

The meeting of the Bay Head Planning Board was held on Wednesday, November 17, 2010 at 7:30 p.m.

Mr. Shore read the following statement: “Pursuant to the applicable portions of the NJ Public Meetings Act, adequate notice of this meeting was mailed to the Ocean Star and posted in the corridor of this building and filed with the Bay Head Borough Clerk.”

Roll Call: Brian Shore, William Furze, David Kellogg, Kathleen Tell, Verity Frizzell, Patricia Wojcik, Edward Convey, Kathleen Wintersteen, Frederick Applegate  
Engineer – Susan Brasefield                      Attorney – Steven Zabarsky, Esq.

Absent: Mayor Curtis, Bart Petrillo, Peter Harrington, Jennifer Barnes-Gambert

The October 6, 2010 minutes were approved on a motion by Mr. Kellogg and seconded by Ms. Wintersteen and passed with all in favor.

The first application, 2010-10, property located at 530 Main Ave., Block 57, Lot 17 was for 3 of a Kind, LLC.

Ms. Roberta Burcz, Attorney, stated she would be representing the application.

Mr. William Gage, Attorney, stated he would be representing Mr. and Mrs. James Urner, Stephen and Patricia Waterbury and Lauren Payne who are neighbors to the applicant and are objecting to this application.

The following were marked into evidence:

- A-1 Application, dated August 23, 2010
- A-2 Amended Application, dated September 28, 2010
- A-3 Professional Land Survey by George H. Henn, Inc., dated February 27, 2008
- A-4 Drawing of the existing conditions at Theresa’s South, submitted by Richard A. O’Connor, dated August 23, 2010.
- A-5 Certificate of Ownership, dated August 23, 2010
- A-6 Drawing prepared by Richard O’Connor of the proposed structure lot coverage vs. existing structure lot coverage, dated August 23, 2010
- A-7 Letter from the Code Enforcement/Zoning Officer Bart Petrillo, dated June 16, 2010 stating failure to comply with the conditions outlined in Bay Head Planning Board Resolution 2008-08
- A-8 Survey, dated February 27, 2008
- A-9 Memorializing Resolution, Application 2008-08, dated October 15, 2008
- A-10 Review Letter from the Planning Board Engineer, dated October 8, 2008
- A-11 Memorializing Resolution, Application 2008-05, dated, June 18, 2008
- A-12 Review Letter from the Planning Board Engineer, dated, May 12, 2008
- A-13 Memorializing Resolution, Application 2005-03, dated July 20, 2005
- A-14 Memorializing Resolution, Application 2000-02, dated March 21, 2001
- A-15 Survey, dated April 6, 2005
- A-16 Deed Restriction to provide access to 524 Main Ave.
- A-17 Resolution of Block 57, Lot 14, 524 Main Ave, dated March 15, 1995
- A-18 Letter from the Planning Board Engineer, dated September 17, 2010 – Deeming the application complete

**A-19 Review Letter from the Planning Board Engineer, dated, October 14, 2010**  
**A-20 Proof of Service**  
**A-21 Proof of Publication**

**Mr. Gage confirmed with the Board Clerk that the Resolutions for application 2008-08 and application 2008-05 were marked into evidence as A-9 and A-11 respectively. Mr. Gage stated there is a procedural matter before getting to the merits of the case. The prior application requested approval for a refrigerator located outside on a part of an existing slab. The Resolution has testimony to the effect that the access to the refrigerator box should be from an outside door. The final stipulation of 2008 granted there would be no access from the outside of the building but rather the access had to be from the inside of the building. Therefore, this matter was presented in 2008. Testimony was given both pro and con. The board heard it, reviewed it and gave its decision upon these facts. I believe, in that case, the matter has been barred by adoption of Res Judicata and is not proper before the board.**

