

**UPPER TOWNSHIP ZONING BOARD OF ADJUSTMENT
MEETING MINUTES
APRIL 11, 2013**

The regular meeting of the Upper Township Zoning Board of Adjustment was held at the Township Hall, 2100 Tuckahoe Road, Petersburg, New Jersey. The meeting was called to order at 7:30 p.m.

SUNSHINE ANNOUNCEMENT

SALUTE TO THE FLAG

ROLL CALL

Present: Christopher Phifer, Jeffrey Pierson, Andrew Shawl, Matthew Unsworth, Joseph Healy, Alistair Lihou, Susan Adelizzi-Schmidt and Paul Casaccio.

Absent: Lynn Petrozza, Hobart Young, and Brian McCoy.

Also in attendance were Dean Marcolongo, Board Solicitor; Paul Dietrich, Board Engineer and Joanne Heron, Acting Board Secretary.

SWEAR IN PAUL DIETRICH

APPROVAL OF THE MARCH 14, 2013 MEETING MINUTES

A motion to approve the minutes was made by Mr. Unsworth, seconded by Mr. Pierson, and approved. Abstain: Phifer, Healy and Casaccio.

TABLED APPLICATIONS

1. MPS LANDHOLDERS LLC – BLOCK 479, LOT 46 – BA13-12
2. MPS LANDHOLDERS LLC – BLOCK 479, LOTS 30, 31, 32, 35 & 37 – BA14-12

The applications listed above have been tabled until May 9, 2013. The applicants agree to waive the time in which the Board has to act on the applications. No further notice is required.

RESOLUTIONS

1. ROBERT & ELLEN BARKER – BLOCK 856, LOT 5 – BA03-13

A motion to adopt the Resolution was made by Mr. Pierson, seconded by Mr. Shawl, and approved. Abstain: Phifer, Healy and Casaccio.

BILLS

A motion to pay the bills as presented was made by Ms. Adelizzi-Schmidt, seconded by Mr. Unsworth, and approved.

APPOINT TEMPORARY CHAIRPERSON

Chair Casaccio announced that he would have to step down during the application for Ralph & Deanna Holt. Vice Chair Unsworth also has to step down.

A motion to appoint Mr. Pierson as temporary Chair was made by Mr. Unsworth and seconded by Mr. Phifer and approved.

APPLICATIONS

1. OFFSHORE PROPERTY GROUP LLC – BLOCK 599, LOT 14 – BA04-13

Application is for a use variance to permit more than one principal building (existing building and two proposed 6,000 sq. ft. buildings) to be used for motor vehicle/trailer display, offices and warehouse/storage/workshops and preliminary and final site plan approval at 509 Route US 9 South, Marmora.

Ms. Adelizzi-Schmidt stepped down during discussion and voting on this application.

William Serber, Esquire, represented the applicant. Mr. Serber stated that the two proposed buildings would be constructed in two phases. The applicant proposes to continue the existing area approved by the NJDMV for the sales of landscaping utility trailers.

Vincent Orlando, Professional Engineer and Planner, Landscape Architect and Certified Municipal Engineer, was sworn.

Solicitor Marcolongo stated that the applicant is agreeing as a condition of approval there would be no sale of motor vehicles at the property. Mr. Dietrich stated the plan would have to be amended to remove motor vehicle sales.

Mr. Orlando testified that his firm EDA prepared the site plan dated 11/29/12 and revised 2/11/13 and 3/4/13. A color aerial map was marked as Exhibit A-1. A color rendering of page 2 of 6 of the site plan showing the landscaping was marked A-2. He stated that the building was previously approved for offices and has an adequate number of parking spaces. The property is approximately 4 acres and is uniquely shaped since there is only 104.54 ft. of frontage on route 9 where 125 ft. is required. They have asked for a lot frontage variance since the change of use dictates a variance. In order to construct the two proposed buildings a use variance would be needed to allow more than one principal building on the site even though the proposed uses are permitted. All storage would be

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inside the buildings and there is no exterior storage proposed. The site was designed to conform to the storm water management regulations. They propose to utilize building mounted lights directed downward so there is no off site glare. The proposed hours of operation are 7 a.m. until 8 p.m.

