact that we're actually reducing the size of the building. So, it's our position that under B-1 a minor deviation in terms of where your footprint is going to be should be permitted under that section. So those are essentially the two sections that we believe support our application for the interpretation. I'm happy to answer any questions.

Mr. Donovan: Is everybody satisfied with the information that they have the map that they have now shows the existing location plus the new location? Or do you have anything that's colored?

Mr. Myrow: I...I apologize. David Wisotsky is here with me from Bohler Engineering. He has renderings and he has a map with the existing footprint...

Mr. Donovan: The other guy from Bohler wasn't good enough for this application?

Mr. Myrow: Say it again.

Mr. Donovan: I don't know, we got two guys from Bohler tonight...I...sorry.

Mr. Wisotsky: They had to send in the better looking one right now.

Mr. Donovan: Do you have anything that you could put, I mean we have a map here; do you have anything you can put up on the board for us?

Mr. Wisotsky: Okay and for the record it's David Wisotsky with Bohler Engineering, I'm representing McDonald's and what I...what I put up on the...on here is...you should also have a copy of in your application but just for reference this is...this is the a...a...land title survey prepared by Control Point Associates. It just shows...shows the existing...the existing conditions. The existing McDonald's building as Jay had mentioned is roughly fifty-six hundred square foot store a...that fronts North...North Plank Road and it is in the a...in the location right...right in the middle...right in the middle of the plot. And then moving right ahead to a rendered version of the site plan that...that actually is the same...same as Sheet 4 that's in your packet. It's just colorized for presentation so you can see...so you can see the difference. This is a...the a...proposed McDonald's building is the orange or yellow piece in the middle surrounded by the grey pavement and the green landscaping. So if you compare and contrast the two, the a...in this layout, the...the proposed McDonald's is you know, is roughly, roughly ten to fifteen feet further to the south than...than the existing building and it's also about another twenty or thirty feet to the west off of the...off of the road...off of North Plank Road, away from North Plank and the existing condition, which actually eliminates one of the existing setback variances. The existing has a non-conforming front setback which the...the proposed condition would actually eliminate that and shift the building down. The layout...the layout as proposed really remains the same it...it...it operates in a typical counter clockwise rotation to get to the drive-thru in the back with parking around it. And that's the same as the existing case and proposed so

the a...the proposed building only roughly fifty-two hundred square feet. I think to be exact its fifty-two hundred and six square feet versus the existing which is fifty-six hundred and twenty a...sorry, fifty-six hundred and fifty-seven square feet so it's a...in our view it would be a decrease of the non-conforming use and...and make a better...a better, more efficient kind of site plan as well.

Chairperson Cardone: I have a question for you Dave. Would this fall under B-1, if they're decreasing the non-conformity?

Mr. Donovan: Well, I, you know, I guess the...the question is B-1 a non-conforming building or structure shall not be moved to another location where such building or structure would also be non-conforming unless such movement would decrease the non-conformity. A...so I think the question before the Board is could you rationally determine that a...to satisfy an existing side yard setback which presently is being violated plus building a small building would that decrease the non-conformity? I think that you could a...you have a rational basis to draw that conclusion.

Mr. Maher: Then we get to number two.

Mr. Donovan: Then you get to number two.

Chairperson Cardone: Number two.

Mr. Donovan: I think Jerry has a question.

Chairperson Cardone: Yes?

Mr. Canfield: If I may? And exactly the point I was going to make. A...I think counsel for the applicant has done accurate presentation however, I respectfully disagree with that B-1 does apply because the B section pertains to non-conforming buildings. It is not the building that's the question here it's the use.

Mr. Donovan: I thought I heard that there was a setback being violated by the existing structure that would be a...which violation would be cured by moving the building.

Mr. Canfield: I think the...the non-conforming use...see by virtue of tearing down the building or the need for a site plan negates any non-conformities so that's what brings the application here. It was a referral from the planning board for the site plan and the demolition and reconstruction of a new facility. By virtue of that site plan, you lose the existing non-conforming use protection so that's what brings the application here. And I think the accurate application of the Code is A non-conforming uses which that is what directs you to B-2...

Chairperson Cardone: Right.

Mr. Canfield: ...which deals with non-conforming buildings specifically to restoration after damage a...I think the applicant's representative has made a presentation with respect to that our Code does not specify how the damage is to be incurred. He...he's claiming that because we're

tearing the building down that's damage. A...and it could very well may be, the use and the aging of the building could be damage that is irreparable and there's a need to take the building down and reconstruct it. But I don't believe that the B-1 Section is what applies here. And that's just a clarification point.

Mr. Myrow: Well if I could...

Chairperson Cardone: A-1 is what you would apply.

Mr. Canfield: That's correct.

