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Zoning Board of Adjustment

October 19, 2011

Hearing
(Minutes)

Prepared by:

Paul Demarest

Mr. Bianco called to order, at 8:03pm, the Regular Monthly Hearing of the Zoning Board of Adjustment for the Borough of Closter, New Jersey, convening Wednesday, October 19, 2011 in the Council Chambers of the Borough Hall. He stated the meeting was being held in compliance with the provisions set forth in the New Jersey Open Public Meetings Act and had been advertised in the Borough's officially-designated newspaper. He advised that the Board adheres to an 11:00pm adjournment and no new matters would be considered after such time.

He invited all persons present to join the Board in reciting the Pledge of Allegiance.



The following Board members and professionals were present at the meeting:

- Steven Freesman, Esq.- Secretary
- Joseph Bianco, RA/PP
- Theodore West, DDS
- Mitchell Monaco
- Antranig Ouzoonian, PE
- Thomas Hennessey- Alternate #1
- Mark Crisafulli- Alternate #2
- Andrew Shyong, DDS- Alternate #3
- Marie Hartwell- Alternate #4
- Arthur Dolson- Council Liaison
- Leonard Sinowitz- Zoning Officer
- Michael Kates, Esq.- Board Attorney
- Jeffrey Morris, PE- Board Engineer
- Paul Demarest- Board Coordinator

The following Board members and professionals were absent from the meeting:

- Robert Knee- Chairman
- Lorin Sonenshine, RA/PP- Vice Chairman



Due to the absence of both Chairman Knee and Vice Chairman Sonenshine, Mr. Bianco, with the consent of Secretary Freesman, chaired the meeting.



Prior to the meeting, the Board obtained mail correspondence received by the Land Use Department on its behalf. Secretary Freesman read said mailings into the record.



A motion was made by Dr. West and seconded by Dr. Shyong, to approve the minutes for the September 21, 2011 Hearing; all eligible members present voted in favor. A motion was made by

Mr. Ouzoonian and seconded by Dr. Shyong, to approve the minutes for the September 28, 2011 (Special) Hearing; all eligible members present voted in favor.

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Mr. Bianco requested 3 volunteers from the Board to serve on the Subcommittee for the October 26, 2011 Work Session. The following were assigned: Mr. Bianco, Dr. West and Mr. Hennessey. Since 1 of the applications to be reviewed involves Site Plan Review, Mr. Morris agreed to attend as well.

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Mr. Bianco opened the meeting to the public for anyone wishing to comment on matters not related to a case on the evening's agenda.

John Kilduff, 180 Herbert Avenue, said 9 months have past since the Board denied Use Variance and Site Plan Approvals for the continuation of a contractor's yard at 63 John Street (Case #Z-2009-14), which is located in District #2 (Residential); he said the subject property's conditions have not improved and no effort has been made by the applicant to rid the site of its illegal operation. *At this time, Mr. Kilduff submitted a series of photographs taken of the subject property earlier in the day which illustrate the current conditions on-site; said photographs were not required to be marked in evidence by the Board and Mr. Kilduff stated he provided similar photographs to the Governing Body 2 to 3 weeks prior.* Mr. Kates explained said case is in the Superior Court of New Jersey- Bergen County Law Division and he is defending the Board's decision in the appeal filed by the applicant. He informed that oral argument has taken place and that the Board would be discussing the situation in closed session later in the evening. Mr. Kates stated the issue of enforcement, specifically the discontinuance of the contractor's yard on-site, is the concern of the Mayor and Council, not the Board; he further stated that the Board has no basis for discussing Mr. Kilduff's photographs until the appeal process is finalized. Mr. Kilduff felt the applicant's actions are setting a negative precedent whereby it is perceived the Board's decisions can be bypassed through litigation and delay tactics. He revealed that a site visit arranged by the Mayor's office involving State Senator Gerald Cardinale recently took place to help the applicant in his predicament; he found such a secretive meeting between elected officials to be suspicious because the judge involved subsequently reserved a decision in order to allow all parties a chance to resolve the issue amongst themselves. Mr. Kates said he would only be concerned if an involved party influenced the judge; otherwise, he said the Mayor's office is irrelevant in terms of litigation but not in the Governing Body's oversight of Borough lands, of which the subject case indirectly deals with a paper street (Westminster Avenue). He saw nothing unusual about elected officials assessing properties in-person. Mr. Kilduff indicated his son started using an inhaler 3 years ago to control his exercise-induced asthma, which he feels is attributed to his residence being in close proximity to the illegal operation being run out of 63 John Street. Ultimately, he felt the applicant's disregard for previous orders/penalties issued by the New Jersey Department of Environmental as well the Municipal Court is unacceptable.