**Ms. Burcz stated she did review the minutes from the last time we were here and the question was raised as a compromise position and was not part of the application. My client was asked whether it was possible to put in an interior access door. He did concede that he thought that would be ok and this did become part of the final Resolution. It wasn't fully discussed. It was not fully reviewed. Ms. Burcz stated that with connection to tonight's application she will provide testimony which will fully and adequately review it. There has also been, some changed circumstances with as far as what her client has done to mitigate any potential problems that the adjoining neighbors apparently have and also changes in the economic environment. It was not fully mitigated and she has the minutes to prove it.**

**Mr. Zabarsky reviewed the elements of Res Judicata:**

- 1. The second application is substantially similar to the first**
- 2. The same parties or their privies are involved**
- 3. There must be no substantial change in the application itself or conditions surrounding the property**
- 4. There must have been an adjudication on the merits of the first case (we have a Resolution)**
- 5. Both applications involve the same cause of action**

**Mr. Zabarsky stated we have number two, number four and number five so the main focus is number one and number three.**

**In Mr. Zabarsky's opinion you can't make a decision on Res Judicata until the evidence has been heard. Allow the testimony to come in. Whoever is claiming Res Judicata will have the burden to satisfy you as to what the prior application was and that is a. substantially similar to it and b. no substantial change in the application itself or conditions surrounding the property. Res Judicata is a very harsh doctrine because it is tells the applicant you don't get a chance to be heard. Mr. Zabarsky stated the Board should hear all the evidence.**

**Ms. Burcz confirmed with the Planning Board members that no site plan was required.**

**Mr. Zabarsky confirmed to Ms. Burcz that members of council that are on the Planning Board, being in the room for this application is not an issue. Mayor Curtis and Jennifer-Barnes Gambert were not in attendance.**

**Mr. Zabarsky stated that Ms. Burcz should not request relief from the Planning Board unless it is from a provision of the zoning ordinance. The Board does not have jurisdiction over Noise, Board of Health (hoods, stoves or cleaning) issues or other provisions in the code book of Bay Head.**

**Mr. Shore asked Ms. Burcz to explain why the applicants have come before the Planning Board.**

**Ms. Burcz stated their application is to relieve the applicant from the requirement from the last ordinance not to provide the interior access to the walk in box. They will provide testimony from a safety person which will indicate the negative safety impact should this be a requirement. We will have testimony from principals who will talk about the negative impact of the economy which will cause this restaurant not to become profitable if its operations are slowed or hindered. The ten weeks in the summer is the only time of year the applicant has to go from the red into the black. The application will show when weighing in all the balances of all the testimony they are about to present, allowing the applicant to maintain the status quo and granting relief requested will not substantially impair or be detrimental to the surrounding area, the public good or the interest or purpose of zoning.**

**Mr. Richard O'Connor was sworn in by Mr. Zabarsky.**

**Ms. Burcz confirmed with Mr. O'Connor that the walk in box is a free standing structure on a concrete slab in the rear of the building. It is about five by eleven feet and is hardwired from the inside of the building.**

**Mr. O'Connor stated that the noise heard by the opening and the closing of the door of the walk in is more of a thud and not a slam. It is not loud at all. It is a dull thud. The back door has an automatic closer on it. We chose to make it close fast so the neighbors do not hear the noise coming out of the kitchen. Ninety percent of the trips out that back door are garbage. It is not to go to the refrigerator.**

**Mr. Zabarsky marked four color photos into evidence:**

**A-22 Photo of the refrigerator and the rear door from inside the restaurant, taken one month ago.**

**A-23 Photo of the refrigerator in the rear from inside the restaurant, taken one month ago.**

**A-24 Photo of the south wall of the restaurant from inside the restaurant. The red marking is a cross hatch to depict where a door would have to be located inside the restaurant.**

**A-25 Photo, without the cross hatch, of the south wall from inside the restaurant where the refrigerator is located now**

**Ms. Burcz confirmed with Mr. O'Connor that photo A-22 shows the adjustable, silver, pneumatic door closer at the top right of the rear door. The closer is set to close at a faster speed. Mr. O'Connor stated the door closing is not loud and there is no noise coming out of the back of the restaurant.**

