

DECEMBER 13, 2016 MINUTES
OAKLAND BOARD OF ADJUSTMENT
OAKLAND COUNCIL CHAMBERS - 8:00 P.M.
PUBLIC HEARING

Pursuant to Chapter 231, Public Law 1975 Open Public Meetings Act, adequate notice of this meeting has been provided by:

- *Adoption of an annual schedule of meetings.
- *Posting a copy of same at Borough Hall.
- *Forwarding a copy of same to the Record.
- *Mailing a copy to any person requesting same.

FLAG SALUTE, MEETING OPENED AT 8:06 P.M.

ROLL CALL: Present: Mrs. Steele, Messrs. Ackerly, Bremer, Smid, Wegman, and Chairman Lepre.
Absent: Messrs. Schneeweiss and Chadwick*

Also in attendance were Mr. Matthew Cavaliere, Board Attorney, Mr. Steve Lydon, Board Planner and Ms. Rebecca Mejia, Board Engineer.

PUBLIC MEETING:

1. Cohen – 87 Algonquin Trail, Block 5503, Lot 17. Public hearing for a rear yard setback.

Members conducted a site inspection with the exception of Mr. Chadwick. Mr. Wegman reported that the property is located in the RA-2 Residential zone and light in traffic. Chairman Lepre reported comments from the various departments.

The applicant is proposing a rear yard setback of 54-feet, 58-feet exists and 75-feet.

Mr. Allen Cohen was sworn in and testified that he is the owner of the home. He is proposing a rear deck to replace stairs that are missing. Mr. Cavaliere confirmed that there is an existing enclosed porch adjacent to the deck and that the size of the deck would not exceed 18' length by 11' width.

*Mr. Chadwick entered the meeting 8:13 p.m.

Chairman Lepre entertained a motion to open the meeting to the public.

Motioned by Mr. Smid and seconded by Mr. Wegman, to open the meeting to the public regarding matters to concerning the Cohen application was voted unanimously by the Board.

No comments.

Motioned by Mr. Smid and seconded by Mr. Wegman, to close the meeting to the public regarding matters to concerning the Cohen application was voted unanimously by the Board.

Motioned by Mr. Wegman and seconded by Mr. Smid, to approve the Cohen application.

Roll Call Vote: Ayes: Mrs. Steele, Messrs. Bremer, Ackerly, Smid, Wegman and Chairman Lepre
Nays: None
Abstain: None
Absent: Messrs. Chadwick and Schneeweiss

2. Bowitz – West Oakland Avenue, Block 2501, Lots 9, 10, 11, 16 & 30. Public hearing for a zoning permit has requested to carry to the January 10, 2017 meeting.

Chairman Lepre announced that the applicant has requested their application be carried with no further notice served. He entertained a motion. Mr. Smid questioned the number of times an application can carry. Mr. Cavaliere responded that the applicant is having survey issues and believes this is a legitimate reason.

Motioned by Mr. Wegman and seconded by Mr. Smid, to carry the Bowitz application to the January 10, 2016 public hearing.

3. Obernauer Enterprises, LLC/Oakland Service, LLC – 101 Plaza Road, Block 2702, Lots 1.01 and 1.02. Public hearing for an Appeal/Interpretation.
4. Jayare Associates – 101 Plaza Road, Block 2701, Lots 1.01 and 1.02. Public hearing for an Appeal/Interpretation.

Chairman Lepre verified that all attorneys were present for both Appeal/Interpretation applications. He expressed that it was clear that these two Appeal/Interpretations are connected and questioned if all attorneys involved would agree to consolidate and present their cases together. All attorneys agreed.

Mr. Cavaliere suggested that all attorneys be recognized for the record. Mr. Carl Rizzo, Esq. represents Jayare Associates, Shoprite, Mr. Robert Simon, Esq. from Herold Law located in Warren, N.J. represents Obernauer Enterprises, LLC and Oakland Service, LLC and Mr. Thomas Herten, Esq. representing A&E Ventures, LLC (Wawa).

Chairman Lepre verified that this application for an Appeal/Interpretation has been filed against the A & E Ventures, LLC application before the Planning Board for jurisdiction purposes. A discussion ensued concerning notice and public questioning. Mr. Cavaliere expressed that he did not consider this a public hearing where the public can participate in questioning the attorneys and all attorneys agreed. Mr. Simon responded that no notice is required for an Appeal according to MLUL but if the municipality has an ordinance in place requiring notice, then the applicant would need to abide. He informed the Board that the Borough has no ordinance requiring them to notice for an Appeal or Interpretation. However, if the application is treated as an Interpretation and witnesses are present to testify, then the public has the right to question.

Mr. Simon explained that an Appeal and Interpretation has been filed and under N.J.S.A. 40:50 - 70a and 70b it must follow the same provisions. An Appeal, (70a), is filed to the Board of Adjustment when an interested party has issue with the decision, such as an error in the order, requirement, decision or refusal by the zoning officer within 65 days of filing the appeal. An Interpretation application, 70b, was also filed which requires the Zoning Board of Adjustment to hear the interpretation and render a decision with no deadline.