Mr. Myrow: Well, my...my only mention of B-1 was with respect to the reconstruction of the building and the necessity. I believe it came up in front of the planning board, I believe it was asked a...as to whether or not if the building...if it was permitted to come down and go back up whether it had to be exactly in the same footprint. I believe that was asked. I wanted to make sure, even if it wasn't, I wanted to make sure that we don't have to come back here if the demolition is permitted and we can reconstruct if they have to tweak the location and the Section 1 does apply to location. And it pertains specifically to the building...in...in my opinion it what would be what was proposed to be reconstructed so my reading of B-1 allows...is authority to say listen, you need...if you're going to rebuild the thing you don't have to put it exactly brick for brick within the existing footprint. Not only are you allowed to rebuild it under B-2 but you do it if you do something that rationally makes sense and in our case we're actually building a smaller building. The planning board doesn't have to say to the applicant if you deviate one foot from the existing footprint you got to go back to the ZBA. I don't think that's what was intended and I wasn't looking at B-1 for a forty...to tear it down and build it back up. That's a separate question and I agree that's covered under B-2 but I was only referring to B-1 for the proposition that if we get past B-2 can the planning board look at this and say we can actually allow you to locate it a little off from where the prior one was. That was...that was my only purpose of referencing it that way.

Chairperson Cardone: But I think what Jerry is saying you have to get past A-1 first.

Mr. Canfield: That's the way I interpret it.

Chairperson Cardone: That's right.

Mr. Canfield: That's correct.

Mr. Myrow: To get past which?

Chairperson Cardone: A-1.

Mr. Wisotsky: A-1?

Chairperson Cardone: Yes.

Chairperson Cardone: Or placed on a different portion of the lot or a...

Mr. Myrow: But A...A-1 says a...

Chairperson Cardone: ...parcel of land.

Mr. Myrow: ...non-conforming use shall not be enlarged, extended, reconstructed or restored except in accordance with Sub-Section B-2. So that's how I go to B-2.

Chairperson Cardone: But it reads or placed on a different portion...

Mr. Myrow: Yeah, B-2 is...

Chairperson Cardone: ...of the lot or parcel.

Mr. Myrow: Listen, B-2 is what's going to allow us to either knock this thing down and rebuild it or not. If...if the Board interprets this to say that for any cause, and damage from any caused includes an intentional demolition which in my opinion actually there's a public policy reason to include that language, I don't think it's just random, public policy is...is that, you know, if you have a building... I believe this was built in the '70's...

Mr. Canfield: I believe that's been quite a while.

Mr. Myrow: ...yeah, so now you've got a building that's thirty, forty years old, why force the...the...why force these people to continue to operate in a building that may over time just use...lose its usefulness. You're code actually provides, hey, if you want to modernize it by tearing it down and rebuilding it there's actually authority for you to do that because an intentional demolition could fall within any cause a...that...that's, I believe, there's actually a real...a...a...a strong public policy argument to support the language there in terms of allowing for a teardown and a buildup.

Mr. Donovan: Jerry...

Mr. Myrow: Number one your window.

Mr. Donovan: Jerry, can I go back to 185-19-B? A non-conforming building or a building housing a non-conforming use, do we cover both the building and the use in there or...or do you still think I'm wrong? Cause I could very well be but...

Mr. Canfield: It does say or non-conforming use but A-1 is what reverts you to B-2. That's what I'm basing my opinion on.

Chairperson Cardone: Right.

Mr. Canfield: However, ultimately this Board has that authority to make that determination. I'm just rendering my opinion on it.



Mr. Donovan: And your opinion is valued.

Mr. Manley: And I think that this...this Board has taken very painstaking approaches towards Interpretations as interpretations do often times set precedent. And you bring up a...a valid point but one of the things that...that I would ask, playing devil's advocate, and asking you the question if that's so obvious, why wouldn't the Town simply include that in the Code? When they developed the Code, why not...why not be more explicit in expressing exactly what you said, you know that, you know if you wanted to demolish the building for purposes of the ...the building has used up its useful life then that is covered under that. I mean, it...it specifically says damage a...and in the subsequent sentences it does say from any cause but it...it specifically references damage so...so...

Mr. Myrow: But you can't ignore for any cause, the three words.

Mr. Manley: ...but I mean you are splitting hairs. Is it...is it intentional damage or unintentional damage?

Mr. Myrow: Well it says for any cause. From any cause and that to me is...is a...an...expresses an intent on the part of your legislative body that it's supposed to be...to have a broad interpretation and now...

Mr. Manley: And we...

Mr. Myrow: ...you could...

Mr. Manley: ...we revisited the Code back in...

Mr. Myrow: Wait.

Mr. Manley: ...2005...

Mr. Myrow: Yes.

Mr. Manley: ...when they redid the Master Plan and perhaps that should have been, if that was a...a thing that stuck out to them that should maybe have been addressed in...

Mr. Myrow: Maybe.

Mr. Manley: ...in '05.