**Ms. Burcz confirmed with Mr. O'Connor that he had submitted in writing an invitation for the Council Members and Planning Board Members to go and review the door to the walk in box and the noise that comes out the back of the restaurant.**

**Mr. O'Connor stated three people did come and their opinion was that it was fairly quiet.**

**Ms. Burcz confirmed with Mr. O'Connor that the town of Bay Head's lawyer sent a letter stating violation of noise ordinances. Three of A kind wrote back to the lawyer to confirm what ordinances they allegedly violated. They never received a response.**

**It was confirmed by Mr. Zabarsky that Mr. O'Connor had never received a summons for a noise violation.**

**Mr. Zabarsky marked the following into evidence:**

**A-26 Letter dated August 18, 2010 from the law office of Gilmore and Monohan to Three of A Kind, signed by Jean Cipriani.**

**Mr. Shore confirmed with Mr. O'Connor that ninety percent of the trips out the rear door of the restaurant, on a busy Saturday night, are for garbage.**

**Mr. O'Connor referenced photo A-23, the purchased refrigerator placed inside the restaurant to stock prior to the start of the evening of a busy night to eliminate the number of trips outside to the outside refrigerator.**

**Mr. Shore confirmed with Mr. O'Connor that a maximum of three trips are made to the outside refrigerator on a busy, Saturday night.**

**Mr. O'Connor confirmed that the size of the outside, walk in box is five feet by eleven feet. The size of the inside refrigerator is 4.5 feet by 2.5 feet.**

**Mr. Shore stated that there are other items in the back of the restaurant such as water bottles and storage racks with pans on them.**

**Mr. O'Connor confirmed the restaurant put up the fence, cleaned that area up and put down the concrete pads. Trips are not made outside for these items. They do not sell much water but it is stocked inside.**

**Ms. Burcz confirmed with Mr. O'Connor that he feels this recession is worse on his business than the recessions in the late 1960's, late 1970's and from 1987-1991. Mr. O'Connor stated he did not perceive the length of this recession back in 2009 or back in 2008. Mr. O'Connor confirmed with Ms. Burcz that Theresa's South makes their profit within a ten week time frame during the summer. We stay open Wednesday through Sunday for the town all year around. Our feedback from customers is positive. We run a good, high profile establishment.**

**Ms. Burcz questioned Mr. O'Connor concerning the property to the west. Mr. O'Connor mentioned that the garage is close to the restaurant's property line.**

**Mr. William Gage, attorney, objected to this testimony. He did not know what the neighbor's property had to do with the property of the current application.**

**Mr. Zabarsky stated that the restaurant is a conditional use in a B-1 zone according to our ordinance. The restaurant must be a minimum of fifty feet back from the nearest lot line of a single family residence.**

**Mr. Zabarsky asked Ms. Burcz the relevance of her testimony.**

**Ms. Burcz stated she was just showing the garage.**

**Mr. Shore agreed with Mr. Gage that this was not relevant at all.**

**Ms. Burcz stated she had no more questions at this time and that someone would like to cross examine.**

**Mr. Gage confirmed with Mr. O'Connor he purchased the restaurant in 2008. Mr. O'Connor stated that a feasibility study was performed for the restaurant by his partner. Mr. O'Connor did have projected numbers for the future.**

**Mr. O'Connor agreed with Mr. Gage that there would be anticipated, occasional economic downturns, but not like this.**

**Mr. Gage stated that the Resolution from November, 2008 required the condition to request relief. Mr. Gage stated the applicant has not complied with that. Mr. Gage asked Mr. O'Connor, since that application, what have you done to try and comply?**

**Mr. O'Connor stated he purchased the refrigerator for the inside of the restaurant.**

**Mr. Gage stated that the prior Resolution stated the restaurant requested a refrigerator that is six feet by eight feet and the current walk in refrigerator is five by eleven feet.**

**Ms. Burcz objected. She stated that just because it is in the Resolution does not mean it is what they applied for. It is the application from 2008 that would identify there request. It is the same walk in box and has not changed in size since the Resolution was passed in 2008.**