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Due to the Board's heavy caseload, it announced the convening of a (Special) Hearing following the regularly-scheduled Work Session on November 28, 2011; it decided the following cases

would be heard pending the applicants' acceptance: 1.) 17 Bogert Street (Case #Z-2011-02); 2.) 66 Taillon Terrace (Case #Z-2011-12); 3.) 8 O'Shaughnessy Lane (Case #Z-2011-14).



Item #1

Case #Z-2009-10 170 & 176 Closter Dock Road (Block 1301/Lots 10 & 11)	Applicant(s): Representation:	DR Schmidt Realty, LLC Elliot Urdang, Esq.
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The applicant is appealing the determination of the Zoning Officer, in response to its inquiry, as to the legality of existing use(s) on the subject property; NOTE #1: the application stems from prior a Board decision (Case #Z-2008-06) granting Use Variance and Site Plan Approvals for the conversion of existing office space to 2 residential units, resulting in a total of 4 at the subject mixed-use building; NOTE #2: due to the nature of the case, perfection by the Subcommittee at a Work Session was not required; NOTE #3: given the history surrounding the subject property, the Borough Attorney's presence is required during Board proceedings;

Elliot Urdang, Esq., 19 Engle Street, Tenafly, New Jersey, introduced himself.

Mark Madaio, Esq., 29 Legion Drive, Bergenfield, New Jersey, counsel for Desan Enterprises, Inc. (owner-in-fee of the subject property), introduced himself.

Mr. Madaio explained the building on-site has existed in its current form for 100+ years. He reminded that in 2008 his client applied for Use Variance and Site Plan Approvals for the conversion of office space to 2 affordable housing units on the 2nd floor; he stated that over the course of several meetings, the Board considered 8 to 9 design waivers, not variances. He noted that despite the objection of DR Schmidt Realty, LLC (owner-in-fee of 162 Closter Dock Road), the application was approved. Mr. Madaio said that, unfortunately, the Board did not require specific proofs on each of the design waivers being sought, relying instead on a Planning Board Minor Site Plan Subcommittee approval issued to Desan Enterprises, Inc. in 2001 which supposedly granted said waivers; he said the 2008 case, thus, merely reiterated the existing waivers without hearing testimony on them. Mr. Madaio continued saying an appeal was filed following Desan Enterprise, Inc.'s most recent Board approval and the presiding judge ruled the Board could not rely simply on the Subcommittee's determination when it had a new Site Plan Review request to consider; he further stated proofs for each waiver must be presented to produce a better record of the case. He explained Mr. Urdang simultaneously filed an Appeal of the Zoning Officer's determination regarding the 2 existing apartments as well as the automotive repair shop and the related 700 to 800 sf retail space, all of which the appellant felt are not "grandfathered" uses. Mr. Madaio said the Appeal to the Board remained inactive on its agenda and it was not considered by the Court. He said on the advice of Mr. Kates, Mr. Urdang should present his Appeal on the question of "grandfathering" or at least shift the burden of proof to Desan Enterprises, Inc. by showing evidence to the contrary; Mr. Madaio believed such should occur before he presents the re-filed Site Plan Approval request for the same proposal (Case #Z-2011-16), which is a result of the Court remanding the Board's prior decision, less its Use Variance approval, in the 2008 case.

Mr. Urdang said the purpose of the October 18, 2011 report prepared by his client's engineer, David Hals, PE (which critiques the site plan filed in connection with Case #Z-2011-16) is to avoid arguing the completeness of said case once testimony started; he noted that if the site plan is modified accordingly, his client would have no objection. Thus, he felt the non-conforming use aspect of the subject property should be addressed prior because it could have site plan implications. He reiterated that his client does not dispute the 2 affordable housing units

