

TOWNSHIP OF OCEAN
PLANNING BOARD
REGULAR MEETING
February 5, 2009

Meeting began at 7:30 PM

The meeting of the Ocean Township Planning Board was held on the above date and time; Chairman Anepete presided and called the meeting to order.

Pledge of Allegiance

STATEMENT: Pursuant to the provisions of the New Jersey Open Public Meetings Act, sending copies of the notice of the meeting properly provided adequate notice of the meeting to the Times-Beacon and the Atlantic City Press. Notice was posted on the bulletin board in the Administration Building.

ROLL CALL

Members Present:	Vince Anepete	Ronald Negra	Dennis Tredy
	Ralph Avellino	Richard Reilly	Lee Eagles
	Robert Knowles	Rita Sweeney	Craig James

Members Absent: James Eckert, Gordon VonSchmidt.

Chairman Anepete asked for a motion to approve the minutes of the January 6, 2009 Re-organizational meeting. Vice-Chairman Avellino made a motion to approve the minutes. Mr. Tredy seconded the motion. All in favor: (aye) Avellino, Tredy, Knowles, Reilly, Sweeney, Eagles, James, Anepete.

Chairman Anepete asked for a motion to approve the minutes of the January 6, 2009 Regular meeting. Mr. Eagles made a motion to approve the minutes. Mrs. Sweeney seconded the motion. All in favor: (aye) Eagles, Sweeney, Avellino, Knowles, Negra, Reilly, Tredy, James, Anepete.

Chairman Anepete asked for a motion to approve the vouchers. Mr. Tredy made a motion to approve the vouchers. Vice-Chairman Avellino seconded the motion. All in favor: (aye) Tredy, Avellino, Knowles, Negra, Reilly, Sweeney, Eagles, James, Anepete.

Chairman Anepete stated that the correspondence is available in the board office for review at any time.

BOARD COMMENTS

No comments were made from the Board.

OLD BUSINESS

Resolution No. 2009-1-PB – Planning Board authorizes and directs the execution of Contracts of Agreement with the following for their professional services for the year ending December 31, 2009:

- | | |
|----------------------|---|
| Resolution #01-09-PB | Planning Board Attorney
Stephen E, Yost, Esq.
214 Washington Street
Toms River, NJ 08759 |
| Resolution #02-09-PB | Planning Board Conflict Attorney
Benjamin Mabie III, Esq.
769 US Highway 9
Bayville, NJ 08721 |
| Resolution #03-09-PB | Planning Board Engineer
Remington, Vernick & Vena
9 Allen Street
Toms River, NJ 08753 |
| Resolution #04-09-PB | Planning Board Conflict Engineer
Polistina & Associates, LLC
6684 Washington Avenue
Egg Harbor Township, NJ 08234 |
| Resolution #05-09-PB | Planning Board Landscape Architect
Taylor Design Group
100 Technology Road, Suite 125
Mt. Laurel, NJ 08054 |
| Resolution #06-09-PB | Planning Board Conflict Landscape Architect
Melillo & Bauer Associates
2399 Highway 34, Building D-3
Manasquan, NJ 08736 |
| Resolution #07-09-PB | Planning Board Architect
B.L.D.G. Architecture, LLC (John Burgdorfer)
617 Union Avenue, Bldg 3-14
Brielle, NJ 08730 |
| Resolution #08-09-PB | Planning Board Conflict Architect
Taylor Design Group
100 Technology Road, Suite 125
Mount Laurel, NJ 08054 |

Motion to approve Resolution made by Mr. Tredy and seconded by Vice-Chairman Avellino.
All in favor: (ayes) Tredy, Avellino, Knowles, Reilly, Sweeney, Eagles, James, Anepete.

Tardibuono, Block 98, Lot 5, Docket No. 04-08-PB, Minor Subdivision CARRIED from January 6, 2009 meeting.