Mr. Myrow: Well, you're assuming that it's not as intended. It's supposed to be that broad. Any da...any cause, I mean you're assuming that because they didn't elaborate on it they should have elaborated on it. My position would be that by looking at...at the language in it it's broad for a particular reason and that particular reason might be the case where damage, although intentional, serves a legitimate public purpose. And that is to prevent businesses that have long

standing non-conforming uses a...it's not intended, our code is not intended to prevent them from modernizing their facilities even if it's a complete rebuild. That, you know, we have restrictions on non-conforming uses but we are not restricting to the point where for a one year period if you chose to tear your building down to modernize and to make it better and to certainly make it more efficient and more functional we're going to give you the opportunity to do that. A...would it have been nice if...you know, listen, I don't know how many pages our code is but if every time you wanted to see the elaboration you would like to have your Code would be three times as big as it is. So you sit here as the Board that actually interprets the Code and I guess the ultimate question here is whether...whether those three words for any cause have a broad a meaning as I believe they're...they're intended to have. And I...I...I...I appreciate the comment because it's always nice especially from where I sit to have it elaborated exactly as you would want it to be but when I look at the read...when I look at the words, when I analyze a code there's two things that could have happened here. The Board could have simply not elaborated and they should have or they saw no need to elaborate, we want it to be this broad. So, I would suggest that because you could actually point to a public policy reason and a legitimate, health, safety, public interest reason why you should give it a broad meaning I think if you look at...I think there's plenty of reasons why that interpretation should be given. And ultimately, you know, to cut to the chase and stop talking legalize you are going to have a better building. It's a McDonald's. It's been there forever. It's probably rundown. It's probably withstood, you know, withstood its useful purpose and at the end of the day they're going to rebuild, it's going to be pretty much the same where it is but it's going to be a more efficient layout. It's going to cure some of the setback problems we have. Is that what the Board...is that what you...is that what the Town Board intended? I would say, you...certainly you could give a fair reading to that.

Mr. Manley: Just one more question. What about the non-conforming use perhaps that maybe isn't so desirable? In this particular case you are making the statement that your particular building which is a nice building, no doubt that it's going to be much nicer than what you have but what about that one building that is non-conforming? Or it could be two buildings or three buildings, in the future, that all of a sudden the public hears is going to re-modernize itself and re-change and now it doesn't have to go through this...this oversight because of this new interpretation that this Board rules on...

Mr. Myrow: Well.

Mr. Manley: ...and all of a sudden you have something that now is going to be brand new that is despised by the community without having the opportunity to come before the Board because that interpretation has been made. So I throw that question at you. What about that particular case?

Mr. Myrow: Well there's two things, number one a...most likely, I...I believe in most circumstances you're going to have to go through the planning board process. Just like we're going through the planning board process so if it's permitted that a building that's or a use that is not particularly liked a...has to...must do a total teardown and rebuild the planning board has the authority to mitigate as much as possible where they didn't have it without the teardown, you know, maybe additional screening, maybe change the signing, maybe change the colors a...maybe change the setbacks, maybe relocate the building a...there is...there is one level of

review that's gonna have to happen and there is an opportunity there to try to fix some of these things. From a legal standpoint, a...a non-conforming use that preexists zoning is considered a legal use whether the public likes it or not and it has...in an legal non-conforming use essentially has a...the same a...protections that a permitted use has within the zone so a...typically the way if you really have something that's abhorrent your legislature and your...your Town Board has the authority maybe amortize that use out. A...I mean that's done with adult uses, it certainly could be done with other uses but I think you're now into more of a legislative function than, you know, and that's really something that an elected official should be handling on behalf of the public a...I hope that's the short answer. I'm not really sure but again, there are lev...you know, it's a good question because and...and I think the real answer is where if you don't allow the teardown and the rebuild of the abhorrent building it can stay there forever just the way it is. If they want to tear down and rebuild it at least you have some opportunity to have the planning board impose whatever things they can do to make it better for the public. And then you have the opportunity to have the Town Board amortize them out and get rid of them. So...I think that's typically how you look at it.

Mr. Brown: Is this a Public Hearing?

Chairperson Cardone: Yes.

Mr. Brown: May I make a comment?

Chairperson Cardone: Absolutely. Just identify yourself for the record.

Mr. Brown: Okay, I'm Charles Brown and my office is actually... Is this your dumpster here?

Mr. Wisotsky: Over here.

Mr. Brown: I'm directly across the street from that. I...if I understand this right, what makes this a...a...a non-permitted use is the drive-thru, correct? A...and if this is what they've been doing at other McDonald's this is actually now a dual drive-thru so they're actually expanding the non-conformity or maybe that's what really should be addressed by the legal counsel here. A...I think maybe that's the intent of the planning board for an interpretation again. I wasn't at the planning board meeting for this. A...but, you know if you come off with a positive determination in...in the favor of the applicant I think you got to be clear that the drive-thru is really a...being modified. A...and that's what makes this a non-conforming use if I'm understanding the code.

Mr. Wisotsky: So if I...

Ms. Gennarelli: Do you need batteries, Jerry?

(Microphone not working)

Mr. Manley: You have to repeat all that.

Mr. Brown: I will.

Chairperson Cardone: You can take the other microphone off the stand.

Mr. Brown: I am not against the project. I just want to be clear on that.

