

MEMORANDUM

FROM: MICHAEL B. STEIB, ESQ.
TO: MICHAEL B. STEIB, ESQ.
DATE: OCTOBER 5, 2020
RE: COLTS NECK COMMUNITY CHURCH AND FLANCAUM
LETTER BRIEFS REGARDING N.J.S.A.40:55D-70.a. & b.

Counsel for the above property owner has submitted a letter brief which, in part, takes the position that the appeal of Flancaum, et. al. pursuant to N.J.S.A. 40:55D-70.a & b. challenging the decision of the Zoning Officer as to its application was improperly filed and is not authorized by the MLUL. The thrust of the argument is that N.J.S.A. 40:55D-70.a. applies only to appeals from the decision of "an administrative officer based on or made in the enforcement of the zoning ordinance." His argument is that the determination appealed from was not of the administrative officer. Instead it was a decision of Tim Anfuso who is the Zoning Officer and Planner of Colts Neck Township. Thus, the Board of Adjustment does not have authority to hear the appeal. The following is the gist of the argument:

The MLUL definition provides that "Administrative Officer" "means the clerk of the municipality, unless a different municipal official or officials are designated by ordinance or statute." N.J.S.A. 40:55D-3.

The Colts Neck ordinance Section 102-4 defines "Administrative Officer" as for Planning Board matters, the Planning Board Assistant Secretary; for Zoning Board matters, the Zoning Board of Adjustment Assistant Secretary; for governing body matters, the Township Clerk; and for matters pertaining to the issuance of an official list of property owners for notice requirements, the Township Planner.

The issue in question does not relate to the issuance of a list of property owners. Therefore, the Township Planner is not the appropriate administrative officer and there is no right of appeal from his decision as it does not relate to a property owner list.

However, as noted previously, the statute permits the designation of different municipal officials to serve as the administrative officer in different situations. Section 102-32.1 sets forth the procedure to be followed on an application for zoning review. 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.

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.

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. as the Zoning Officer. 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.

With respect to the appeal pursuant to N.J.S.A. 40:55D-70.b. it appears that the basis for that appeal is the same as the appeal under N.J.S.A. 40:55D-70.a. challenging the Zoning Officer's determination that a conditional use variance is not necessary. Based on the case of Sitkowski v. Zoning Bd. of Adj., 238 N.J. Super 255 (App. Div. 1990), since the nature of the appeal filed was properly submitted under N.J.S.A. 40:55D-70.a. the board should handle the appeal under that section and not allow circumvention of that section by characterizing it as an "interpretation" when it is, in fact, a challenge of the Zoning Officer's decision.

Based on the foregoing the letter brief of counsel for the appellant is correct in its position that the Zoning Board must review and decide the appeal from the Zoning Officer's decision that the application of the Colts Neck Community Church does not require a "Use Variance" under N.J.S.A. 40:55D-70.d.(3). The appellant is also correct that the Zoning Board shall review and consider the expert testimony and exhibits that may be presented by the appellant, the property owner (Church) and the Zoning Officer as to the issues necessary to resolve the appeal.

It is noted that the appellant's letter brief makes reference to appealing from the determinations of the Planner "supplemented by the Zoning Board engineer Glenn R. Gerken" in his August 7, 2020 and September 2, 2020 letters. It is noted that the Statute does not provide for an appeal from the determination of the Engineer. The Engineer's letters should not be construed as a zoning determination, only as a determination whether the submitted plans complied, or failed to comply, with an ordinance section.

The appellant's brief raises an issue as to pinpointing the origination of the determination that the Church proposal is a permitted conditional use.

It suggests that the Zoning Officer has no authority to do so since he is not an "approving authority". However, that assertion ignores the clear and unambiguous language of Section 102-32.1 which states that "For all applications for development" application must be made in the first instance to the Zoning Officer. If the Zoning Officer determines that the application is not exempt it is he who instructs the applicant what approvals are required and which board has jurisdiction to hear the application. If the applicant disagrees with that decision they may appeal it as is being done here.

The remainder of the letter briefs of both parties are devoted to the issue of whether the application of the Church is a permitted conditional use or whether conditional use variance approval is necessary. I am addressing that issue in a separate memorandum.

Respectfully Submitted,

Michael B. Steib