Mr. Harvey York of Novins, York & Pagano addressed the board. I had an opportunity to read Mr. Yost's memo. I don't find anything unusual or contrary about it. One issue which we raised in our memo which we did not raise in the initial meeting and I'll raise this again for the record is that fact that these are two lots. They were two lots created by the Planning Board and under *Loechner vs. Campoli*; we believe the two lots exist and were improperly combined by the Tax Office. I think our letter sets off the reasons, that's a legal issue, that's not necessarily a fact issue, but the testimony we had indicated that these were part of a filed map which map was signed and approved by the Planning Board. So, therefore, under *Loechner vs. Campoli*, the nation into two into one was improper by the Tax Office. With regard to the minor subdivision, which we've also submitted, we believe there is no testimony on the record that would show that the denial of this would be anything other than arbitrary and capricious under the Land Use Law. The testimony is clear that the vast majority of the lot either 200 or 500' are the same size. Yes, there are a couple of larger ones, but as a fully developed area, no testimony to the contrary; this is not a situation where there is vacant land where someone can combine. Comments from the board at the last meeting were we're trying to upgrade the area perhaps. Well I think that is a very noble idea, but to upgrade the area would require someone to find someone who wanted to sell two adjoining houses, buy both of the houses and tear them down to "upgrade the area". I think that that is not realistic and there is no testimony, there is no proof that that's in fact what has happened. It is a fully developed area and we think we're entitled to the variance and we also think that *Loechner vs. Campoli* forces the town to grant the subdivision because they had no right to combine the lots in the first place.

Mr. Tredy: Mr. Yost, can I ask a question?

Mr. Yost: Sure.

Mr. Tredy: I don't recall and perhaps I'm wrong, I don't recall Mr. York mentioning *Loechner vs. Campoli* at our last meeting. He did reference the lots were combined, but did he reference this brief?

Mr. Yost: Off the top of my head, I don't know if he mentioned it at the hearing, but I know he cited it in his brief.

Mr. York: On December 30th. Just so the board is aware, *Loechner vs. Campoli* is a New Jersey Supreme Court decision. It remains the law in the State of New Jersey. It is what it is.

Mr. Tredy: It was in your brief, but what I said was I don't recall you mentioning it at the hearing and you sort of just said it was mentioned at the last hearing. It's neither here nor there.

Mr. York: The only thing I mentioned at the last hearing was that the lots were created by the subdivision and I gave the filed map information. I didn't argue the law on that because that's a legal question, not something that the board gets the opportunity to decide on a factual basis. Their created, their law, there is no dispute the lots were created by a map that was filed and recorded. There nothing further to say that is why it wasn't mentioned at the hearing.

Chairman Anepete: I have a piece of property in town myself which has six lots which are currently undersized lots. They were recorded that way back then. I couldn't build on any one of those lots any longer because the zoning has changed. The fact that lots were created historically back then and not combined into a larger lot doesn't seem to allow me to build on the six smaller lots that I own.

Mr. York: I don't know the circumstances of those six lots.

Chairman Anepete: Why would that historically...

Mr. York: Why would it differ? It depends on how they were created. Were they created by a valid subdivision? Loechner vs. Campoli says when you have lots that were created by a valid subdivision, subsequent to the Planning Act changes in 1953, that you have a right to maintain those lots. You would still have an obligation to get a variance for the dimensional variances if in fact you needed them, but that's the law. Now I don't know the circumstances of your lots. If your six lots were created by a filed map and all into Loechner vs. Campoli then you may have the right to build on them, but I can't answer a question without the sufficient title searches and all the other information needed. In this case, Loechner vs. Campoli clearly applies but more importantly when you look at the entire project, all of the lots, or a very large percentage of them, I shouldn't say all, 75-80% were developed exactly as they were suppose to on that filed map. So, I don't know the circumstances of your case. But Loechner is a case that is sited regularly. It was reaffirmed by the Appellate Division two years ago in the Jock case and it stands for the proposition that if you have valid subdivided lots on a filed map approved by the Planning Board, the town does not have the right to combine them.

Vice-Chairman Avellino: When these lots were combined, you said they didn't have the right to combine them, why didn't the owner at that time fight that combining of the lots? Why all of a sudden now, he wants to subdivide it.

Mr. York: I don't know about the prior owner, I can only talk about this owner. This owner believed he had the right to use both lots even though they are on the tax map I believe. I don't have the tax bill in front of me, the tax bill and the tax map I still believe shows them as two lots. Again, if you give me a minute, I will see if I have the tax map handy but I'm not so certain that your tax map doesn't show them as two lots today.

