

## **FAIR HAVEN ZONING BOARD OF ADJUSTMENT**

### **Regular Meeting Minutes - June 4<sup>th</sup>, 2020 – Virtual Meeting via Zoom Platform due to the COVID-19/Coronavirus Pandemic.**

The meeting was called to order at 7:17pm by Mr. Lehder, Chair, with a reading of the Open Public Meetings Act Statement (below), followed by the pledge to the flag.

#### **1. ROLL CALL**

Present: Mr. Neczesny, Ms. Quigley, Mr. Ridgeway, Mr. Ryan, Mr. Ludman, Dr. Laufer, Mr. Kinsella, Mrs. Neff, Mr. Lehder

Absent: None

Also, Present: Mr. Irene, Board Attorney; Ms. Gable, Board Planner; Mr. Nicolas Poruchynsky, Fair Haven Zoning Officer; and Mr. Joe Mule, Borough Zoom support.

Mr. Irene, Board Attorney, noted for the record that in addition to the initial Open Public Meetings Act notice issued at the beginning of the year, the Board also issued a supplemental revised Open Public Meetings Act notice that was sent to two newspapers (The Asbury Park Press and Star Ledger) for publication, posted on the Borough website, posted on the front and rear entrance of Borough Hall and sent to the Borough Clerk advising that the Zoning Board meetings would now be broadcast virtually. This information is on the Borough website with instructions on how to gain access to the meeting.

Mr. Lehder noted for the record that all materials for applications were collected electronically prior to the hearing in preparation for their Zoom presentations. The applicants were also provided instructional Zoom test session by Borough staff, if requested.

#### **2. NEW BUSINESS**

**DelTin – 4 Hendrickson Place, Block 46, Lot 14, R-10 Zone** – Application for side yard setback variance.

Nicole and Mark DelTin were promoted to panelists as well as their professional Doug Clelland, P.E. from Insite Engineering.

Mr. Irene confirmed the notice material for the DelTin application appeared to be in order and asked if there were any interested parties that had any questions or issues regarding the notice material. There were no comments on the notice material.

Ms. Gable the Board Planner, Nicole and Mark DelTin as well as Doug Clelland P.E. were all sworn. Mr. Irene stated that there was a prior application in 2019 before the Zoning Board for 4 Hendrickson Place with regard to demolition of an existing dwelling and construction of a new dwelling. The Board granted relief for a number of bulk variances among those variances was a side yard setback. Approval was for the East side yard setback of 7 feet where 10 feet is required and also for total combined side yard setbacks of 18.6 feet where 24 feet is required. After completing resolution compliance, the applicant obtained their approvals for construction. When the foundation location survey was submitted for review by the Zoning Officer a landing and related steps off of a small mudroom on the West side of the property appeared to create an additional variance. The original approved plans stated a setback of 11.6 feet whereas the

foundation location survey reflected a setback of 10.4 feet. The 10.4 feet conforms with the required side yard setback, but the total combined side yard setback is proposed at 17.4 feet as opposed to the 18.6 feet that was previously approved. As a result of this change to the combined side yard setback the applicant has returned to the Board seeking relief for the 17.4 feet combined side yard setback variance.

Mr. DelTin and Mr. Clelland confirmed that Mr. Irene was accurate with his description of their relief request.

Mr. DelTin began his testimony stating that the area in question is on the driveway side of the property. The landing is 3.6 feet that leads into a mudroom off of the driveway and is 10.4 feet from the property line. There is no covering above the landing.

Mr. Lehder asked if there were any other changes to the plans that were originally submitted and reviewed by the Board at their last hearing in 2019.

Mr. DelTin stated that there have been no changes to the plans that the Board in 2019.

Mr. Irene stated that it appears as though on the original plans that were submitted in 2019, the bump out in question was missed or it wasn't apparent when reviewed by the Board. There were a lot of overlapping lines on the plans.