Mr. Orlando testified that he believes the variances could be granted in accordance with NJ40:55D2 section "G" since this is an appropriate location for this use since it is located within the TC zone and is a unique shaped lot. Another purpose is "M" since it allows the land to be used sufficiently and "I" since he believes the placement of the structures is good civic design and arrangement for good circulation.

Mr. Orlando testified in regards to the negative aspects of the application. He does not believe there would be any impairment to the zone plan or zoning ordinance since the uses are permitted. He does not believe granting the variances would have a substantial detriment to the public good. The principals of the facility would have an on-site office. They would be onsite seven days a week and they would control the management of the facility.

Mr. Orlando testified that the applicants have discussed the landscaping with the adjacent property to the north. They are in favor of a condition that the applicant plant additional evergreens along the property line and work with Mr. Dietrich to provide a more substantial buffer.

In regards to the architecture of the two proposed buildings, Mr. Orlando testified they would be 26 ft. high, light grey metal with red trim as shown on the Apex plan dated 12-3-12. The buildings would be constructed in two phases. Phase I would be the infrastructure, basin and the first building. Phase II would be the second building. The existing signage and the easement would remain. The existing easement would continue for access to the back of the building.

Robert Guarini, 3 Woodstock Drive, Linwood, NJ, was sworn. He testified they have no intention of operating a towing impound yard on the property.

Mr. Dietrich testified the site conforms to the township standards. The Township may pick up the trash and recycling depending on the type of use and number of containers.

The meeting was open to the public.

Kathy Knapp, 435 Route US 9 South, was sworn. She has concerns about the hours of operation and noise. She is also concerned about the fence. Mr. Orlando stated the proposed slats in the fence would be used to block visibility. She is not clear as to what the property would be used for. Mr. Orlando explained the main structure would be used for offices and the two proposed buildings would be utilized as workshop/warehouse and storage. There was discussion concerning the height of the fence, buffers and the fact that Bayberry Cove is also in a commercial zone. Mr. Orlando stated that the buildings

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on the subject site comply with the setback requirements; however the campground does not comply with the ordinance since it is a pre-existing non-conforming use and does not comply with the setbacks. Mr. Dietrich confirmed that the campground requires a 100 ft. buffer between the property line and the units but it does not. Mr. Orlando further testified that the proposed units would generate approximately 20 trips per day.

Mr. Kitts owner of unit #9 in Bayberry Cove, was sworn. He is concerned about the types of uses that might go into the proposed buildings. Mr. Orlando stated the applicants have agreed there would be no automotive repair, body shops or welding and that all activities would take place inside the buildings. Mr. Kitts asked if the applicants would reduce the hours of operation.

Brie Matticks, owner of #12 Bayberry Cove, was sworn. She has been at Bayberry Cove for 25 years. She objects to the application since her front deck would face the applicant's property. She does not feel they need to be open 7 days a week. She is concerned about the noise, traffic, air pollution and property values.

Hearing no further comment the meeting returned to the Board for findings of fact.

MR. SHAWL –Offshore Property Group LLC is before the board for property located at 509 Route US 9 South in Marmora, also known as Lot 14, Block 599. The property is located in the TC zone. The applicant submitted an aerial photo and a series of plans. The plan meets most of the zoning requirements. There are three nonconformities on the plan. Vincent Orlando, applicant's engineer, described the surrounding area and uses. The plan proposes to construct two storage structures and renovate an existing office building. There would be no outside storage around the buildings. The hours of operation would be 7 am until 8 pm. There is an existing fence around the property. The applicant proposes to add additional landscaping on the north side next to the residential area to cut back on the visual impact and noise. Mr. Orlando testified that special reasons G, M and I are being advanced and that there would be no substantial detriment to the public good and there would be no negative impact to the zoning ordinance. Residents of Bayberry Cove objected to the application for various reasons. Mr. Orlando testified that the traffic study proposes there would be less than 20 vehicle trips per day. He concurs with the special reasons given by Mr. Orlando. He does not believe that granting the application would have a negative impact on the public or the zoning plan.

MR. PHIFER – He believes the application can be granted without detriment to the public good and without impairing the intent or purpose of the zoning plan. He believes the applicant has met special reasons G, I and K, pursuant to NJS40:55d-2. He would be in favor of the application.