Mr. Tredy: Mr. York, let me stop you for a second. You stated that certain things are a product of law and not fact so we don't have to decide on them, why are you giving us these briefs about the law? Do you want our attorney to make the decision or the board?

Mr. York: The board is either going to grant the subdivision, not grant the subdivision, say Loechner doesn't apply and we disagree with you Mr. York and then whatever decision I think is appropriate after that I then go to a judge and then say look judge I think this and this and this is the law. But you get the right to make the decision.

Mr. Reilly: I was asking Steve if he wanted to comment on the Loechner comments of Mr. York.

Mr. Yost: If Mr. York is correct in his assessment of Loechner, I think he is, then the board has to make the decision if the facts are in front of the board are governed by Loechner. The board is to make a determination of the facts and apply the law to the facts that are in front of the board. You have to be satisfied that the circumstances and the facts that were presented to the board fall under that case as you understand it.

Mr. Tredy: As board members, we have remember that when an applicant's attorney comes before our board, they are trying to present a picture that would look favorable to their applicant. The board has to look at the zoning regulations and see if there is a legitimate reason to vary from what's considered appropriate according to the laws or the ordinances that are in place. So, I think the board has to realize that every time an attorney comes, and Mr. York I hope you don't take this wrong but, every attorney is trying to protect their client so in their presentation many times they throw up what I call a smoke screen and throw a lot of things out where the board really has to focus in on what is really before them. The question of making this a subdivision.

Mr. York: I don't disagree with most of what you said except for one part. I am a lawyer, licensed to practice in the State of New Jersey. I come here and I quote the law. I have to give you an honest, forthright and frank opinion as to the law as I interpret it. You said smoke screen. I cannot come in and say the case of XYZ says the moon is made out of blue cheese; I as a lawyer have an absolute ethical consideration to say this is the law as I see it. If Mr. Yost disagrees, he has the right to say I disagree with you for the following reasons, but with Loechner vs. Campoli this is a case that has been around for a long time. 42 years. And the interpretation of it is long accepted. Loechner itself, as a case law, is not being interpreted anymore by lawyers. Today if the Supreme Court made a decision, you can get 10 lawyers in a room and they'd all say it's a different thing. But there is a difference. Loechner has been around 42 years. 50 or 60 cases have followed it and explained it in detail.

Mr. Tredy: I agree with that Mr. York. What I'm saying is we have to find out if all of this actually applies to your application. Correct?

Mr. York: Well, yes and no. The question of Loechner is very simple. Was the property properly subdivided on a map signed by the Planning Board? My engineer testified it was. I have a copy of the map if you want to look at it. Did that happen after the change in the law? We gave you the date of the filing of the map. It did. So there is nothing left to say whether Loechner vs. Campoli applies. It applies.

Mr. Tredy: What about the case being I have a learning experience here from you, thank you very much. What I'd like to know is what about the subsequent laws that followed that allowed the Tax Assessor to combine lots that are owned by the same person if they are undersized according to the new current zoning?

Mr. York: The problem with the Tax Assessor? There is no law that says he can combine them. Loechner says exactly the contrary. It says you can't. The Assessor, for whatever reason, went ahead and did it. But he never took the lots off the tax rolls. I am willing to bet that if you look at the tax bill, it shows two lots. He combined them on a tax bill. If you look at your tax map right now it shows two lots. He didn't combine them. He didn't take the next step which he might have done in his (referring to Chairman Anepete) six lots and say no it doesn't apply I'm erasing the lot lines instead of having lots 15, 16, 17, 18, 19, we have lot 15. That's not what he did. He didn't take the act of fully combing the them and erasing them. So any person getting

the tax bill doesn't know that they've been merged until you come to Town Hall and get a building permit and get told you can't do that we consider that one lot. The Tax Assessor's....

Mr. Tredy: So what you're trying to say is that in every town in the state where lots have been combined, that they are not allowed to combine them?

Mr. York: I didn't say that. I said Loechner vs. Campoli only applies to specific types of lots and specific cases. And you have to meet those criteria.

Mr. Tredy: Okay.

Chairman Anepete: I guess it's our position to determine whether or not this particular application meets that criteria.

Mr. Tredy: Actually not. He only brought this up in his brief. He didn't bring that up when he came and presented his application.