He explained that he sent a letter to the Zoning officer requesting an explanation of his review for the jurisdiction of the Wawa application before the Planning Board. They found out that jurisdiction was not decided by the Zoning officer but by the Planning Board attorney and by refusal of the Zoning officer's decision or response, the appeal was filed.

Mr. Herten referenced case law, DePetro vs. Wayne Planning Board, where objectors raised jurisdictional objections but their rights were preserved even though they disagree with the Board's decision. This allowed the objectors to litigate their objections without filing an Interpretation. Under a 70a, a planning board has the right to determine their own jurisdiction. However, a planning board cannot hear a 70a but can hear a 70b.

Mr. Simon expressed that he sent correspondence to the Zoning official a number of times and there has been no response which allows them to file the appeal. Mr. Cavaliere questioned if they are appealing the non-action of the zoning official. Mr. Simon responded that the appeal has been filed due to the Zoning official's failure to take a position that this application should be before the Zoning Board. Mr. Cavaliere questioned the status of the Wawa application at the Planning Board.

Mr. Herten, representative of Wawa, explained that they began with the Planning Board back in October with the objectors present. He further explained that the Zoning officer was not asked for an interpretation. His argument is that according to N.J.S.A. 40:55D-70(a) filed by the objectors, there is no basis for an appeal since the administrative officer has made no decision from which an appeal may be taken. Mr. Rizzo expressed that there is a jurisdiction matter that needs to be decided by this Board. Mr. Cavaliere questioned if no action was taken by the Zoning officer in response to their letter. Mr. Simon responded that they filed the N.J.S.A. 40:55D-70(a) back in September to the Zoning officer and since then, they have sent 3 to 5 letters with no response or weigh in. However, when a Zoning officer refuses to make a determination, a 70(a)

can be filed with the intent that the Board of Adjustment make that determination. Mr. Herten responded that the Zoning officer did not refuse the interpretation and there is no record of that, he just did not react. So the 70(a) appeal fails causing this matter to be 'stayed' with the Planning Board. Mr. Cavaliere clarified that Mr. Herten meant that a determination under 70(a) would go to the Board of Adjustment and 70(b) would stay with the Planning Board and the Zoning official is taken out of the equation. Mr. Simon responded that if this goes to a 70(b), it removes the 'stayed' and the Planning Board can continue to hear the application simultaneously while a determination is being made by the Zoning Board of Adjustment which is a waste of time because if the decision goes to the Board of Adjustment, the Planning Board cannot grant a use variance. Mr. Rizzo expressed that it would be more efficient for a determination to be made and one board hears the entire application.

Mr. Herten expressed that this was the objectors' choice to file a 70(a) and 70(b) with no guarantees while they could have been present throughout the entire application before the Planning Board to offer their feedback. Mr. Simon responded that the Planning Board cannot rule on jurisdiction and what Mr. Herten proposes is that the application continue to be heard in its entirety wasting the time of Planning Board when they are just appealing where the application belongs and the Board of Adjustment should make that decision.

Mr. Cavaliere confirmed the circumstances of both the appeal and the interpretation. He suggested that each attorney give a preview of their position.

Mr. Simon explained that as determined, A & E Venture, LLC is proposing retail use with gasoline pumps in the B-2 Business zone which is not permitted according to the Borough's ordinance. As determined, the proposed Wawa falls under retail sales and according to the Borough's ordinance, no outdoor sales are permitted except for nursery and horticultural products. As determined, Wawa is proposing a convenience store and a gas station and according to the Borough's ordinance, a combination of 2 uses on one lot is not permitted. Their position is that all three proposals referenced falls within the jurisdiction of the Zoning Board of Adjustment requiring a variance approval by the Zoning Board of Adjustment.

Referencing case law, he informed the Board that it has also been determined that an automobile service station use which should also be defined as a gasoline station, is required to be at least 1,500-feet away from any other gasoline station according to the Borough's ordinance for safety reasons. The proposed Wawa and the existing Valaro would be separated by 1,200-feet. Mr. Rizzo echoed Mr. Simon's position. He expressed that he believes that the proposed Wawa is skirting around the outdoor sales issue when they are known to sell soda and other things outdoors. He read the ordinance.

Meeting recessed at 9:40 p.m.

Meeting resumed at 9:50 p.m.

Mr. Herten gave his position. He expressed that he disagrees with Mr. Simon's case law findings. He believes that the Planning Board has jurisdiction over the application and there is no merit to the appeal or interpretation filed to the Board of Adjustment.

In both instances, no decision was made by the zoning official with regard to jurisdiction and the Planning Board should retain jurisdiction and be permitted to interpret the ordinance as set forth in the MLUL.

This application has special circumstances and referenced case law where a trial decision concluded that a combined gas station and retail use was considered a single principle use. He expressed that Oakland's ordinance does not give much guidance and gave an example of the use "retail sales" and clarified that this not an "automobile service station." The proposed use will not include outdoor sales but gasoline and diesel fuel sales cannot be accommodated indoors so the proposed use is not in violation with this provision which he supported with case law he shared to the Board.

Mr. Cavaliere suggested that all exhibits be entered into evidence and the hearing continue next month. All three attorneys will offer testimony given by their planners.