MR. HEALY – He concurs with his colleagues.

MR. LIHOU – He also believes the application should be granted. He sees no detriment to the community. The proposed uses are permitted.

MR. PIERSON – He concurs. He agrees with the special reasons given by Mr. Orlando. He believes the application can be granted without substantial detriment to the public good and without impairing the intent and purpose of the zone plan.

MR. UNSWORTH – He concurs. The lot is a unique shape. It is a flag lot and does not meet the lot frontage requirement. He also agrees with the special reasons that Mr. Orlando testified to. The use being proposed is much less than other uses that are permitted on the property. The public has concerns about noise and visual impairment. The structures on the adjacent property were constructed closer to the property line than required under today's standards for a campground. The applicant has agreed to numerous conditions. He is in favor of granting the application.

MR. CASACCIO – He concurs. Mr. Orlando testified the traffic counts show there will be no more than 20 trips per day.

There was a question in regards to who would install the slats in the fence. Mr. Orlando stated that the applicant would do this and they will coordinate with the adjacent property owner.

A motion was made by Mr. Unsworth and seconded by Mr. Pierson to grant the application as proposed with the conditions that there will be no sale of motor vehicles on site, the plan will be revised to show that the sales would be landscaping utility trailers only, there would be no outside storage particularly of any equipment with the exception of the designated display area in the front of the property, the hours of operation will be from 7 a.m. until 8 p.m., the applicant will increase the buffer on the northerly property line to the satisfaction of the board engineer by adding additional plantings, the plantings must be completed before the issuance of a certificate of occupancy, note 4 will be restriction on the plans that there would be no auto repair, body shop or welding operations on site and will not be used as a towing storage yard and all activities will occur within the storage facility. There would be no tractor trailers on site, any leases would prohibit the storage of toxic, explosive, hazardous or illegal materials, the slats will be placed inside the fence adjacent to the northern property line by the applicant. In favor: Phifer, Pierson, Shawl, Unsworth, Healy, Lihou, Casaccio.

2. RALPH & DEANNA HOLT – BLOCK 652.01, LOT 19 – BA15-12

Applicants are requesting a use variance for expansion of a non-conforming use, variance for the number of parking spaces required and amended preliminary and final site plan approval to permit additional seating on the second floor at Ralph's Bagels, 121 Tuckahoe Road, Marmora.

There was a short recess.

Mr. Casaccio and Mr. Unsworth stepped down during this application. Ms. Adelizzi-Schmidt rejoined the Board. Mr. Pierson acted as Chair during this application.

Ralph & Deanna Holt, 50 Jill Avenue, Marmora, were sworn.

Solicitor Marcolongo stated that the Board must determine whether or not they have jurisdiction to hear the application before any discussion involving the merits of the

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application can be heard. He reviewed res judicata. He then reviewed each of the previous resolutions adopted by the Board along with each of the applications brought before the Board by Mr. and Mrs. Holt. He reviewed the conditions of approvals granted which include that the second floor would not be used for catering or additional seating.

Mr. Holt wanted the record to reflect that last week while in Superior Court regarding his zone change; Solicitor Marcolongo requested that the judge postpone this matter until after the judge makes a decision on the zone change. He does not think that their prior applications that were submitted to the Zoning Board have anything to do with res judicata. His current request is completely different than it was back in 2007.

Mr. Holt explained that a deli/take out requires more parking spaces than a restaurant. In his establishment people can walk up and help themselves to drinks, bagels and the deli case so it is not the same as a restaurant. He does not want to make his parking lot bigger. Solicitor Marcolongo marked as Exhibit A-1 a copy of the Upper Township Commercial Parking Standards. Mr. Holt stated this shows the difference between a restaurant and a deli/take out. A copy of correspondence from the Cape May County Department of Health, dated February 7, 2007 was marked A-2. A copy of the interior of the building showing the seating was marked as Exhibit A-3. Mr. Holt stated the request in 2007 was for a catering hall which is not what they are requesting now. He said that he is getting a lot more business since the churches have merged and there is more traffic since the Shop Rite opened. The second floor would not be used for catering. The second floor would be used for additional seating for the first floor use. The steps to the second floor have been changed to commercial steps and the bathroom is handicap accessible.