Doug Clelland P.E. noted his appearance on behalf of the DelTin's and presented his professional credentials to the Board. The Board excepted his credentials with no objections.

**Exhibit A-1** – Foundation Location Survey Plan, prepared by Insite Surveying, signed and sealed by Justin J. Hedges, P.L.S. dated 01-27-20 with a revision date of 01-29-2020, Sheet 1 of 1.

**Exhibit A-2** – Revised Plot Plan, prepared by Insite Engineering, signed by Jason L. Fichter, P.E., dated 05-15-19, one sheet.

**Exhibit A-3** – Revised architectural plan entitled, 'Proposed New House for DelTin Residence', prepared and signed by Anthony M. Condouris, dated 02-04-19, revision date of 11-25-19 for resolution compliance, sheets Z-1 and Z-2.

Doug Clelland P.E. reviewed Exhibit A-2 showing the Board where the bump out for the mudroom landing is proposed. He stated that the original combined side yard setback variance that was approved was for 18.6 feet and with the landing the new proposed combined side yard setback would be 17.4 feet where 24 feet is required. The proposed entry stair and landing were shown on the approved plans; however, it was visually in conflict with the proposed drainage pipe which can be seen in Exhibit A-3. The landing is about 2 to 2.5 feet off of the ground, it is unroofed, and encroaches beyond the approved side yard by 1.2 feet and approximately 8 square-feet. Mr. Clelland wanted to add for the record that the existing lot is nonconforming for the zone it is located, it is a narrow lot for the R-10 zone.

Mr. Irene confirmed that the lot is undersized at 7,370 square feet where 10,000 square feet is required. The lot is short on the required frontage at 50 feet existing where 75 feet is required, which was part of the basis for the Board granting the approvals in 2019.

Mr. Lehder asked Mr. Clelland if he could confirm that the architectural plans reviewed at tonight's hearing were the same plans that were approved by the Board in 2019.

Mr. Clelland confirmed that they are the same plans.

No comments or questions from the public.

Mr. Neczesny stated for the record that he believes if the landing was presented as it was tonight at the 2019 hearing he didn't see why it would not have been approved then. He believes it to be a de minimis exacerbation. He thinks the Board would have treated it as they did for the 18.4 feet and it would have been approved.

Mrs. Neff agreed with Mr. Neczesny and did not feel as though the request was material relative to the plans.

Ms. Quigley thought it was important to state that the side with the landing still complies with the side yard setback.

MOTION by Mr. Lehder, second Mr. Neczesny, to approve the total side yard setback variance.

In Favor: Neczesny, Quigley, Ridgeway, Ryan, Ludman, Laufer, and Lehder

Opposed: None

**Fair Haven Retail, LLC – 588 River Road, Block 32, Lot 02, B-1 Zone – Appeal of Zoning Official's determination for Over Easy Restaurant.**

Michael Bruno, Esq. and Adam Garcia, Esq. were promoted to panelists and announced themselves on behalf of the applicant, Fair Haven Retail, LLC. Mr. Nicholas Graviano, professional planner was also promoted to a panelist.

Mr. Irene stated that this is the Fair Haven Retail, LLC appeal. He confirmed the notice material appeared to be in order and asked if there were any interested parties that had any questions or issues regarding the notice material. There were no comments on the notice material.

Mr. Irene stated with regard to the nature of the applicant's appeal material it indicates an appeal and an interpretation. He asked that Mr. Bruno or Mr. Garcia confirm that the application was for only an appeal.

Mr. Bruno confirmed that the application was only for an appeal of the Zoning Officer's determination that the matter must go before the Planning Board.

