

Regular meeting of the Haworth Zoning Board of Adjustment on June 3, 2014, at the Municipal Center.

PRESENT: Dennis Posen, Chairman
Richard Ehrenberg
Jeffrey Lester
Catharine Luby
Joseph Panzella
John Paquet
Brian Strum
David Roth
Lawrence Weiss

Alexander West, Board Attorney

ABSENT: Vincent Iacobino, Council Liaison

Mr. Posen called the meeting to order and upon roll call, the above Members were present. Mr. Strum arrived later.

Due notice of this meeting was given in accordance with the New Jersey Open Public Meetings Act.

ACCEPTANCE OF THE MINUTES

The minutes of the April 2014 meeting were reviewed.

Mr. Posen requested that the minutes be amended to show that Mr. Roth and Mr. Panzella were both present.

Mr. Ehrenberg moved to accept the minutes as amended subject to the rights of absent members for statements directly attributed to them.

Seconded by Mr. Weiss and unanimously carried.

Regular meeting of the Haworth Zoning Board of Adjustment on June 3, 2014, at the Municipal Center.

CORRESPONDENCE

- Affidavit from Mr. Roth stating that he listened to the tape on the Tall Company, Inc. application.
- Brief from Mr. Watkins relating to *res judicata* and the Tall Company, Inc. application.
- Response by Mr. West offering an opinion on a statement by Mr. Watkins relating to *res judicata* and the Tall Company, Inc. application.

TALL COMPANY, INC. APPLICATION

Mr. Posen called a ten-minute break in order to allow all parties to review the documents relating to *res judicata*.

Mr. Posen opened the meeting and in essence, the following occurred

Mr. Posen stated that at the last meeting, the Board had to make a decision as to whether this application was allowed under the rules of *res judicata*. Mr. Watkins had stated that he wanted to write a brief and the Board asked counsel to prepare an opinion. His remarks will be addressed first.

Mr. Watkins appeared on behalf of the applicant. He stated that Mr. West's paper stated that the application should be denied because of *res judicata* but he had no right to render a decision - he should have just explained the law. Mr. Watkins said based upon that, he was upset and felt that this hearing was a waste of time because Mr. West tainted the opinions of the Board.

Mr. Watkins cited Sandpiper Homeowners Association Inc. v. Planning Board of Borough of Keyport. He said that their decision was not arbitrary. Mr. Watkins explained that the distinction was that when the Tall Company, Inc.'s original application was filed, it was for a two-bedroom apartment with a den. It was denied and the applicant came back with an application for two apartments, which were small units with one bedroom each. The original application had larger dimensions and chances were that there would have been children living there who would be going to school and this application diminishes that possibility. Mr. Watkins said he felt it was a change that should allow the application to be heard on its merits and should be in favor of the applicant. He said that the Board had to take that testimony into consideration.

Regular meeting of the Haworth Zoning Board of Adjustment on June 3, 2014, at the Municipal Center.

Mr. Watkins said that he differed with Mr. West on subjective criteria. He said that Mr. West was not allowed to do what he did and it was not his position to render that decision and taint the decisions of the Board members.

Mr. Lester asked if the change was sufficient - that is, one vs. two bedrooms. He noted that under the Municipal Land Use Law, you cannot say that "maybe some kids will live there." Mr. Lester asked if the changes were sufficient enough to hear this application.

Mr. Watkins stated that his burden was to have the Board understand the law. He kept reiterating that the law should be liberally construed in favor of the applicant.

Mr. Lester said he agreed that it was not the position of Mr. West to give his decision. He talked about the Sandpiper case and said that they had a creative engineering which turned it into a conforming situation. Sandpiper was no longer a use or bulk issue. Mr. Lester asked if the Board agreed that the question was if the application before them should be liberally construed in favor of the applicant. He then asked if they agreed that this application was more detrimental to the zoning ordinance than *res judicata*.

Mr. Watkins said he didn't agree with Mr. Lester.

Mr. Lester referred to Mr. West's document, page 1, last paragraph, which related to the 2010 application. He asked if the question now was whether the new application was truly different.

Mr. Watkins said he felt it was sufficiently different.

Mr. Lester said he felt Mr. Watkins mentioned children several times and it was a lesser distinction.

Mr. Watkins responded that based upon his analysis of the Resolution, it did not come up.

There was discussion on whether there was a sufficient difference.

Mr. Watkins reiterated that it should be liberally construed and the decision should be in favor of the applicant since he felt there was a sufficient difference. Mr. Watkins insisted that the Board had to make that decision.

Regular meeting of the Haworth Zoning Board of Adjustment on June 3, 2014, at the Municipal Center.

Mr. Lester stated that the Board had to go back to making a decision as to whether this was a case of *res judicata*. He said that Mr. Watkins was saying that that the new application was lesser because there would not be any children in the apartments. Mr. Lester commented that he was sure the town could handle one or two more children. He then brought up the question of sufficient parking.

Mr. Watkins responded that there wouldn't be any change.

There was discussion relating to whether this application had sufficient change.

Mr. Watkins said that there was a difference as to whether there would be a number of children going to school.

Mr. Paquet asked if Mr. West should explain his decision.

Mr. West stated that he did a position paper after he received Mr. Watkins's brief on whether the application was sufficiently different. He noted that both applications are for the same relief - a use variance. Mr. West said that the original application was for one two-bedroom apartments and now the application is for two one-bedroom apartments.