Mr. Wisotsky: Yeah, and the...that is correct. The drive-thru...the drive-thru does a...does change but a...a...but it's still a...one drive-thru with one a...payment window, one pick up window, the same...the same as there is today. What...what happens is they...they do a dual...a dual stacking lane in the back to allow...to allow for more efficient a...efficient stacking and...and a easier way...easier way of ordering. So...so while a...that...that is accurate, that we are improving the stacking and improving the efficiency of it and...and adding to...and adding a split in back where there's two places to stack an order...it's...it's still one drive-thru with...with one pickup window and one a...one payment spot. The...and as far as the planning board went I think it was...their concern was...over...the...that a...that overall use and...and the movement of the building which is why they were referred here a...I think if we look at their record it didn't...it didn't indicate that they were concerned at the drive-thru change just the...

Mr. Manley: How many windows are there now? Two or one? I'm trying to remember.

Mr. Wisotsky: There...there's two...there's two windows now, so you have a a...a payment window and a pickup window.

Mr. Brown: I can hear them at twelve o'clock at night when I'm still working.

Mr. Maher: Just to clarify, the planning board did refer based on the...the fast food use.

Chairperson Cardone: Do we have any other comments from the public?

No response.

Chairperson Cardone: Do we have any questions or comments from the Board?

No response.

Chairperson Cardone: Any other comments from Code Compliance? Do we have a motion to close the Public Hearing?

Mr. Manley: I would so move.

Mr. Master: I'll second it.

Ms. Gennarelli: Roll call.

John McKelvey: Yes

Michael Maher: Yes

James Manley: Yes

John Masten: Yes

Darrin Scalzo: Yes

Roseanne Smith: Yes

Grace Cardone: Yes

Chairperson Cardone: Thank you.

(Time Noted - 8:24 PM)

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ZBA MEETING – MAY 22, 2014 (Resumption for decision: 8:58 PM)

LAKE CREEK PROPERTIES, LLC /  
LINGO ASSOCIATES, LLC.  
(McDONALD'S)

65 NORTH PLANK ROAD, NBGH  
(76-1-1.1) B ZONE

Applicant is seeking an Interpretation of 185 Attachment 11- Schedule 11 - Use Interpretation - to demolish and rebuild the existing drive-thru McDonald's establishment.

Chairperson Cardone: Lake Creek Properties, LLC./Lingo Associates, LLC. seeking an Interpretation of 185 Attachment 11- Schedule 11 - Use Interpretation - to demolish and rebuild the existing drive-thru McDonald's establishment. Do we have discussion on this application?

Mr. Manley: I would like to have some additional time to review the Code.

Chairperson Cardone: Right, I...I do think that we do need additional time. Do I have a motion to Reserve Decision on this application?

Mr. Manley: I would so move...

Mr. Masten: I'll second it.

Mr. Manley: to Reserve Decision.

Mr. Masten: I'll second it.

Ms. Gennarelli: Roll call.

John McKelvey: Yes

Michael Maher: Yes

James Manley: Yes

John Masten: Yes

Darrin Scalzo: Yes

Roseanne Smith: Yes

Grace Cardone: Yes

Chairperson Cardone: The motion is carried.

**PRESENT ARE:**

GRACE CARDONE  
JOHN MC KELVEY  
MICHAEL MAHER  
JAMES MANLEY  
JOHN MASTEN  
DARRIN SCALZO  
ROSEANNE SMITH

**ALSO PRESENT:**

DAVID A. DONOVAN, ESQ.  
BETTY GENNARELLI, ZBA SECRETARY  
GERALD CANFIELD, CODE COMPLIANCE

(Time Noted – 9:00 PM)

ZBA MEETING – APRIL 24, 2014 (Time Noted – 7:02 PM)

LAKE CREEK PROPERTIES, LLC /  
LINGO ASSOCIATES, LLC.  
(McDONALD'S)

65 NORTH PLANK ROAD, NBGH  
(76-1-1.1) B ZONE

Applicant is seeking an Interpretation of 185 Attachment 11- Schedule 11 - Use Interpretation - to demolish and rebuild the existing drive-thru McDonald's establishment.

Chairperson Cardone: If anyone is here in regard to the Lake Creek Properties, we will not be hearing that...we may not be hearing that tonight. I have a letter:

Our office would like to request that the appearance scheduled for April 24, 2014 be adjourned to the May 22<sup>nd</sup> 2014 Zoning Board of Appeals Hearing for the above referenced project. If you should have any questions or require any additional information please do not hesitate to contact the undersigned. Lauren Monaghan, Bradford Bohler from Bohler Engineering.

Chairperson Cardone: Do I have a motion to hold adjourn the meeting (hearing) for the May 22<sup>nd</sup>?

Mr. McKelvey: I'll make a motion.

Mr. Masten: I'll second it.

Ms. Gennarelli: Roll call.

John McKelvey: Yes

James Manley: Yes

John Masten: Yes

Roseanne Smith: Yes

Grace Cardone: Yes

Chairperson Cardone: The motion is carried.

PRESENT ARE:

GRACE CARDONE  
JOHN MC KELVEY  
JAMES MANLEY  
JOHN MASTEN

ROSEANNE SMITH

ABSENT: MICHAEL MAHER

ALSO PRESENT:

DAVID A. DONOVAN, ESQ.

