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Via e-mail

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Via e-mail

Salvatore Alfieri, Esq.
955 Route 34, Suite 200
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Via e-mail

Robert Farrell, Chairman
Colts Neck Zoning Board of Adjustment
124 Cedar Drive
Colts Neck, N.J. 07722

Re: Appeal/Interpretation of Flancbaum, Dfailey and Zagha
Colts Neck Zoning Board of Adjustment

Gentlemen,

I have been requested by the Board chairman to provide the Board with a description of the two issues they will be reviewing at tonight's meeting with a synopsis anticipated positions pro and con. I have attempted to do that in the attachment to this e-mail. The synopsis is not intended to fully elaborate your positions or to restrict you from fully elaborating your positions at the meeting.

Very Truly Yours,

Michael B. Steib

PRELIMINARY ISSUES TO BE DECIDED

#1 MUST THE HEARING BE CONDUCTED AT AN IN-PERSON MEETING?

Mr. Shea's letter brief of 10/1/20 contends that it must be held at an in-person meeting:

- 1. The Board is a quasi-judicial body and, similar to a court, has the power to interpret the law. In this case the Ordinance.**
- 2. In March of 2020 the New Jersey Supreme Court suspended all jury trials.**
- 3. The suspension was, in part, due to concerns regarding the due process rights of citizens to confront and cross-examine witnesses.**
- 4. There is no express language in the Open Public Meetings Act (OPMA) or the Municipal Land Use Law (MLUL) authorizing holding hearings by virtual means.**
- 5. The Open Public Meetings Act (OPMA) is, in part, designed to ensure the right of the public "to be present at all meetings of public bodies."**
- 6. The OPMA also states that it is to ensure the right of citizens "to attend all meetings of public bodies."**
- 7. Although the OPMA defines "meeting" as including any gathering "by means of communication equipment" the 1975 Statute predated the internet and Zoom. Therefore, the legislature could not have intended gatherings by means of communication equipment to include current internet and Zoom technology.**
- 8. Zoom technology limits the ability of the public to observe aspects of virtual meetings such as seeing witnesses as they review plans and exhibits. This allegedly impairs the due process rights of interested parties to observe witnesses, cross-examine witnesses etc.**
- 9. Not everyone will have access to a computer to participate so their rights will be impaired using Zoom technology.**

Mr. Steib's responses 9/28/20 and 10/5/20 contends the Board can conduct a hearing either in-person or by virtual means:

1. The MLUL requires Boards to conduct regular meetings at least once per month unless there are no pending applications.
2. The MLUL requires Boards to act of applications within finite time periods and failure to act results in automatic approval.
3. The MLUL does not define the term "open to the public".
4. The OPMA expressly permits meetings of public bodies to be held by means of "communication equipment." "Communication Equipment" is not defined.
5. The legislature, aware of the rapid advances in technology in the 19th and 20th centuries (telegraph, telephone, wireless telegraph, wireless radio, television etc.) , used the broad term "communication equipment" so that it would encompass future technological advances such as the internet and Zoom after 1975.
6. Shortly following the Governor's March executive Ordering limiting in-person public gatherings the Department of Community Affairs Division of Local Services (DLGS) issued a "Guidance for Remote Public Meetings" brochure reminding local government agencies, including zoning and planning boards, of their obligation to hold meetings and conduct business.
7. The DLGS recognized traditional teleconferencing, web-based calls (ie. Skype, Zoom, Go To Meeting) and Social Media live streaming as acceptable means of conducting public meetings.
8. The OPMA permits any person to apply to the Superior Court for an injunction to insure compliance with the OPMA. No such action has been filed by Mr. Shea's clients.
9. In September 2020 the legislature adopted N.J.S.A. 52:27D-18.11 which expressly authorizes public bodies to conduct public meetings remotely by electronic means during a governor declared state of emergency.
10. Although the current executive order permits in-person gatherings subject to a variety of conditions regarding numbers and social distancing, it does not mandate in-person meetings or prohibit virtual meetings.
11. Whether a meeting is to be held in-person or virtually is a decision within the discretion of the Board.

#2 DOES THE BOARD HAVE JURISDICTION TO HEAR THIS APPEAL/INTERPRETATION?

Mr. Alfieri's Letter Brief dated October 5, 2020 contends the Board doesn't have jurisdiction to hear this case:

Part 1

1. N.J.S.A. 40:55D-70a. allows the Board to hear appeals "... where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance."
2. N.J.S.A. 40:55D-3 defines "Administrative Officer" as the Clerk of the municipality unless a different municipal officer or officials are designated by ordinance.
3. The Ordinance definition of "Administrative Officer" states that for planning board matters it is the Planning Board assistant secretary and for zoning board matters it is the Zoning Board assistant secretary.
4. Tim Anfuso is neither and therefore is not the administrative officer.
5. Since Tim Anfuso is not the administrative officer and the statute is limited to appeals from decisions of the administrative officer the Board has no jurisdiction to hear the case.

Part 2

1. Both zoning and planning boards have the authority to interpret the provisions of land use ordinances in cases before them.
2. Since the Colts Neck Community Church application is already before the planning board it is the planning board that should interpret the ordinance.

Mr. Steib's memorandum dated October 5, 2020 disagrees:

Part 1

1. Agrees with Mr. Alfieri only as to points 1, 2 & 3.
2. The statute permits the designation of different municipal officials to serve as the administrative officer in different situations.
3. Section 102-32.1 Section A. provides that for all applications for development, a Colts Neck Township zoning application shall first be made to the administrative officer (Zoning Officer) for issuance of a zoning approval by any person wishing to undertake any regulated activity. The ordinance expressly designates the Zoning Officer as the administrative officer acting under Section 102-32.1.
4. Section 102-32.1 Section F provides that if the administrative officer determines that the proposed undertaking is not an exempt development, the applicant shall be instructed that the Planning Board or Board of Adjustment approval of the application is required. That Zoning Officer shall further advise the applicant which board has jurisdiction over the application for development and which approvals are required.
5. Tim Anfuso is the Zoning Officer as well as the Planner for Colts Neck Township. In directing this matter to the Planning Board for conditional use and variance approval he was acting pursuant to his authority under Section 102-32.1.F.
6. Thus, the action appealed from was that of the Zoning Officer expressly designated by ordinance Section 102-32.1 as the administrative officer for such purposes. Therefore the appeal was properly taken pursuant to N.J.S.A. 40:55D-70.a. and the Zoning Board of Adjustment has jurisdiction to hear the appeal.

Part 2

1. Since the Board has jurisdiction to hear the case under Part 1 above the issue as to Part 2 is moot.

2. Nevertheless, the Statute expressly authorizes the Board of Adjustment as the primary authority to hear requests for interpretation in the first instance. The MLUL provides no such express authority to the Planning Board.
3. The request for interpretation is separate and independent from the case before the Planning Board and need not await a case to be made before that Board.