Mr. Simon entered evidence.

Exhibit A-1, A & E Ventures, LLC application filed with the Planning Board June 23, 2016.

Exhibit A-2, A & E Ventures, Site Plan cover sheet page 3 of 13 filed with the Planning Board dated May 20, 2016.

Exhibit A-3, A & E Ventures Highlands Exemption, NJDEP dated June 8, 2016.

Exhibit A-4, Copy of law opinion Jai Sai Ram vs Toms River.

Exhibit A-5, Jai Sai Ram vs Toms River Appellate.

Exhibit A-6, Jai Sai Ram vs. Toms River Supreme Court decision.

Exhibit A-7, Zohra Resolution of approval by Board of Adjustment dated December 8, 2009.

Exhibit A-8, Online GIS map Valaro – Wawa location.

Mr. Rizzo, Mr. Simon and Mr. Herten confirmed the letters submitted to the Board. Chairman Lepre announced that this matter would be carried to the January 10, 2017 public hearing with no further notice.

MEMORIALIZATION OF RESOLUTION:

1. Talamini – 33 Seminole, Block 4602, Lot 27. Approval for a side yard setback.

Eligible voters: Mrs. Steele, Messrs. Bremer, Ackerly, Smid, Wegman, Schneeweiss and Chairman Lepre.

Motioned by Mr. Smid and seconded by Mr. Bremer, to memorialize the above resolution of approval.

Roll call vote: Ayes: Mrs. Steele, Messrs. Bremer, Ackerly, Smid, Wegman and Chairman Lepre.
Nays: None
Abstain: None
Absent: Mr. Schneeweiss

2. Mattera – 21 Manito Avenue, Block 5202, Lot 31. Approval for a side yard setback and building height.

Eligible voters: Mrs. Steele, Messrs. Bremer, Ackerly, Smid, Wegman, Schneeweiss and Chairman Lepre.

Motioned by Mr. Wegman and seconded by Mr. Bremer, to memorialize the above resolution of approval.

Roll call vote: Ayes: Mrs. Steele, Messrs. Bremer, Ackerly, Smid, Wegman and Chairman Lepre.
Nays: None
Abstain: None
Absent: Mr. Schneeweiss

3. Knudsen – 83 McNomee Street, Block 3804, Lot 30. Approval for a front and side yard setback.

Eligible voters: Mrs. Steele, Messrs. Bremer, Ackerly, Smid, Wegman, Schneeweiss and Chairman Lepre.

Motioned by Mr. Smid and seconded by Mr. Wegman, to memorialize the above resolution of approval.

Roll call vote: Ayes: Mrs. Steele, Messrs. Bremer, Ackerly, Smid, Wegman and Chairman Lepre.
Nays: None
Abstain: None
Absent: Mr. Schneeweiss

4. Klinchik – 21 Calumet Avenue, Block 4602, Lot 19. Approval for two side yard and front yard setbacks.

Eligible voters: Mrs. Steele, Messrs. Bremer, Ackerly, Smid, Wegman, Schneeweiss and Chairman Lepre.

Motioned by Mr. Bremer and seconded by Mrs. Steele, to memorialize the above resolution of approval.

Roll call vote: Ayes: Mrs. Steele, Messrs. Bremer, Ackerly, Smid, Wegman and Chairman Lepre.
Nays: None
Abstain: None
Absent: Mr. Schneeweiss

5. Guru Nanak Mission, Inc. – 138 Bauer Drive, Block 3603, Lot 2. Approval for a use variance.

Mr. Cavaliere reviewed the entire resolution with the Board, Mrs. Gonchar and Mr. Guldeep. Amendments were made to the agreement of the Board and the application.

Eligible voters: Mrs. Steele, Messrs. Chadwick, Ackerly, Wegman, and Chairman Lepre.

Motioned by Mr. Chadwick and seconded by Mr. Wegman, to memorialize the above resolution of approval.

Roll call vote: Ayes: Mrs. Steele, Messrs. Ackerly, Chadwick, Wegman and Chairman Lepre.
Nays: None
Abstain: None
Absent: None

PAYMENT OF BILLS:

Motioned by Mr. Ackerly and seconded by Mr. Smid, to approve the payment of bills subject to the availability of funds was voted unanimously by the Board.

APPROVAL OF MINUTES:

Motioned by Mr. Wegman and seconded by Mr. Smid, to approve the November 15, 2016 Minutes as amended was voted unanimously by the Board.

NEW BUSINESS:

RFQ committees were formed to review the qualifications of professional candidates for the Board. Mr. Smid and Bremer would review RFQ for Board Attorney, Mr. Chadwick and Mr. Schneeweiss would review RFQ for Board Engineer and Mr. Wegman and Mr. Ackerly would review candidate for Board Planner.

OLD BUSINESS:

None

MEETING ADJOURNED:

Motioned by Mr. Bremer and seconded by Mrs. Steele, to adjourn the meeting concluding at 11:45 p.m. was voted unanimously by the Board.

Respectfully submitted by,

Kathlyn Gurney, Board Secretary

*Next meeting is January 10, 2017.