Mr. Paquet commented that the example which was cited in Mr. Watkins's opinion was for houses so he felt it was like comparing apples and oranges. He felt that in the Sandpiper case, he did not think their Board was opposed to having three homes but to having two-family homes.

Mr. Watkins commented that it was a functional analysis.

Mr. Paquet asked about the law - was this application sufficiently different from the first one? He told Mr. Watkins that to suggest that the Board was tainted by Mr. West's opinion, was an insult and that was not the case. Mr. Paquet said that they could all make their own decisions. Mr. Paquet reiterated how he felt about the example cited.

Mr. Paquet stated that their decisions would not be tainted. He felt this was the same application in that they were proposing apartments for residential use in a commercial zone. Mr. Paquet said that many of the buildings have a second story and all have offices upstairs. He stated that the matter was that this was a commercial zone and the applicant should abide by the law.

Regular meeting of the Haworth Zoning Board of Adjustment on June 3, 2014, at the Municipal Center.

Mr. Weiss asked if this application was substantially different from the last. He stated that the issue of the number of children was irrelevant. Mr. Weiss asked Mr. Watkins to explain how this application was different.

Mr. Watkins replied that the issue of children was not raised in the first application.

Mr. Weiss responded that Mr. Watkins brought up the issue of schools and he raised a substantive issue but that did not relate to *res judicata*.

Mr. Ehrenberg pointed out that they had asked Mr. West to write an opinion. He asked if they had to take the impact of the application on the school.

Mr. Lester replied that they should not bring up the school.

Mr. Ehrenberg asked that if there was an application before the Board and the applicant knew they had triplets on the way, did the Board need to take it into consideration.

Mr. Watkins said that they had to determine if the facts were different, they had to vote on *res judicata*, and then they could hear the case and decide on the application.

Mr. Posen pointed out that Mr. Watkins was asking that they accept his statement to support that the application is different. He noted that it should have no bearing on whether the application itself would be approved or denied. Mr. Posen stated that the part of the application being heard this evening was not about school children and parking, it was whether the application was sufficiently different than their first application and that was the decision that had to be made.

Mr. Posen explained that this was a procedural issue and they needed a regular majority to determine if *res judicata* applied. He said that if it applied, they would not go forward and if it is decided that it did not apply, they would proceed.

Mr. Lester moved that this application was sufficiently different and it should be heard.

Seconded by Mr. Roth.

Discussion: Mr. Posen noted that if they voted ~~%~~Yes,+it would go forward and if they voted ~~%~~No,+it would not go forward.

Mr. Lester said he did not think that the proposed issue should overrule substance.

Regular meeting of the Haworth Zoning Board of Adjustment on June 3, 2014, at the Municipal Center.

The vote went as follows: Yes - Mr. Lester, Mr. Roth, Mr. Ehrenberg, Mrs. Luby, and Mr. Posen; No - Mr. Paquet and Mr. Weiss. Motion carried.

Mr. Posen noted that the case would be heard on July 1, 2014 at 7:30 p.m.

Mr. Posen asked Mr. Watkins to stipulate to extend time and Mr. Watkins agreed to extend time to July 1, 2014.

Mr. Posen stated for the record that Mr. Watkins agreed to stipulate to extend time to July 1, 2014, the date of the next meeting.

Mr. Watkins thanked the Board.

Mr. Posen reminded everyone that there had been discussion at the last meeting about whether or not the Board wanted to have the opinion of the Borough's planner for this case. He asked each member for their opinion.

Mr. Ehrenberg said he felt they did not need one.

Mr. Paquet disagreed. He said they needed a professional opinion

Mr. Roth agreed.

Mr. Lester said that this case was about a use variance and they needed a planner's opinion.

Mr. Posen agreed.

Mrs. Luby didn't feel they needed one.

Mr. Lester asked what would be the down side of having a planner and should that be a consideration.

Mr. Paquet said he felt everything should be reviewed by their professional.

Mr. Posen said that in every use variance case he works on as a professional architect, there is always a planner for the Board and one for the applicant.

There was discussion.

Mr. Lester noted that their planner was not expected to be adversarial but to give his professional opinion.

Regular meeting of the Haworth Zoning Board of Adjustment on June 3, 2014, at the Municipal Center.

Mr. Paquet stated that he wanted to make sure that the Board was represented and make the right decision.

There was discussion.

Mr. Lester said that they could not deal with substance until they heard from the planner. He said they should give Mr. Hakim the application and ask for his opinion.

There was discussion relating to the planner.

Mr. West noted that they were not objecting to the application. He explained what goes on during long hearings.

Mr. Posen said he felt it would be a good idea to be ready and prepared to move forward. He explained that too many times the Boards and applicants are not prepared.

Mr. Weiss moved to get the opinion of the Borough planner.

Seconded by Mr. Roth and unanimously carried.

Mr. Posen stated that he and Mr. West would speak with Mr. Hakim, the Borough planner.

Mr. Strum arrived.

1st. Mrs. Luby said that she most likely would be away and unable to attend on July

There being no other business, Mr. Ehrenberg moved to adjourn.

Seconded by Mr. Roth and unanimously carried.

Respectfully submitted,

Dolores Fazio O'Dowd