Nicholas Poruchynsky, Fair Haven Zoning Officer, was sworn in and began to explain a timeline of the applicant's zoning submissions, the denial and determination which requires the applicant to appear before the Planning Board. Subsequent to the denial, the applicant filed an appeal. Fair Haven Retail, LLC submitted multiple applications to the zoning office. The applications were reviewed and determined they did not satisfy zoning regulations and therefore administratively denied and required to submit to the Planning Board for further review. The initial application was received on 09-03-19, application number 19-194, for a *commercial interior, interior remodeling and a commencement change of use* for Over Easy Kitchen in the tenant D space at the ACME shopping center. The proposal consisted of floor area space of 2,468 square feet, with seating for 64 people. The space was previously occupied by Bike Haven retail store. The application was denied on 09-17-19 stating that the application was found not to comply with the exempt development classification 30-2.4 and therefore required additional Planning Board review and approval. The applicant then submitted a second zoning permit application on 10-09-19, application number 19-229, the application stated that their revision was to expand into the

tenant space next to tenant D and increase the proposed operation to 3,400 square feet and provide seating for 94 people. Application 19-229 was also denied by the zoning office for not complying with the exempt development classification. The applicant submitted a third and final application on 12-13-19, application number 19-277, proposing the original scope of work submitted with application number 19-194 for Over Easy Kitchen utilizing only tenant D space of 2,468 square feet with seating for 64 people. This application was again reviewed and denied by the zoning office as it also did not comply with the exempt development classification.

Mr. Poruchynsky stated his determination was decided by the following review steps. The initial step was to review the Use of the proposal. The Use of as a restaurant category 1 is permitted in the B-1 Zone district so the applicant complied with the Use review. The second step of the zoning determination is to review the application for Land Use Regulations. If an application meets the exempt development requirements there is no further need for review by a Board. It was also stated in the denial letter that details were not provided regarding how the change of occupancy/change of use would not adversely affect the previously approved site plan, increase in traffic circulation, relationship of buildings, buffering and parking requirements. The limited documents submitted for the Over Easy Kitchen failed to prove it to be classified as an exempt development and therefore denied requiring further review and approval from the Planning Board.

**Exhibit B-1** – Revised Site Plan prepared by Dynamic Engineering, signed by Robert P. Freud P.E., revised through and including 09/04/19 which was submitted with the zoning permit application reviewed by the Zoning Officer.

Mr. Bruno began his presentation stating that the application was an appeal of the Zoning Officer's denial. Mr. Bruno stated that the Fair Haven shopping center was the subject of a site plan approval in 2017 and 2019 and the granted approval from the Fair Haven Planning Board was for a site plan and upgrades to the shopping center. The property is approved as a shopping center with 249 parking spaces where 180 is required for a shopping center. The proposed Over Easy Restaurant was determined to be a permitted restaurant category 1 with sit down dining and waiter service. The applicant believes that having a fully permitted site plan, fully permitted Use, no proposed changes to the site plan, parking, drainage, circulation, or landscaping the new tenant, Over Easy Restaurant, does not need Planning Board relief. The applicant is requesting to add a new permitted tenant to the shopping center. Mr. Bruno stated that he does not believe the law requires every new tenant that moves into the shopping center be required to receive approval by the Planning Board. He wondered why Mr. Poruchynsky did not indicate in his denial letter what additional information was needed with the zoning permit application submission for review. If the applicant had been aware that they needed additional information, such as a calculation for the parking requirements, they would have provided it to Mr. Poruchynsky for his review. He believes the shopping center and any proposed tenants are exempt developments.

**Exhibit A-1** – Zoning Officer's denial letter dated 09-17-19 revised 10-16-19 and 12-20-19, 3 pages.

**Exhibit A-2** – Letter dated 01-09-2020 from Michael A. Bruno which enclosed the Fair Haven Retail, LLC appeal application to the Zoning Board, 15 pages.

**Exhibit A-3** – Copies of the zoning permit applications submitted by IBO Construction Group on behalf of Fair Haven Retail, dated 09-03-19, 10-08-19 and 12-13-19, 6 pages.