Vice-Chairman Avellino: Do we have any proof that the lots were not combined other than his statement?

Mr. York: By the way if they are not combined, I could get a building permit and we wouldn't make the application in the first place. I'd have two lots. I wouldn't need subdivision approval.

Mr. Reilly: You said the tax bill.

Mr. York: The tax map?

Mr. Reilly: I thought you said the tax bill earlier whether they were two separate lots or one lot. Have we determined whether or not it's billed singly?

Mr. York: It's billed singly.

Mr. Reilly: And it's been billed singly for a substantial number of years?

Mr. York: I don't know how long. I know that your tax map, we have it with us, has two lots.

Mr. Reilly: Okay but I'm saying when the tax bill was sent to the owner of the property, was it a tax bill for one piece or for two pieces.

Mr. York: It probably, and I don't have the bill with me, would have said one tax bill with a lead lot and a secondary lot. That's normally how it's done. Can I tell you in this case that that's the fact, I can't.

Mr. Reilly: Is it relevant?

Mr. York: It's not relevant. Whether he did it as one lot or two lots, is not the issue. Loechner vs. Campoli doesn't say I care of the Tax Assessor has put it together. I'd be glad to quote you Loechner vs. Campoli, but the answer is why are we protected? Because we are protected because it was a lot created not under the old Map Filing Act which when you talk about six lots,

those are the lots that were created under the old map filing act, not on the Planning Act. Mr. York quotes, "It follows that the filing under the old Map Act does not result in immunity from the operative effect of the Subdivision Act and a zoning ordinance may therefore establish an area or dimension requirement different from the area or dimension of the lot as shown on the map. Any reduction in the size of the parcel or tract by a division into two or more lots is in a language of the Subdivision Act subdivision and subject to statutory." It then goes on to say how you obtain subdivision approval under the new act which was 1953.

Mr. McVicar: Your subdivision map prepared by your engineer shows this parcel as Lot 5. Is there somewhere it's numbered as two different numbers?

Mr. York: Your tax map. If you look on our plan, we show it right on general notes "Property known as Lot 16 and 17 Block 39 on map entitled" and we go into great detail....also known as Lot 5 in Block 98. If you look at the area map right on the submission we made, it shows two lots numbered as two lots. We didn't hide anything, it's not a secret. We took nothing more than the tax map that this town publishes. I can get you a survey showing its Lots 16 and 17.

Mr. Tredy: Let me ask you something Mr. York. If in fact you were so certain that these were single lots, why didn't you go to the court in Toms River first and say these were improperly combined? Then if you came to us we would be looking at a lot, how to put this house....

Mr. York: Because the law says I have to exhaust my administrative remedies and in this particular instance first. And I'm here. And if the board says look hey I'm not granting you the subdivision and *Loechner vs. Campoli* doesn't apply, I will go to the court. But the idea is not to do it the wrong way; it's to say to the town this is the right thing. Now, quite frankly had I done that, I believe the court would have remanded it here in a heartbeat.

Mr. Reilly: Was this property sold to your client?

Mr. York: Yes.

Mr. Reilly: When he purchased it, in the purchase, how was this property identified...as Lot 5 or as two separate lots.

Mr. York: I will tell you in a second. I have the search here.

Mr. Tredy: The Vicinity Map indicates it as Lot 5, Block 98.

Mr. York: Actually it had both in the deed. It has both Lot 5 and it has the description Lot 16 and 17 and Block 39. Both descriptions are used in the deed.

Mr. Tredy: But that would be standard wouldn't it so that if someone was researching and was looking under some old subdivisions?

Mr. York: Yes, absolutely it would be standard because that is how you do conveyances. You only asked me how did we get it. I'm telling you how we got it. The deed clearly says "also known as Lot 5, Lot 98". It goes through the history of when it was filed. It was filed October 14, 1953, map deeded 197 which is the testimony we had last time. It hasn't changed.

Mr. Eagles: Steve, can we ask you to comment on this?

Mr. Yost: The board has to make a determination if the facts fall under the Loechner case. So I think that the questions that are being asked about what did the deed say, what does the tax map say, these are all appropriate questions that the board needs to find facts on and apply the Loechner case to. I think that when Mr. York talks about the Loechner case he's talking about the subdivision issue, not necessarily about the variance issues. Am I correct?