BETTY GENNARELLI, ZBA SECRETARY

GERALD CANFIELD, CODE COMPLIANCE

(Time Noted – 7:04 PM)



ZBA MEETING – MARCH 27, 2014 (Time Noted – 7:33 PM)

LAKE CREEK PROPERTIES, LLC / 65 NORTH PLANK ROAD, NBGH  
LINGO ASSOCIATES, LLC. (76-1-1.1) B ZONE  
(McDONALD’S)

Applicant is seeking an Interpretation of 185 Attachment 11- Schedule 11 - Use Interpretation - to demolish and rebuild the existing drive-thru McDonald’s establishment.

Chairperson Cardone: Before we begin, I have a letter regarding Lake Creek I don’t know if anyone is here for that application.

As discussed, our office would like to carry the application to the April 24<sup>th</sup> Zoning Board of Appeals hearing for the above referenced project. If you should have any questions or require any additional information please do not hesitate to contact the undersigned. Boehler Engineering, Lauren Monaque, Bradford Boehler.

Chairperson Cardone: Do I have a motion to hold this open for the April 24<sup>th</sup> meeting?

Ms. Smith: I’ll motion.

Chairperson Cardone: Do I have a second?

Mr. Masten: I’ll second it.

Ms. Gennarelli: Roll call.

Michael Maher: Yes

John Masten: Yes

Roseanne Smith: Yes

Grace Cardone: Yes

Chairperson Cardone: The motion is carried. So if there is anyone here interested in that you would not be re-noticed but we will be hearing that on April the 24<sup>th</sup>.

PRESENT ARE:

GRACE CARDONE  
MICHAEL MAHER  
JOHN MASTEN  
ROSEANNE SMITH

ABSENT: JAMES MANLEY  
JOHN MC KELVEY

ALSO PRESENT:

DAVID A. DONOVAN, ESQ.  
BETTY GENNARELLI, ZBA SECRETARY  
GERALD CANFIELD, CODE COMPLIANCE  
JOSEPH MATTINA, CODE COMPLIANCE

(Time Noted – 7:35 PM)

ZBA MEETING – FEBRUARY 27, 2014

(Time Noted – 7:36 PM)

LAKE CREEK PROPERTIES, LLC /  
LINGO ASSOCIATES, LLC.  
(McDONALD'S)

65 NORTH PLANK ROAD, NBGH  
(76-1-1.1) B ZONE

Applicant is seeking an Interpretation of 185 Attachment 11- Schedule 11 - Use Interpretation - to demolish and rebuild the existing drive-thru McDonald's establishment.

Chairperson Cardone: Our next applicant Lake Creek Properties (, LLC./Lingo Associates, LLC.)

Ms. Gennarelli: This applicant sent out thirty-eight letters. All the mailings and postings are in order. The Sentinel published the ad unfortunately the Mid-Hudson Times omitted the Legal Notice for this applicant.

Chairperson Cardone: Since one of the papers did not publish it we will hear this this evening but then it will be held over until next month so that it can be re-published in the paper that neglected to publish it.

Mr. Cahill: Okay and this is...Keith Cahill from Boehler Engineering in...on behalf of McDonald's a...and for the Zoning interpretation it needed to be published in that newspaper?

Mr. Donovan: We have two official newspapers...

Mr. Cahill: Right.

Mr. Donovan: ...and one of the newspapers didn't publish it so we have...we don't have compliance with the legal requirements of the Public Hearing.

Mr. Cahill: Okay.

Mr. Donovan: So, I mean, when we talked about it internally we could have said come back in March. We thought it was, given the agenda tonight, it was better to have you in, open the Public Hearing, continue it so there'd be publication in the other paper so we're all legally compliant and then hopefully be in a position to take action in March.

Mr. Cahill: Okay, okay. Then I'll give you an understanding of what we're requesting this evening and essentially in this case we're asking for an interpretation...a...on behalf of McDonald's. The existing McDonald's is located on North Plank Road and just to the South of Gideon (Gidney) Avenue a...and we're on the corner of Gardnertown Road and North Plank Road. McDonald's has been there for in excess of 30+ years a...they've done numerous internal renovations over the time...over the period of time a...that they've been in business there and what they're looking to do now is essentially the building