sanctioned in the 2008 case, but rather the "grandfathering" of the 2 other apartments that have been considered pre-existing uses by Mr. Sinowitz. Mr. Urdang believed the context of the court case to be more restricted than spoken of by Mr. Madaio; he said the litigation surrounding the remand is still pending. He noted the Court order requires that the Board consider the adequacy of the proposed site plan in terms of present requirements stipulated in Chapter 173 of the Borough Code. He stated the Subcommittee did not grant design waivers as part of its 2001 approval, of which there are no minutes or public notice of the proceedings. Mr. Urdang stated that elements of the proposed site plan referred to by its preparer as existing conditions presupposes that they exist by virtue of a prior approval, which he believes they do not. He stated that when he brought up the issue of non-conforming uses on-site during the 2008 Board case, Mr. Kates stated such enforcement issues should be addressed to the Zoning Officer; he said a request was made to Mr. Sinowitz on the topic and his response was that there was not sufficient evidence to determine the existing uses' legality and, thus, Mr. Sinowitz forwarded the matter to the Board. Mr. Urdang stated that the Board eventually approved the 2008 case without dealing with the question of the non-conforming uses; he said, subsequently, another letter was sent to Mr. Sinowitz asking for a ruling on the uses and he responded by declaring them legal without enumeration but referencing the memorialized Resolution for the 2008 Board case as his reasoning. Mr. Urdang said he did not understand the Zoning Officer's logic behind his 2nd response, which he felt contradicted his 1st, because the Resolution had no discussion on the question of non-conforming uses. He said an Appeal was filed by his client that remained unheard by the Board, and following the consolidation of the non-conforming uses question into DR Schmidt Realty, LLC's court case, it was then decided (at a case management conference) that the existing use matter belonged before the Board. He summated such was the genesis of the remand as pertaining to the Board's Site Plan Approval involving the 2008 case. Disagreeing with Mr. Madaio, Mr. Urdang stated the 1 claiming the non-conforming use has the burden of proof. He said if counsel could show the use existed prior to the ordinance adoption prohibiting it as well as establish what the precise scope of that non-conformity was at the time (demonstrating if the non-conformity expanded), the burden would only shift back to DR Schmidt Realty, LLC if it claims there was an abandonment of the non-conforming uses; he said if such were to be established, the burden would, again, shift back to Desan Enterprises, Inc. to prove otherwise. Thus, Mr. Urdang stated it is Mr. Madaio's burden of proof even though it is his client's Appeal. Mr. Kates said the norm of proving the right to relief is on the applicant making a request for it, which he interpreted as the burden of proof going forward and, therefore, believed it is Mr. Urdang's burden. Mr. Urdang disagreed, citing *Berkeley Square v. Trenton Zoning Board of Adjustment*. Mr. Kates replied that the Zoning Officer has not been able to synthesize the proofs and asked Mr. Madaio if he could present such proofs. Mr. Madaio stated he would, but added Mr. Urdang is offering a grammatical distinction, not a zoning law distinction, when he states Mr. Sinowitz' initial response to his use inquiry was a non-decision and that both his written responses contradicted each other. Dr. West asked how many hours of presentation would be needed by counsel, not including discussion and questioning; Mr. Madaio estimated the issue of non-conforming uses along with the Site Plan Review remand would require 6 hours. Mr. Kates reminded that Mr. Sinowitz should not be put on the defensive if he is called to testify.

Edward Rogan, Esq., Edward Rogan & Associates, LLC, 125 State Street, Hackensack, New Jersey, counsel for the Zoning Officer, introduced himself. He stated that while normally Mr. Urdang's argument regarding burden of proof would be correct, the subject case differs in that when Mr. Sinowitz was contacted by Mr. Urdang, there was no application filed with his office

and, thus, no permit application was approved or denied by the Zoning Officer; he said Mr. Sinowitz was asked to give a letter of opinion and he was not in a position to take proofs from all parties involved. Mr. Rogan felt the Board needed to consider, as a matter of policy, whether it wishes to establish a precedent where someone, questioning the Zoning Officer, does not like his answer, which results in him having to constantly defend his actions; he believed Mr. Sinowitz' opinions should be given some deference and a challenger should have to provide some evidence as to why he is wrong. Mr. Urdang disagreed, reminding it was Mr. Sinowitz' 1st response which put the issue of non-conforming uses before the Board, and his client is simply appealing the Zoning Officer's withdrawal of that from it by way of his 2nd response. Mr. Bianco questioned if a Certificate of Occupancy would establish what uses are permitted on-site; Mr. Urdang replied it does not, as per case law, because it does not protect against a non-conforming use if the Certificate is for a different use. Mr. Urdang noted that an Open Public Records Act (OPRA) request found that the Borough's records on the subject property are lacking, which adds to the procedural problems surrounding Desan Enterprises, Inc.'s approvals by the Borough's land use boards over the past several years. Mr. Urdang stated the problem is that when Mr. Sinowitz was deposed, as part of the litigation, about the meaning of his 2nd response, he could not refer to any factor other than the Resolution from the 2008 Board case. Mr. Rogan reiterated that the Zoning Officer should not have to defend a pre-existing, non-conforming use. Mr. Bianco asked if there is a time limit in which an interested party can file an Appeal with the Board; Mr. Kates answered that in the remand of the case, either the Board or judge waived the usual 20-day window.