Mr. York: Well it's actually both because there is a paragraph in Loechner, let me read it because I think it applies whether I interpret it one way or somebody else interprets another way. And this is the end of the case *"for future guidance the mechanics of the procedure to obtain subdivision approval from a Planning Board with a resulting parcel do not meet the requirements of the zoning ordinance should be as follows: The original application for approval whether or not it is then known that the result desired by the avenue reached the minimum zoning requirement should be made to the Planning Board. If the Planning Board finds the application meets all the required tests except for lot size or dimension, it should approve such subdivision subject to approval of a variance by the Zoning Board"*. Now remember this is back in the day when this board could grant subdivisions but not variances. I know that is going to be hard for you to believe but in the old day, we had to come here, get the subdivision, go to the Board of Adjustment and get a variance. Mr. York continued quoting Loechner *"the Planning Board may with its approval express its non-binding opinion as to whether or not the variance will be conducive or detrimental to the planning."* Although the variance was obtained here, and it then goes into the issue of Loechner. Again, it says *"matter of minimum lot size whether or not the lot in question was delineated on a map filed under an old map file presents a zoning problem. The question is how to accommodate the respective double roles."* Obviously we're not double roles anymore, its one stop shopping.

Mr. Knowles: When was the property purchased, what year?

Mr. York: December 20, 2007, recorded January 4, 2008 at the Ocean County Clerk's Office.

Mr. Knowles: Do you have the date at which time that it was referred to as Block 98, Lot 5?

Mr. York: No that I don't have. It was prior to our client purchasing the property.

Mr. Tredy: When your client purchased the property, sort of piggybacking off of what Mr. Knowles said, did they assume that they were buying two buildable lots or did they assume they assume they were buying one lot?

Mr. York: I don't know.

Mr. Tredy: Okay to me that means that they were buying one lot.

Mr. York: I'm telling you that I don't know.

Mr. Tredy: To me that answer means that.....

The applicant, Joseph Tardibuono, Jr. of 89 Susan Street in Toms River approached and was sworn in by Mr. Yost.

Mr. Tardibuono: As the applicant sitting here in front of you, I believed the lots to be two buildable lots.

Mr. Knowles: What did Lot 5 mean to you?

Mr. Tardibuono: I noticed Lot 16 and Lot 17 on the block.

Mr. Knowles: But you also had reference on the deed to Lot 5. What did Lot 5 mean to you?

Mr. Tardibuono: It didn't mean anything to me sir.

Mr. Tredy: How did you purchase it? Was this a hand to hand from the owner, or did you go through a real estate agency?

Mr. Tardibuono: It was handled through Mr. York's office. I'm sorry Mr. Orlovsky's office.

Mr. York: That's not what he's asking you. How did you find out about it? He's not asking who represented you.

Mr. Tardibuono: We dealt directly with the owner.

Mr. Tredy: And the owner made representation that this was two lots?

Mr. Tardibuono: I can't comment on that now, I can't recall.

Mr. Reilly: When you were going through the purchase process, did you not inquire why it was referred to as Lot 5 and then sectioned off to 15 and 16?

Mr. Tardibuono: When I went through the process, I contacted Crest Engineering, Mr. Intile, the Engineer who looked at the parcel with me and did some research and we both felt at that time, it should be two buildable lots. It conforms to the area, it would fit in with the area and we felt that it would best suit that area to have two buildable lots there.

Mr. Tredy: But that has nothing to do with the current zoning. That was an opinion.

Mr. Tardibuono: That is correct, of a professional engineer.

Mr. Reilly: Yes, but that was his opinion, based upon what fact?

Mr. Tardibuono: Right because I didn't know any of you at that time.

Mr. Reilly: I'm saying it was his opinion that it was two buildable lots, but based upon what?

Mr. Tredy: What kind of research did he do?

Mr. York: You can't ask him how he got the opinion. I'll be glad to have Mr. Intile come up. But he can't tell you.....

Mr. Reilly: I was inquiring from the perspective of what was conveyed to him by his engineer.

Mr. Tardibuono: My conversation with Mr. Intile is the reason why we are here. Mike what do you feel about this parcel? He looked at the parcel and he said Joe, it should be two buildable lots and we went forth from that.