**Mr. O'Connor confirmed to Mr. Gage that an effort was made to have someone in to determine if a door could be built from the inside of the restaurant to the walk in. It was determined that the slab is one foot lower then the existing kitchen floor. It would have to be raised a foot. That would not be the problem. The eve of the roof is the problem. The roof would have to be cut in order to get the refrigerator against the building. Water would come down and lay against the refrigerator and may possibly cause mold.**

**Mr. Gage referred to exhibit A-26, the letter from the town attorney about the restaurants' violations. He stated this letter also states there is a violation for not complying with the Resolution.**

**Mr. O'Connor agreed.**

**Mr. Gage requested the date the most recent application was filed for present relief.**

**Mr. Zabarsky confirmed the application was received August 23, 2010. The revised application was dated August 28, 2010.**

**Mr. Gage stated that from November, 2008 to August, 2010 there was no action taken to comply or request relief.**

**Mr. O'Connor stated they did not comply but may strides to comply by purchasing the inside refrigerator. If the outside, walk in refrigerator was placed inside the restaurant it would kill the inside kitchen area and the flow of the kitchen. Mr. O'Connor referenced exhibit A-22 and A-25.**

**Mr. Zabarsky confirmed that with the application for Resolution 2008-08, the refrigerator was inside and was moved outside without approval of the Board and then they came in front of the Board for a Variance to do that. Resolution 2008-08 granted relief for it to be placed outside.**

**Ms. Tell confirmed with Mr. O'Connor that in exhibit A-22 the small wall is perpendicular to the south wall.**

**Mr. O'Connor confirmed for Mr. Convey that even a different refrigerator, with different dimensions would not fit under the roof and above the existing slab. There is not enough space.**

**Mr. Furze stated he is still questioning what the noise issue is.**

**Mr. Amelchenko, Architect, was sworn in by Mr. Zabarsky.**

**Mr. Zabarsky marked the following into evidence:**

**A-27 Poster board with four colored photos, taken today, November 17, 2010.**

**Mr. Amelchenko confirmed the photos in A-27 are shots of the outside rear of the restaurant.**

**Mr. Amelchenko stated he was retained by Theresa's South to access the feasibility of providing a door from the prep area directly into the walk in box. The primary issues are:**

- 1. The floors would need to be level in the prep area to the floors in the walk in box. The box would need to be elevated and have a watertight condition as it comes into contact with the building. The smooth aluminum back of the refrigerator would be up against the stucco building.**
- 2. If the box is elevated it comes into the soffit. There is about seven inches from the top of the box to the soffit. The roof would have to be modified at the eaves where it comes in contact with the box. Also a gutter to capture some water would be recommended.**
- 3. The condenser would also be lifted so the awning would have to be removed or lifted higher. It would be nice for the neighbors to have the awning there and would serve as some rain protection.**
- 4. Thirty six inches would be removed for a door to be installed. That space is precious in a room that is small, around eleven by fourteen which are inside dimensions. The door would swing into the prep area which would cause issues. If the door swings in a small area would be lost inside the walk in box.**

**Mr. Convey inquired if the outside walk in had to be against the stucco wall.**

**Mr. Amelchenko stated that perhaps a frame and a roof could be made.**

**Mr. Convey inquired if it would be possible to have a step down into the walk in box form the inside door to address the grade issue.**

**Mr. Amelchenko stated a transition may be possible but it would impact the space in the walk in box.**

**Ms. Frizzell confirmed with Mr. Amelchenko that if the floor in the prep area inside the restaurant was lowered it would be below the flood elevation.**

**Mr. O'Connor confirmed with Ms. Frizzell that the site plan he had prepared, exhibit A-6, dated August 23, 2010 is the most current. The hand written changes show the location of the fence and the concrete pad. Mr. O'Connor stated these hand written changes were made by him. He has been a draftsman out of high school and was in construction for more then forty years.**

**Ms. Frizzell stated that Mr. O'Connor is not qualified and does not have the license to revise the survey. It can not be a legal document.**