**Exhibit A-4** – Over Easy Restaurant Fit Out plans prepared by Monmouth Ocean Design Experts, signed by Daniel M. Condatore R.A., dated 08-26-19 revised 12-10-19, 16 sheets.

**Exhibit A-5** – Resolution from the Fair Haven Planning Board granting approval for amended preliminary and final site plan for the shopping center. Adopted on 04-27-17, 11 pages.

**Exhibit A-6** – Resolution of the Planning Board granting site plan approval for the placement of a monument sign. Adopted 05-19-17, 6 pages.

**Exhibit A-7** – Resolution of the Planning Board granting approval for amended final site plan and change of use for the Dunkin Donuts at the shopping center. Adopted 09-19-2019, 10 pages.

**Exhibit A-8** – Site Plan prepared by Dynamic Engineering, signed by Robert P. Freud P.E., dated 12-09-16 with revision dates of 02-07-17 and 04-06-17. 15 sheets.

In reference to Mr. Bruno's comment that he was not aware the Zoning Officer needed additional information from the applicant, Mr. Lehder wanted to note for the record that on page 2 of Mr. Poruchynsky's denial letter, revised date of 12-20-19, it clearly states in detail that there was information not provided by the applicant. Also, on page 3 of the denial letter it states that if the applicant would like to amend their application, they could submit amended plans to the Zoning Office for review.

Mr. Bruno stated that he did not believe it was clearly stated in the denial letter that the applicant was missing any information and that the letter only states they could appeal to the Zoning Board of Adjustments. He also stated that the application is not for a Change of Use but an application for a permitted tenancy in the permitted shopping center. His position is that no further Planning Board relief is required for any new tenant in the shopping center as long as it is a permitted use because the site plan has already been approved by the Planning Board.

Mr. Irene stated that the Ordinance provided is what the Zoning Officer must follow when making a determination on an application. The Ordinance states that a Change in Use site plan review is required unless the applicant can demonstrate to the Zoning Officer that the provisions of the exempt development ordinance have been satisfied.

Mr. Bruno stated the Use is a shopping center.

Mr. Irene stated his interpretation of the ordinance for a shopping center is a grouping or integration of various uses that are permitted such as retail, restaurants, banking, etc. and a shopping center is defined as integrated development consisting of those uses that are permitted in the zone. Even if you replace a permitted use for a permitted use under the ordinance, a site plan approval is required unless the applicant can demonstrate they are an exempt development.

Mr. Bruno introduced Nicholas Graviano, Planner with Graviano and Gillis Architects and Planners, LLC at 101 Crawford's Corner Road, NJ. Mr. Graviano was sworn in and provided his credentials for the Board. The Board excepted Mr. Graviano as an expert and he began his testimony. Mr. Graviano believes that the Over Easy Restaurant falls under the exempt development criteria and therefore does not need approval from the Planning Board. He believes that the proposed restaurant would fall under the B, E, and J requirements of the exempt development criteria. He reviewed the history of the site and site plan approvals. He stated that the Resolution PB 19-06, Exhibit A-7, states the approved Use is for a shopping center and that it does not state that new tenants would require site plan approval from the Planning Board for a Change of Tenancy in the shopping center and the shopping center is a Use as a whole.

Mr. Irene asked Mr. Graviano if shopping center is listed as a permitted use in nonresidential zones in the table of permitted uses.

Mr. Graviano states that shopping center was not listed as a permitted use on the table of permitted uses.

Mr. Lehder stated that if the analysis of the exempt development criteria includes adding an increase in parking, wouldn't each tenant opening in the shopping center have a direct effect on the parking and wouldn't that need to be evaluated.

Mr. Graviano stated that it was not outlined that way in the original site plan approval, and it does not require every tenant to appear before the Planning Board for site plan approval.

Mr. Lehder didn't see what the site plan approval had to do with the ordinance.