Mr. Sinowitz was sworn in as Witness #1. Mr. Madaio gave direct examination of the Zoning Officer. Mr. Sinowitz testified he has admired the subject building ever since moving into the Borough around 1970; he believed to have visited the site 15 to 20 times, 5 of which he entered the building throughout the prior 3 decades. He stated the automotive repair shop (principal use) and the automotive retail space (ancillary use) seems to have remained unchanged throughout the years. Mr. Sinowitz approximated that in the 1990's he viewed the building's 2nd floor and it contained 2 apartments, which he assumed were occupied, as well as 2 non-effective office spaces. He said he did not recall the use of the 2 apartments being abandoned. He informed he has served the Borough in the following capacities: 1.) Zoning Officer (1998 to present); 2.) Property Maintenance Officer (1997 to 1998); 3.) Planning Board full member (? to present).

Mr. Urdang cross-examined the witness. Exhibit #S-1, a transcript of Mr. Sinowitz' deposition conducted by Mr. Curding on March 10, 2010, was presented. Mr. Sinowitz stated a non-conforming use is 1 that, while not permitted in a zone, is being claimed by a party that it has a right to continue the use. He said he did not recall what proofs he asked of Desan Enterprises, Inc. when it applied for a zoning permit sanctioning its takeover of the existing automotive repair shop in 2001; however, he said it is custom for tax records, photographs and other historical data to accompany such applications filed with his office. The witness said he understood the subject property to have continued the garage/service station use uninterrupted

since the 1920's (and as far back as the 1890's during the "horse and buggy" era preceding the advent of the automobile). Exhibit #S-2, a "Zoning Application Denial" by Mr. Sinowitz dated December 12, 2001, was presented. Mr. Kates noted said exhibit was in response to an application filed with the Zoning Officer to operate an automotive repair shop on-site doing business as Alpine Valley Service Center; he said the witness denied the applicant and referred it to the Planning Board Minor Site Plan Subcommittee. Mr. Urdang interjected, saying the architecturals submitted as part of said application proposed construction on the 2nd floor

apartments. Mr. Sinowitz said he made such a decision because he did not have all the facts before him and the Subcommittee had the options of reviewing/deciding the case, forwarding it to the full Planning Board or returning it to him for approval. Mr. Sinowitz said the Subcommittee would not have had jurisdiction over the matter of non-conforming uses on-site. He said he did not recall if the 2 existing apartments were heated during that time nor was he aware that tax records described the 2nd floor as uninhabitable. He noted that because a space is not be utilized, it does not equate to the use being abandoned. Mr. Madaio believed said exhibit shows that by the Zoning Officer sending the application to the Subcommittee, not the Zoning Board of Adjustment; it meant he was satisfied with the residential use on-site even though such is not stated in his denial. Mr. Sinowitz stated he did not remember making any physical examinations of the site at the time Exhibit #S-2 was being prepared. He felt that if the apartments were not habitable, such could have merely required minor upgrades which would not mean the use was abandoned. Mr. Kates stated the Zoning Officer was not being asked to pass judgment on the apartment issue with respect to said exhibit; Mr. Urdang questioned how Mr. Sinowitz could have ignored the issue because the associated architecturals show the residences being created and/or restored. He stated the Subcommittee does not have jurisdiction on such a use matter and also noted that Mr. Sinowitz' personal knowledge of the site is hardly credible in light of the fact of his role as Zoning Officer when he did not bother to investigate the subject property. Mr. Bianco stated he thought apartments are permitted in District #3 (Business) and if not, questioned how the Borough's downtown area came to have its current layout of residential units above non-residential units. Mr. Urdang replied apartments in the downtown area may be non-conforming uses but stated the use is not permitted in District #3; Mr. Bianco disagreed. Mr. Kates informed the Zoning Code states any use permitted in District #'s 1 and 2 (Residential) is allowed in District #3 and, therefore, residences are acceptable. Mr. Urdang questioned if apartments are permitted to be created in the subject zone as of today; Mr. Sinowitz clarified that such would be a conditional use in District #3. Mr. Kates believed the condition for such a use is that it be affordable housing. Mr. Bianco felt the subject site matches the development pattern of the downtown area which has been in existence for over 1 century. Mr. Urdang countered that non-conforming uses are not favored in the law and that the Zoning Officer's actions in 2001 are inconsistent with his testimony this evening, much of which he felt was hearsay. Mr. Sinowitz stated that if a new service station were to be constructed in District #3, the Governing Body's approval would be a prerequisite as per Chapter 200-67. In the case of Exhibit #S-2, Mr. Sinowitz said since the proposed use was not changing from what it was prior, the Planning Board Minor Site Plan Subcommittee had jurisdiction; Mr. Urdang disagreed. Exhibit #S-3, a letter by Mr. Sinowitz dated December 10, 2008 written in response to Mr. Urdang's 1st inquiry about uses on the subject property, was presented. Exhibit #S-4, a letter by Mr. Sinowitz dated June 18, 2009 written in response to Mr. Urdang's 2nd inquiry about uses on the subject property, was presented. Mr. Sinowitz stated said exhibits were written as a courtesy to DR Schmidt Realty, LLC based on his personal knowledge and other historical documents. Mr. Urdang stated the witness had such personal knowledge both in 2001 and 2008 when Exhibit #S-3 was prepared and inquired what circumstances came