itself has gotten to the point where they're looking to rebuild it. They've done internal stuff but now they're looking to rebuild it and at this time of putting this type of investment into rebuilding it a...they're going to a...looking to make some site plan modifications to...to fit the new footprint. Under the initial review understanding that restaurant uses a...food and eating establishments are all permitted. The fast food component is not permitted in the B 1 (B) Zone. Just want to point out a couple of this just to make sure everyone is familiar with the...the existing location. The size of this facility as well as shown on this exhibit in the center of the plan is five thousand six hundred and fifty-seven square feet. It has a play area in the front, has a hundred and fifteen seats in it. In regards to the location of the building it's approximately thirty-six feet off of the North Plank Road frontage a...in essence the...the building does not comply with the existing requirements from a setback standpoint or a...a...relative to some other existing non-conformances in regards to the driveway location on the south side of the site a...in proximity to the Gardnertown Road intersection, it is setback one hundred and eighteen feet. So under existing conditions, there's some existing non-conformances. What McDonald's is looking to do is rebuild this a...and looked at doing a concept plan...a site plan, excuse me, of further what was proposed a...rebuilding, knocking down the existing building and rebuilding it entirely brand new building, foundation, walls, etc. Essentially the building itself would slide approximately forty feet to the south so further away from the existing Citgo a...and we would realign the driveways around it. A...in terms of the proposal we're not intending to expand the existing use in any way, shape or form. The building is going to be in...smaller, it will be five thousand two hundred and six square feet. It would only have a hundred and seven seats. The number of parking stalls would be reduced a...down to sixty-four parking stalls a...the impervious coverage would be reduced by about fifty-two hundred square feet. Also the improvements of this site besides having the latest and greatest building in terms of a new structure internally it would be a more efficient layout for a...actual service of its customers. The site layout would be much improved as well in regards to access, the driveway entrances which currently, again you only have an entrance point off of North Plank Road, a one-way in and circulation in and around the building in a counter-clockwise direction being all one-way flow. Under current conditions, for that, you can actually have a couple of situations especially in the rear of the site towards Gidney Avenue where this location at the rear of the building depending where cars come in if you come off of a Gidney Avenue trying to get to the drive-thru, cars can actually go against traffic. I've been out there numerous times, I've witnessed this a...the flow isn't as...as safe or as efficient. A...the proposal as I mentioned looks to have...or is proposing to have completely one-way circulation. The access point off of Gidney would be moved slightly to the North a...so that any car utilizing the drive-thru at the rear of the building wouldn't be tempted to circulate in the wrong direction. In addition to that we're adding what we call a recirculation lane in the front of the site which would allow cars as they came through coming off of Gidney and they couldn't find a parking stall they could recirculate through a...getting to the ADA stalls, etc. Under the existing conditions, you have to go back out on to North Plank Road and recirculate to the site. You'd make a left and then a left back in to our driveway. So this just improves the site circulation significantly a...we're improving the operations of the facility. We're putting their latest and greatest, as I mentioned, internal building itself to operate more efficiently in terms

of providing service to its customers. Also the modification in the rear of the site is what they call a...a side-by-side drive-thru which essentially creates two ordering point so that the stacking in the site is reduced as well for the use of the drive-thru. All of these items are the reasoning of the redevelopment of the site. It's improving site circulation under the existing conditions, it's reconstructing a structure that's beyond its...a...what they would like to keep as its existing life a...reconfiguring the parking scenario to again circulate more efficiently, realigning the driveway to allow the on-site circulation for the drive-thru to the (Inaudible) or the rear more efficiently. Also we're relocating the trash enclosure within our site circulation; I forgot to point that out. One other point, just the trash enclosure is actually on the North side of the building outside of the parking lot area so the trash truck comes off of Gidney into an area that's really just a gravel area to pick it up and goes on to...to Gidney Avenue. The proposal is just to keep everything within its paved parking lot and operate efficiently on site a...in a brand new structure that enclose the trash enclosure look aesthetically pleasing to match the building. So the application is to have significant improvements but the question that came up in terms of the a...the Zoning aspect was...the fast food component was determined or was asked to come to this Board to say is it a non-conforming use and is the reconstruction of it required the use variance in a sense that we are reducing the intensity of the use by reducing the size of the building, the number of parking stalls, the number of seats and the modifications that we're doing are only improving the safety of the operation of the parking lot. So in terms of that we've reviewed your Zoning Ordinance for the non-conforming buildings and uses, Section 185-19 and under alterations 1) indicates that non-conforming uses shall not be enlarged, extended, reconstructed or restored a...except for the...in accordance with sub-section B-2 and when you refer to that...it refers to an area when a building is damaged that it can be reconstructed within one year to continue that use. And again, the restrictions would prevent it from being expanded or requesting additional variances. The redevelopment of the site does have a...a...would bring the site in more compliance because we're bringing the building further away from the frontage out of the existing non-conformance front yard setback a...so in that sense again we're not asking for any intensification. The long story short we're moving the footprint of the building a...approximately forty feet to the South, we're moving the existing driveways approximately thirty-two feet to the South as well so that the circulation isn't blocked and not intensifying it. So we're looking for the interpretation to say, this is an existing non-conformance and under your Code could be interpreted to say we are reconstructing a...a...the existing non-conformance use within that one year period of time which we'd be doing a...as if we demo'd it...damaged....demo'd the site, rebuilt it within that one year time frame and we're not intensifying any variances or the use.

Chairperson Cardone: Do we have questions from the Board?

No response.

Chairperson Cardone: Do we have any questions or comments from the public?

Mr. Manley: The only question that I have is could you maybe explain to the Board how you feel that this particular change a...with respect to your interpretation that you feel

that it fits...that what you're doing fits within our Code? Could you explain to the Board how you feel that what you are doing fits and...and why this Board should render an opinion of the Code in your favor, if you could explain that?