**Ms. Burecz confirmed with Mr. Amelchenko that he previously testified for The Heat Wave and drew the renovation. Mr. Amelchenko confirmed that it is a one hundred year old building and is a historic structure. They did receive a plaque for maintaining the historic qualities of the structure.**

**Ms. Burecz confirmed with Mr. Amelchenko that he feels the restaurant is a positive benefit in the community and on that important intersection it is a nice commercial component that exists to the surrounding area. The building was vacant and in need of significant repair when he had started the project.**

**Mr. Kwasnicki was sworn in by Mr. Zabarsky.**

**Mr. Zabarsky confirmed to Ms. Burecz that Mr. Kwasnicki is an insurance producer licensed by the State of New Jersey in Property & Casualty Insurance. He is an expert in insurance premiums not in risk assessment in terms of structure.**

**Ms. Burecz confirmed with Mr. Kwasnicki that he regularly visits clients and forwards recommendations to multiple insurance underwriters so they can assess the risks (AIG, Allstate, Hanover, New Jersey Manufacturers). He was in the kitchen on premise at the restaurant two days ago.**

**Ms. Burecz confirmed with Mr. Kwasnicki that he is familiar with the area as shown in exhibit A-24 and that this is the area of the proposed door, should the Board request a door be cut in for interior access to the walk in box.**

**Mr. Kwasnicki stated that if the door was installed, the prep area would have to be moved. The kitchen is very long and narrow compared to other kitchens he has insured. The prep area would have to go in the middle or along another wall which the restaurant does not seem to have.**

**Mr. Kwasnicki stated that the number one hazard in a restaurant is fire hazards. If the prep area was moved into the middle of the room it would increase the fire hazard because it would be moved directly in front of the only exit out of the kitchen. It would impede their exit and safety if there were a fire. It would be a safety issue.**

**Mr. Zabarsky marked in to evidence:  
A-28 Drawing dated 11/17/2010, labeled project number 1034A-1, Heat Wave Café.**

**Mr. Amelchenko stated that exhibit A-28 is a partial plan of the back of the restaurant with the equipment. It also shows the rear elevation.**

**Mr. Amelchenko confirmed with Ms. Frizzell that it would be a possibility to move the prep table ninety degrees along the wall.**

**Mr. Convey asked if the interior door to the walk in box was installed, couldn't the secondary refrigerator be removed?**

**Mr. Kwasnicki stated that if that prep table, in exhibit A-28, or any other table was moved it would have to be moved directly in front of the exit and would be moved closer the hot water heater which has a hot pipe.**

**Ms. Burcz confirmed with Mr. Kwasnicki that he feels that if the door was installed in the interior of the restaurant and things, as seen in exhibit A-28 and A-24, were moved around there would be an increase in hazard.**

**Mr. Zabarsky stated that Mr. Kwasnicki has no fire code or safety certification. All questions Ms. Burcz is asking the witness is speculative. No plans of a door have been submitted and we do not know how the door would affect the kitchen area.**

**Mr. Shore would rather listen to the owners of the restaurant as how they would reconfigure the kitchen.**

**Ms. Frizzell confirmed with Mr. Kwasnicki that it would be possible to increase the safety of the staff if there was an interior door installed. The staff would not have to go back and forth to the exterior box in times of bad weather for example. Even if it is only the three times a night they go out there.**

**Mr. Scalera, restaurant owner, was sworn in by Mr. Zabarsky.**

**Ms. Burcz stated Mr. Scalera was a principal of Theresa's South. He runs all the day to day operations of all five of their restaurants. This includes setting the menu, ordering, overseeing the hiring and reviewing profit and loss. Mr. Scalera confirmed he has been a Chef for thirty years and an owner/operator for twenty years. All five of the restaurants are "Zagat" qualified and all have received good reviews.**

**Mr. Scalera stated to Ms. Burcz that the restaurant volume of the Bay Head restaurant is different. It comes in a ten week period. The restaurant has a lot of repeat business, has filled a void in the town. It is a point of destination because there is nothing much else around the location.**