about (other than the Board’s Resolution for its 2008 case) to bring him to write Exhibit #S-4, which changed his determination as to the uses’ legality on-site; Mr. Sinowitz said he did not know.

Mr. Madaio re-examined the witness. Mr. Sinowitz said in 2001, the subject building was for sale, hence the proposed use referenced in Exhibit #S-2 was a continuation of an automotive repair shop on-site.

Mr. Rogan conducted follow-up questioning of the witness. Mr. Sinowitz reminded that none of his decisions rendered in 2001 regarding the residential and non-residential uses on-site were appealed. He stated habitability does not necessarily impact a permitted use. He believed Exhibit #S-4 showed that, other than the pre-existing uses, none were being introduced to the subject property.

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The Board recessed at 10:13pm.

The Board reconvened at 10:26pm.

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Outcome

Mr. Kates revealed that during the recess, a search of the Land Use Department’s records uncovered an institutional history of zoning ordinances since the inception of the Borough Code which have been collected into 1 brief; he said an initial review showed that the Mayor and Council adopted ordinances in 1955, 1971 and 1983, all of which restate the Limiting Schedule as permitting 2 families per building located in District #3. Mr. Kates said such raised the question as to whether the 2-family allowance continued until the current ordinance (adopted in 2003), which requires any proposed residential units to be of an affordable housing nature, thereby making it a conditional use. He stated the findings changed the whole landscape of proofs and advised counsel to orient themselves with the brief’s contents, which end at 1985, prior to their next Board appearance. Mr. Madaio assumed he would now only have to demonstrate the “grandfathering” of the 2 existing apartments as far back as 1983. The case was adjourned to the November 22, 2011 Hearing.

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Mr. Kates said he prepared a memo to be sent to Marc Votto, owner-in-fee of 551 Closter Dock Road (Case #Z-2011-07), an item which has been sitting inactive on the Board’s agenda awaiting memorialization of the Resolution; he said the letter relays the message that all required submissions must be received by the Board no later the November 22, 2011 Hearing; he continued saying that if such is not complied with, the Board would reopen the case that evening for purposes of denying the application.

A motion was made by Dr. West and seconded by Mr. Ouzoonian, to memorialize the Resolution for 268 West Street (Case #Z-2010-13). All eligible members present voted in favor. A motion was made by Mr. Ouzoonian and seconded by Dr. West, to memorialize the Resolution for 358 Ruckman Road (Case #Z-2011-06). All eligible members present voted in favor.



A motion was made by Mr. Ouzoonian and seconded by Dr. West, to have the Board go into closed session at 10:43pm. All eligible members present voted in favor.

Mr. Kates reported that the appeal concerning the Board's denial of 63 John Street (Case #Z-2009-14) was argued before the Superior Court of New Jersey- Bergen County Law Division on October 15, 2011; he said the judge reserved decision and asked that the Board discuss, in closed session, whether or to what extent a conditional approval would be acceptable. He noted that if the Board is amenable to reopening the case or to a settlement (known as a "fairness hearing"), such would be done on public notice. The board determined, by acclamation, that Mr. Kates is to draft a proposal which would require its approval before being given to the appellant for his consideration.

Mr. Bianco reopened the meeting at 11:07pm.



There being no further items to discuss, a motion to adjourn the meeting was made by Secretary Freesman and seconded by Ms. Hartwell. All members present voted in favor. The meeting adjourned at 11:08pm.