Solicitor Marcolongo stated that he marked a photo showing the external steps as Exhibit A-4. A copy of the Certificate of Approval from Upper Township to update the second floor bathroom to comply with ADA was marked as A-5.

Mr. Holt testified that his hours of operation are 6:30 a.m. until 11 p.m. seven days a week. He can seat 24 people on the first floor. He testified he only has booths and no individual seats. He wants to have twenty seats upstairs.

The meeting was open to the public.

Mark Stein, Esquire, represented the applicant. He represents the Jacks at 44 Stagecoach Road. He submitted a copy of the notice sent to the neighbors in 2010 to expand the hours of operation and the use. He feels the application has not changed and that the applicants fall under the doctrine of res judicata. His clients do not want to have to keep coming in to defend their property.

Wayne Jack, 115 Tuckahoe Road, was sworn. He has been to several zoning board meetings for seating upstairs. The applicants have gone to the planning board to change

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their residential neighborhood into commercial just so they can have seating upstairs. He stated that everyone is back here again for the same thing.

Mr. Holt testified he did not build a two story building to put storage upstairs. He is allowed to have one permitted use. The office is for the first floor use. He has never used the upstairs as storage. It was labeled storage so that he did not have to finish it in order to get a certificate of occupancy. He is asking for additional seating since he is busier than he was back in 2007.

Mrs. Holt stated that back in 2007 there were conflicts of interest on the Board and that is why they were denied. She feels that her business is limited and other commercial uses in residential zones are not.

Hearing no response the meeting returned to the Board for findings of fact.

MR. SHAWL – In order to determine if res judicata applies to this application we must see if the application is similar to previous applications that were submitted to the Board. The application includes a different description and the intent as described by the applicant is different than what was previously submitted. The plans are from a previous application so they are similar. The parties are the same. He does not believe there have been any substantial changes to the property, it is still the second floor and it is being used as an office. The first resolution granted office space ancillary to the first floor and four other resolutions contain the condition that the storage and office space on the second floor shall continue. It is his opinion that res judicata does apply for this particular application.

MR. LIHOU – He finds that res judicata does apply based on previous resolutions. He sees no changes.

MR. PHIFER – He sees similarities in previous applications. Storage has been discussed in each application. From what the Solicitor read the part that stands out the most is the passage of time and previous consideration. There has been a substantial change in the neighborhood during the passage of time such as the church and the flow of traffic generated by the shopping center. He feels that allowing five tables would not change the amount of vehicles going to the site. He does not feel that res judicata applies. He thinks the passage of time has changed the dynamic of what goes on in that neighborhood.

MR. HEALY – He concurs with Mr. Phifer. He does not believe that res judicata applies because of the time that has passed.

MS. ADELIZZI – She believes the application is similar. The applicants are asking for the exact same thing. The parties are obviously the same. She concurs with Mr. Phifer. She believes things have changed environmentally and that the applicants are affected by the businesses that have opened. They are requesting the additional seats to accommodate patrons already coming to their business that would be inconvenienced by not being able to sit down. She thinks that the application was previously fully adjudicated and that res judicata does not apply.

CHAIR PIERSON – Having sat on the Board during the previous applications he finds that the Board fully decided on the merit of each application. Each application was looked at individually. He finds this application is similar to previous applications, same parties and same setting. He agrees that the neighborhood has changed somewhat. And the increased traffic is the only change. He feels the second floor would turn into a catering business and not just overflow. He believes that res judicata applies.

A motion was made by Mr. Phifer and seconded by Ms. Adelizzi-Schmidt, to find that the application is not barred by res judicata and the Board can hear same. In favor: Phifer, Healy, Adelizzi-Schmidt. Opposed: Shawl, Lihou, and Pierson.

T & R ASSOCIATES INC. – BLOCK 348, LOT 1.01

Solicitor Marcolongo informed the Board that within the last two weeks he has attended a case management conference. The briefs in regards to this litigation have been submitted. Oral argument will be within the next forty five days.

ADJOURNMENT

A motion was made by Mr. Phifer and seconded by Mr. Shawl, to adjourn the meeting. The meeting was adjourned at 10:14 p.m.

Submitted by,

Joanne Herron
Acting Secretary