**Ms. Burze asked Mr. Scalera to comment on the noise generated from the restaurant and the noise complaints from the neighbors.**

**Mr. Scalera stated that after the first season he tried to address the concerns of the neighbors by installing the door closer and purchasing the double door refrigerator. The refrigerator was set with the highest volume of meals from studying two of the**

busiest weeks in the summer. The kitchen guys do not have to go outside to that walk in box. The bulk items for the walk in box are delivered at 10:00a.m. We pull out what is needed and prep from that. The door closing has to do with garbage. Mr. Scalera stated that there is no noise generated from the opening and closing of the walk in box or the back door.

Ms. Burcz confirmed with Mr. Scalera that the prior owner did not have a thriving business. He was going out of business. Mr. Scalera confirmed that the same walk in box was in the kitchen when he purchased the restaurant, but back then the prior owner was doing twenty dinners a night, Mr. Scalera is doing three hundred dinners.

Mr. Scalera confirmed to Ms. Burcz that the kitchen can get to 110 degrees. In all of the other restaurants there is a screen door on the back door. They would not put a screen door on the back door in this location. They did not want to cause more havoc.

Mr. Scalera stated that on a busy, Saturday night there are about ten workers. They may make about fifteen trips out for garbage. He purchased additional inside garbage cans for inside the kitchen to lessen the trips out the door for garbage.

Mr. Shore confirmed with Mr. Scalera that before the restaurant purchased the additional refrigerator there would be six or seven trips out to the walk in box. Now, with the inside refrigerator in place, it is zero trips outside for food.

Mr. Scalera referenced exhibit A-28 and stated that to accommodate the interior door to the walk in box he would have no choice but to move the prep table into the middle. It would be less safe because it gets narrow. The whole flow would be gone and he would not be able to prep for his customers. It would slow down the prep time. Instead of three hundred dinners he would only be able to prep two hundred twenty dinners. It would not be valuable or profitable. The restaurant would be better as a WAWA.

Mr. Zabarsky marked into evidence:

A-29 Two photos of the interior prep area of the restaurant in question, taken today. Mr. Amelchenko will print out the photos and hand-deliver them to the Planning Board Clerk tomorrow for the file.

Mr. Amelchenko stated that the prep table jets out about two feet.

Mr. Shore stated that there will be no time to hear the Informal application tonight and would suggest they come back next month.

Mr. Gage referenced exhibit A-28 and confirmed testimony from Mr. Scalera that even if the interior door was installed to the walk in refrigerator box the second, new refrigerator, purchased in 2009, would still be needed to run the operations of the restaurant.

Ms. Burcz stated she has no further witnesses.

Mr. Burdick, professional engineer and planner, was sworn in by Mr. Zabarsky.

Mr. Burdick stated the application goes back to the 2008 approval that this Board granted. In 2008 the applicant already purchased the property and moved an interior

freezer to the exterior of the site. Essentially that allowed them to expand the use of the interior of the building. The spot where they moved the refrigerator did not meet the fifty foot requirement from the residential property which is immediately west of the facility. They went to the Planning Board for approval. There were objections due to noise levels. As a compromise, in the 2008 Resolution, the applicant was to add interior access into the box. Now the applicant is stating this is an unnecessary condition and is trying to remove this. Mr. Amelchenko stated yes, he in fact could physically do what that condition has requested or required them to do. The noise is in fact a problem. It is not in the favor of the neighbors or the public to grant the waiver of this condition.

Mr. Gage confirmed with Mr. Burdick that the outside walk in box is about fifteen feet from the neighbor's property line.

Mr. Burdick stated that based on testimony he believes the kitchen could be reconfigured to accommodate the installation of the interior door. The additional, smaller fridge being used for prep could be eliminated.

Mr. Furze asked Mr. Gage what is the origin of the noise, the complaint? He has not heard that yet.

Ms. Burcz asked Mr. Burdick what the noise complaint is from the neighbors. He knows there were general noise complaints brought up at the last hearing.