Mr. Cahill: Sure. In regards to Section 185-19 a...for non-conforming buildings and uses. A...it refers to the first A-1 non-conforming uses, non-conforming use may continue indefinitely subject to the following provisions. In alterations a non-conforming use should not be enlarged or extended, reconstructed or restored except in accordance with sub section B-2 of herein. A...and I'll go to B-2, it also indicates that a...the nor shall any a...replacement of it...occupied by such use a...external evidence of such use may be a...no a...intensification of deviations of the Code currently. So as I mentioned that is the first section and it refers you to B-2. B-2 under Restoration after damage a non-conforming building shall not be restored other than a conforming use after damage of more than 50% of any cause unless a prior non-conforming is reinstated with one year of such damage. Now, if I take and damage...demolish...demolish the existing use and I put it back within one years period of time and I am not intensifying the use, I'm reducing the square footage of building, I'm reducing the number of seats, I'm reducing the number of parking stalls, I'm reducing the...a...the amount of the amount of impervious coverage. I'm not increasing the amount of access, the same number of access points are still there. They are just being relocated in an area we feel is more a...it will function safer and more efficiently a...and the use itself in terms of relaying out the site when you reconstruct the building you can make many improvements under the existing non-conformances. As a point, I'm relocating the building further away from North Plank Road. I'm able to reconstruct the drive isles in a fashion that will operate safely and efficiently so they're the items in my mind, the modification of it a...isn't being intensified a...by that definition of adding more. I am relocating it in a fashion but not intensifying any deviations from the setback Code.

Chairperson Cardone: But also 185-19 A-1 states; or placed on a different portion of the lot or parcel of land occupied by such use.

Mr. Cahill: The non-conforming use shall not be enlarged, extended, reconstructed or restored except in accordance with subsection B-2 herein. Right?

Ms. Smith: So...

Mr. Donovan: And we know why you want to stop there but unfortunately there is another...

Ms. Smith: Yeah.

Mr. Donovan: ...which is...

Chairperson Cardone: Right, it continues.

Mr. Donovan: Yeah.

Chairperson Cardone: Or placed on a different portion or parcel of land occupied by such use on the effective date of the Chapter.

Mr. Manley: Has the building sustained any damage whatsoever?

Mr. Cahill: Currently? Internally just over a long period of use is it's been repaired and things of that nature. I'm also taking the approach of saying, you're saying if it's damaged and it can be replaced within that one year period of time you can do that. In theory, I'd be knocking it down.

Mr. Maher: I don't...intentional damage in other words?

Mr. Cahill: Correct, it would be intentional damage because it does say damage in any cause...from any cause.

Ms. Smith: Demolition.

Mr. Cahill: Well it doesn't say and again....

Ms. Smith: No, but what you would...

Mr. Cahill: I understand...I understand...

Ms. Smith: Excuse me.

Mr. Cahill: ...but it doesn't say by natural causes only.

Ms. Smith: Okay.

Mr. Cahill: ...or a fire or something. It just says for any cause so...

Ms. Smith: My question...my statement I guess to you is, you're calling it damage but by taking the building down, it's a demolition.

Mr. Cahill: Yes. Yes. So that would be the cause of that.

Ms. Smith: Okay.

Mr. Cahill: Now I understand that a decision wouldn't be rendered this evening, the other aspect of that, of making the decision I'd also want to be clear on if a decision was, if you knock it down, you are rebuilding it and the way I read this...meaning the Board, the way the Board reads this is you would need a use variance for this. I would understand the legal hurdle of obtaining a use variance with that I would also want to understand if I go to refurbish the existing building in place. There's other fast food uses within the Zone, right down the street from us that rebuilt, I just want to be clear what can be done because

as I mentioned there...there's reason...age reasons why the structure would want to be rebuilt so an alteration of knocking down the building itself a...can I rebuild it in the exact same footprint? Knock down a wall and rebuild it. Foundation would still be in the same location but I put a new foundation in. They're the types of things in terms of the decision and not...if a decisions made in favor of what I'm asking for would be, it's not a use variance and I would move forward with an application to the Planning Board. If it is, if it is a use variance and the limit of what you can do to avoid the use variance is X that's what I'd like to be clear on so I can advise my client what level, you know, where I fall into that picture.

Mr. Manley: I don't think this Board would really be in a position to advise you on how you would have to build it in order to stay within the Zoning. This Board would only rule on the interpretation that you're asking on. That would probably be a question you'd have to, you know, speak with the Building Department and discuss with them as to what...what your options would be. I wouldn't feel comfortable on giving you...

Mr. Cahill: If the Building...just so I understand that...the Building Department then would make the decision on saying I'm going to rebuild within the same footprint or would I say if I could demo the entire building but leave it in the same location?

Mr. Manley: If you gave the Building Department what your thoughts are as far as what you wanted to do, they would let you know whether it was in the letter of the Code or not and if not what you would need to do to...to achieve that. For example, if something needs a variance they would tell you you could do this but it's going to require this versus this Board just rules on what, you know, what we have before us which is an interpretation.

Mr. Cahill: Okay.

Mr. Maher: Does the existing building footprint overlap the new footprint?