Mr. Irene stated that it is required under the Ordinance to meet all of the exempt development criteria to be exempt from appearing before the Planning Board and a resolution approved by the Planning Board has no authority to waive the authority of the Governing Body and essentially omit the exempt development Ordinance provision.

Mr. Bruno stated that he did not believe that Mr. Poruchynsky did not notified his client that a parking analysis was required as they would have provided one if asked.

Mr. Ludman asked if the original two denial letters that preceded the 12-20-2020 denial letter included a request for information regarding parking requirements.

Mr. Poruchynsky stated that yes, the original denial letters included similar language to the 12-20-2020 denial including mention of parking requirements.

Mr. Bruno closed with stating that he and his client believe they are an exempt development because there are no changes to the approved site plan. With regard to parking they believe they are below the 25% threshold stated in the exempt development criteria.

Mrs. Neff asked to receive clarification as how to view the site. Either as a shopping center or as individual businesses.

Mr. Irene suggested that it be viewed by reviewing the definition of a shopping center in the Borough Ordinance but to also view the table of permitted uses. The table does not state a shopping center as a permitted use, it is a combination of other permitted uses. If one would suggest a shopping center is a permitted use, presumably you could put any type of business in the center. This is not the case under the Borough Ordinances, the only uses permitted in the shopping center are listed under the permitted uses table.

Mr. Bruno stated that their argument and testimony is that the Planning Board viewed and approved the site as a shopping center. The uses permitted in a shopping center are not open-ended they are as permitted in the B-1 zone. Although it is a shopping center, you are limited to what can go into the shopping center to the permitted uses in that zone. There is no physical alteration to the shopping center, the only change is the interior occupancy and therefore should not require Planning Board approval unless it evoked a different parking standard that is not met at the site which they do not believe Over Easy does.

No comments or questions from the public.

Mr. Bruno requested to carry the appeal application to the July 9<sup>th</sup> hearing without need for further notice so he can speak with his client on how they would like to proceed. There was some indication that the applicant might withdraw the appeal.

It was the consensus of the Board that they allow the applicant to carry to July but only for a vote and to not allow for additional testimony; the hearing was closed and carried for a vote only .

MOTION by Mr. Neczesny, second Mr. Lehder, to approve the request to carry to the July 9<sup>th</sup>, 2020 meeting without further need to notice and to allow for an extension of time to the Board for a decision.

In Favor: Neczesny, Quigley, Ridgeway, Ryan, Ludman, Laufer, and Lehder

Opposed: None

### **3. ADMINISTRATIVE ITEMS**

MOTION by Mr. Neczesny, second Ms. Quigley, to adopt the minutes of the May 2020 meeting.

In Favor: Neczesny, Quigley, Ridgeway, Ryan, Ludman, Laufer, and Lehder

Opposed: None

### **4. PUBLIC COMMENT**

No comments or questions from the public.

MOTION to adjourn by Mr. Neczesny, second Dr. Laufer and approved unanimously by voice vote.

Meeting adjourned at 10:22 PM.

Respectfully submitted,

Jennifer Johnson, Board Secretary

### **Public Announcement of Compliance**

This is a regular meeting of the Fair Haven Zoning Board of Adjustment. Adequate notice of this meeting has been given pursuant to the provisions of the Open Public Meetings Act. At the time of the Board reorganization in January of this year, the Board adopted its regular meeting schedule for the year. Notice of the schedule of the Board's regular meetings was sent to and published in the Asbury Park Press, and was also sent to the Two River Times and the Star Ledger. Tonight's meeting was listed in the Notice of the schedule of regular meetings. That Notice was also posted on the bulletin board in Borough Hall, and has remained continuously posted there as required by the Statute. In addition, a copy of the Notice is and has been available to the public and is on file in the Office of the Borough Clerk. A copy of the Notice has also been sent to such members of the public as have requested such information in accordance with the statute. Adequate notice having been given, the Board Secretary is directed to include this statement in the minutes of this meeting.