Mr. York: I can recall Mr. Intile if you want and you can find out what his opinion was at the time. I don't know that it is relevant quite frankly.

Mr. Tredy: We're just trying to set a picture here of what took place.

Mr. York: Mr. Intile was sworn in last time.

Mr. Yost: You're still under oath Mr. Intile.

Mr. York: Mr. Intile, was it your opinion or did you provide an opinion to Mr. Tardibuono that there were two buildable lots prior to the purchase?

Mr. Intile: Yes. Mr. Tardibuono called me, I know him personally. He knows I'm an Engineer in town for some time, a Planner and an Engineer. He asked him opinion after looking at the zoning. We saw that the lots were consistent with the neighborhood and told Joe to present proper testimony and...

Mr. York: You have a survey...

Chairman Anepete: Mr. Intile, did you make the applicant aware that zoning for this area..

Mr. Intile: Oh yes. Yes. Zoning...

Chairman Anepete: He knew that it was 12,500 and that these lots were undersized?

Mr. Intile: Yes, the zoning is obviously a matter of record. We talked about that, but he asked my personal opinion as to whether or not...again the size of the lots..

Mr. Tredy: So in other words you didn't tell him these were two lots. But you said that these could be two lots. Is that correct?

Mr. York: How about we have something marked in evidence? The actual survey of the time of purchase.

Mr. Yost: You want to offer that?

Mr. York: Yes. Did you prepare a survey at the time of purchase and does that survey show two lots on a filed map?

Mr. Intile: Yes.

Mr. York: And it was your opinion those two lots were buildable?

Mr. Intile: Yes.

A-3 was marked into evidence.

Mr. Tredy: You had indicated that you had checked the zoning. If you had checked the zoning, then why would you tell your client they were buildable?

Mr. Intile: We were certainly aware #1 that there were two lots based on the filed map. We were also aware that it was indicated as Lot 5 now. After looking at the zoning, we were aware of the zoning criteria which is a matter of record. He had asked my opinion relative to the planning of that piece of property as it was already two lots on the filed map, would there be two lots there? And I indicated that with the proper presentation before the board, the variances described in accordance with the Municipal Land Use Law, that

Mr. Tredy: That's all I wanted to get. It took so long for you to say that. All I wanted to know was did the applicant know that it was one lot? And from what your statement is, he knew it was one lot, but there was a very good possibility after appearing before the board it could be two lots. That's what he just said Mr. York.

Mr. York: He said, you have to look at his survey. His survey shows two lots.

Mr. Tredy: His survey is a survey. What came out of his mouth is something else.

Mr. York: Then I'll re-ask the question. Did you believe that the two lots on the old file map were buildable?

Mr. Intile: Yes.

Mr. York: But did you believe that in order to get them approved you would have to come to the Planning Board.

Mr. Intile: Yes, which is what I said.

Mr. York: And that's why you told him to file a Minor Subdivision application to get here in the first place.

Mr. Intile: I wouldn't ask a gentlemen, who is also a friend of mine, to spend his money to do this if I didn't think that we would be doing this application tonight. Yes. And that there were two lots.

Chairman Anepete: This brings to mind a larger question in that these tax maps we show many many lots now that are undersized and yet the zoning is changed to make them unbuildable. Does this mean that any map that exists and tax maps that show lots that are now like 50x100 are no longer considered buildable in several areas can be brought before us and under the Campoli Act they are made an automatic building lot?

Mr. Tredy: No, I don't think so.

Chairman Anepete: Because that's what I'm hearing.

Mr. Tredy: I think what Mr. York has presented; he's presented a fine application. He's crossed every "T" and dotted every "I". But I think what he's trying to tell the board is that we as a board should step back to the standards of 1950 rather than go forward to the and enforce the ordinances of zoning of 2008. That's the way I feel about it.

Mr. York: With all due respect, that is not what I'm saying, but you may interpret it that way. That's not what I'm saying.

Mr. Tredy: I did.

Mr. York: Now you're putting words in my mouth.

Mr. Tredy: I interpret it that way, I didn't.....

Mr. York: I'm telling you that's not what I'm saying. You can interpret it any way you want. That's not what I am saying.

Mr. Reilly: I think your engineer expressed that it was his opinion that these...an opinion is an opinion, it is not a fact.