Mr. Cahill: Is there an overlap? Yes, the existing building is approximately fifty feet in width in the widest point and as I mentioned I moving it about forty feet. So there's a...there's about five foot overlap if I overlaid the existing building on this site. If I tried to for instance, I want to rebuild in the same location a...and I wouldn't modify per say the driveway locations and the building it would have to stay within it I would still look to make site improvements which I think I want to make sure is not considered any type of an expansion in terms of I'm not adding additional parking stalls, I'm not adding impervious coverage a...but I'm making site improvements that would either way try to mimic what I've showed on the proposal with a brand new building footprint and try to mimic it within this footprint if that was the determination. I can't knock the entire building down.

Chairperson Cardone: But if you were going for a smaller building you wouldn't have to use the same exact footprint if you are decreasing the size. No it would be within the footprint...



Mr. Cahill: No, right.

Chairperson Cardone: ...but it wouldn't be as large as the original footprint.

Mr. Cahill: Correct, with the exception that this building is about a hundred and fifty feet wide and at its widest point fifty and the building that I'm proposing is about a hundred and eighteen feet so it definitely fits in this direction but if you notice the fifty foot section is under a shorter period of time. The newer footprint obviously there's you'd call the a...

Chairperson Cardone: It's more of a rectangle.

Mr. Cahill: Yeah, it's more of a rectangle so I could do that but in this area, in theory, would be outside of...it wouldn't be completely enclosed in all locations of that footprint. But obviously if I had to stay in within that footprint then all of the benefits of the new building in terms of efficiencies of layout internally, the types of equipment that you can do that are more energy efficient, the types of coolers that you would use, the size of the coolers that are more energy efficient all doesn't fit within this footprint. Because the building geometry just doesn't work. The back house of a McDonald's is very similar to an assembly line of building a car. They can foot...they found the Henry Ford way of putting a burger together and they want to use that geometry because where they store it, how much space they store it, the heights of the shelves and how they do the assembly line fits in that footprint but they want that geometry to fit that in. That's essentially why they needed the...the modified footprint. A...they can rebuild within it but they would want to basically take it down and bring it back up and the question really becomes and a...and I understand what saying, I get an interpretation from the Building Department that I can leave the footprint in place, can I leave the slab in place or not. And then I can understand I'd have to stay entirely within that footprint to rebuild it...that...the internals of the building the way we wanted. So, so a point as I mentioned, from a site standpoint I look to make some modifications, keep the exact use, it's still going to be the same use, there's still a drive through, I'm modifying the drive-thru, there's two ordering points there because it becomes more efficient, the cars are in line for less period of time, running and idle. So they're the types of things I would still come back. If it was viewed that making that modification or sliding a driveway from this location to this is an expansion of a non-conforming use I would then be coming back here again to ask for that interpretation. That's why I kind of went a little bit further into the detail of the differences of the existing and proposed so that we could get hopefully one interpretation versus okay, we got this step accomplished, I'm doing other site improvements and so we have to come back here for the Board to say well then it's not an expansion of the use for that reason.

Chairperson Cardone: Jerry, I have a question for you. If the square footage...if the square footage is less would it matter that you're not following the exact same footprint? If the majority of the structure is within the footprint but you have a different configuration and it's less square footage?

Mr. Canfield: I think you're looking for a response a...on this particular application, without seeing the actual physical dimensions and a submittal a...at that point we could make this determination but I can tell you this, consistency that the Code Compliance Department has exercised with this particular section of the Code is that when we say utilizing the existing footprint we mean exactly that.

Chairperson Cardone: Okay.

Mr. Canfield: We have voted on...or past decision on applications whereas we required the builder or developer to put the new structure on the same foundation or if for some reason the new foundation was a...in disrepair and needed to be replaced then the actual dimensions of the foundation would be identical. We would require a prior survey and then of course, an after survey and that the overlay is exact. That has been our determination on going in the same footprint.

Chairperson Cardone: Right. Thank you. Do we have anything else from the Board? Anything from the public?

No response.

Chairperson Cardone: If there is anyone here that is here with interest in this application you will not be re-noticed but we will continue next month, which is March the 27<sup>th</sup>, but you would not be re-noticed.

Mr. Manley: With that I would make a motion that we hold the Public Hearing open until March's meeting.

Ms. Smith: I'll second.

Ms. Gennarelli: Roll call.

Michael Maher: Yes

James Manley: Yes

John Masten: Yes

Roseanne Smith: Yes

Grace Cardone: Yes

Chairperson Cardone: Thank you. Before proceeding the Board will take a short adjournment to confer with Counsel regarding any legal questions raised by tonight's applications. I would ask in the interest of time if you could wait out in the hallway and we'll call you in very shortly. And Betty would you check for that email.

Ms. Gennarelli: I'll go right now.

PRESENT ARE:

GRACE CARDONE  
MICHAEL MAHER  
JAMES MANLEY  
JOHN MASTEN  
ROSEANNE SMITH

ABSENT: JOHN MC KELVEY

ALSO PRESENT:

DAVID A. DONOVAN, ESQ.  
BETTY GENNARELLI, ZBA SECRETARY  
GERALD CANFIELD, CODE COMPLIANCE

(Time Noted - 8:00 PM)