Mr. Urner, 42 Mount Street, was sworn in by Mr. Zabarsky.

Mr. Urner stated that during the day is the problem. The employees of the restaurant go out the back door, through the gate, into the refrigerator and back again. They kick the door, as seen in exhibit A-27, because their hands are full of food.

Mr. Urner is asking the Planning Board to reaffirm the decision made by the Board and would like the restaurateurs to live up to its obligation of this Board.

Mr. Convey confirmed with Mr. Urner, if that outside box went away, Mr. Urner felt that eighty percent of the noise would go away.

Mr. Urner stated if that refrigerator was inside we would not be here tonight.

Ms. Tell confirmed with Mr. Urner that he feels ninety percent of the noise in the afternoon is for the food that is taken out of the walk in box to inside the restaurant by the employees.

Mr. Urner stated to Ms. Burcz that the period of greater noise begins around 10:30AM – 11:00AM, they serve lunch, it continues until 4:30PM when they take a break. Then the noise continues.

Mr. O'Connor testified that for the majority of the time they are closed for lunch.

Mr. Gage had no further witnesses.

**Ms. Tell stated it might make sense to permit the enclosure of the entire awning area. The square footage would be increased to fit the refrigerator inside. An interior door would not be needed.**

**Mr. Furze agreed. It would require a variance and it would be permanent. Mr. Furze understands this would be a major expense.**

**Mr. Gage and his client would be receptive to this.**

**Mr. O'Connor stated this would be a major undertaking.**

**Mr. Shore opened the floor for public comment.**

**Ms. Burcz addressed the Board with her closing comments. Ms. Burcz stated this application is to seek relief from the prior resolution that the applicant provide an interior door from the kitchen to the walk in box. We seek relief from that requirement of the resolution.**

**Ms. Burcz stated that based on what she could gather from the testimony, the adjoining neighbor's complaint is about the noise in the middle of the day starting around 10:30 in the morning and it has to do with the door latch and the employees banging on the door. The question is if this is a detriment to the public good, the purpose of zoning or the master plan. There are safety issues involved, cost issues with putting in an egress door and moving the prep table into a very narrow portion of the kitchen. We do have a successful restaurant that makes their money during the summer in a very short amount of time, on specific nights of the week. This money has to carry them through the winter. This economy is an unforeseen event that my client was not aware of in 2008 or 2009. There was testimony of the safety issues if that prep table were moved. Mr. Scalera testified to reconfigure the restaurant to where that door is proposed and move the prep table to the middle would decrease the number of dinners he would be able to put out. This would cut into their profit that they have to make for it to be a viable business. The noise is minimal, especially for a business in a business zone. We have met the Res Judicata issue and also the granting of the relief will not substantially impair or be detrimental to the surrounding area, the public good, or the purpose of the zoning plan or the zoning ordinance.**

**Mr. Gage restated his objection from the beginning of the meeting concerning Res Judicata. He has heard nothing this evening which would show this building, this business, this property is any different now than it was two years ago. There is no larger or smaller of a building, the property is the same size. The economy can not be used for a change of circumstances. The additional items in the kitchen were put in by the applicants because their business prospered. They decided to make the kitchen more congested. It is self created. He has not heard one bit of testimony to indicate the noise was minimal. I heard my client state that it was quite considerable. This was heard and debated two years ago. Testimony both pro and con was given. We are on old territory now. The Board voted on it. The restaurant has become more successful and needs more room, but that is not how we have Variances.**

**Mr. Shore reviewed the issue of Res Judicata with Mr. Zabarsky.**

**Mr. Shore requested Ms. Burcz to address how the prior conditions have changed.**

**Ms. Burcz stated the intricacies of the actual construction as explained in Mr. O'Connor's and Mr. Amelchenko's testimonies stated the requirements to install the interior door and the various field conditions to do so were not explored at all when the prior application was made. This was a suggestion that came up as a compromise during the last hearing and my client did agree to it. Mr. Amelchenko did a great job in explaining just how many items would have to be addressed. These plans have not been drawn up yet so there may even be additional issues. As far as the economics, this has been a very, very difficult recession. The mistake made was that the owners did not comprehend the impact of putting in the door as proposed.**

**Mr. Kellogg stated we may have overlooked something here that could be a possible solution. He is troubled by where we are tonight. Because of what happened in 2008, there was a compromise and the applicant agreed to a door condition in order to obtain an approval to leave the walk in box outside. In hindsight, they might not have agreed to that condition in 2008. Mr. Kellogg wonders out loud, whether the approval that was granted then would have been granted if they were not able to agree to the compromise. He is also troubled that we had heard this application in October, 2008 twenty four months ago before it gets back here. We have an architect testify that he has been engaged two months ago to look into putting in the new door. Mr. Kellogg thinks the conditions were just blown off until the town put some feet to the fire. Having said all that, he thinks Mr. Furze had an idea that might solve a lot of problems. That idea has not been explored to enclose the area where the ice box is right now. Think about if it is feasible and what the cost might be and come back and provide this Board with some information to deal with and to make an intelligent decision. He does not want to caucus or make a decision without having that information. I think the applicant should look into that. It is a viable solution. It would solve everybody's problem. Mr. Kellogg thinks the Board should carry this application and let that applicant explore that alternative. He recognizes there will be some variances involved.**

**Mr. Shore stated that the applicant has put the Board in a very difficult position. We are very supportive of your business. We have bent over backwards on more than one occasion to make sure you could be as successful as possible and now we have run into this issue.**

**Ms. Tell is concerned that once a variance is granted it lasts forever. Ms. Tell is concerned about what might be there in the future. She thinks it is in the best interest of this piece of property, the neighbors and the Board if everything that is in the property is enclosed.**

**Mr. Zabarsky stated that the application before the Board is simply for an alleviation of a condition in a prior Resolution. This would have to be an amended application. The Board would have to make a decision on the application tonight or carry the application.**

**Ms. Burcz confirmed with her applicant that they choose to carry the vote to provide additional testimony to the Board.**

**Mr. Zabarsky confirmed that the application will be carried to the next scheduled Planning Board meeting on December 15, 2010. No additional notice will be necessary**

for potentially providing additional testimony so the Board can hear the conclusion of the matter.

A motion was approved by Ms. Tell and seconded by Mr. Kellogg to adjourn the application with all in favor.

**New Business:**

Under New Business, Ms. Tell proposes that the Board consider not granting Informal Hearings anymore. She thinks it is a bad idea because we never have enough information or the legal authority to give an applicant anything they can rely on. All we do is create a public perception we prejudged an application before the public has been given notice and an opportunity to attend to hear the evidence. It is a lose, lose proposition. It is important to the integrity of the Planning Board decision making process or rather the public perception of the integrity of that process that we no longer engage in Informal Hearings. I move that we decline to hear Informal Hearings.

Mr. Zabarsky stated that it is a mandatory provision to provide Informals. Mr. Zabarsky agreed with Ms. Tell that with an Informal the Board should be careful on voicing an opinion. Mr. Zabarsky will confirm the law of the statute.

**Demolition Delay Ordinance:**

Mr. Shore stated there will be a meeting next Monday. That time will be used to review the Beach Haven Ordinance and see how it fits into Bay Head. Mr. Shore met with D'Arcy Rohan Green and the Mayor. There is an opportunity to encumber funds from this year's budget to use next year. We would have to specify exactly what the funds will be used for. D'Arcy is still working on making some appointments to interview people. Hopefully we have something by the next Planning Board Meeting. Mr. Shore confirmed that they are looking for a date of July 1<sup>st</sup> to have something to the council.

Mr. Shore agreed with Mr. Kellogg that we should not refer to this as a Demolition Delay Ordinance but as the Historic Preservation Ordinance.

There was a motion made by Mr. Kellogg and seconded by Ms. Tell to approve the vouchers with all in favor.

There being no further business the meeting was adjourned.

Respectfully Submitted,

Laura Tuzzolino  
Board Clerk