Mr. York: So are my legal opinions. They are not facts. They are opinions. He's an engineer he gave his opinion. And the only one that will actually give an opinion that will count when is all is said and done will be a judge because he's actually the one. And then if the judge makes a decision and I don't like it or you don't like it, you go to the Appellate Division and if you don't like what they have to say you get to go to the Supreme Court and when those people make that decision, then it's actually a fact. Up until then it's a bunch of opinions.

Mr. Tredy: Did your client at any time apply for a zoning permit to build prior.....?

Mr. York: Not that I'm aware, no.

Mr. Tredy: So either you, your client or your engineer knew that it was not a buildable lot. They were not two buildable lots.

Mr. York: No because we still have to get variances for the dimensions. That's part of the Loechner case. You just don't get to take an old lot and build it. There is more to Loechner than just saying....

Mr. Tredy: I know that but you would have been at a different board if you didn't need a subdivision. You would have been at the Zoning Board of Adjustment.

Mr. York: That's exactly correct. But the town combined them. So I had no choice but to come here. If these lots were two lots and the Tax Assessor hadn't..... I'll give you a better example. Let's assume that my client, which is what he should have done in the first place, instead of taking title to both lots in one name, took one lot in his name and one lot in a neighbors name. And the town didn't contest it. I would have two lots, I'd go to the Board of Adjustment, I get my variances and I'd be done. But the town had already combined them. And his lawyer at the time did one deed and did it that way. We're still required to get the dimensional variances. It's

a question of whether or not I have to get the subdivision. You still have to get the dimensional variances. And understand, quite frankly, if I were before the Board of Adjustment arguing the dimensional variances, my argument would be no different than my Minor Subdivision application here. Because my argument would be these lots are the same as every lot in the neighborhood. Regardless of what the current zoning is. These are not...I'm not creating two small lots in the middle of 500 big lots. I'm creating two lots that match up with virtually every lot in the neighborhood.

Mr. Tredy: I disagree. We have exhibit B-1 that shows a little bit of different story compared to what you are trying to present.

Mr. York: With all due respect, that map, I don't care how you interpret it and whether you like my opinion or not, that map shows all of these lots as the same size as our lot. Because these lots are on a filed map. These are the same lots created on the same filed map as created our lots. So every one of these lots was created the exact same way and the exact same size. So are all of these, so are all of these. The ones that are not colored in are the ones that are larger.

Mr. Tredy: I disagree. The ones that are not colored in are the ones I think you said meet the current zoning.

Mr. York: I said or larger. Yes.

Mr. Tredy: Larger. There are a lot of lots in that 500' radius that are larger and I have the dimensions on my paperwork here after you get done talking, I will take the floor.

Mr. York: With all due respect, if you are going to testify and offer evidence then you will be subject to the same criteria as our engineer. But our engineer testified that there are 31 total lots, 77% were of the same size. In this area, there were 94 total lots, 63% were smaller than our lots, not bigger, smaller. That's his testimony. Now if there is another engineer who is going to get up and testify that you went out and measured everything and we're wrong by all means, go right ahead.

Mr. Tredy: Mr. York, I don't disagree with the facts you have put into evidence. But it's the way they were put in. If you take both the 200' and 500' radius, and you count out the lots, your engineer claimed that there were 94 or 95. I think I counted 96, but I'll stipulate to whatever your engineer said. The fact is that of those total lots, there are 52 of that 96 that either are larger in square footage or in frontage on the street.

Mr. York: Then my comment is this. I would like you to...

Mr. Tredy: Let me finish Mr. York. It is entered in evidence. Are you talking about the exhibit?

Mr. York: No the exhibit is already in evidence. You are now saying you've looked at the map and this is what you found.

Mr. Tredy: I submitted this map in evidence at the last hearing.

Chairman Anepete: It's a matter of record.

Mr. York: I don't have any map that you submitted.

Mr. Yost: I think what he put in, I remember discussion, it was another vicinity map that you have only it wasn't colored in and I colored it in with a yellow highlighter to show all the lots that were larger in one respect or another as to the two proposed lots that were....

Mr. York: With all due respect, you're using words and you're playing with words.

Mr. Tredy: Absolutely.

Mr. York: Because you are saying the lots are larger. The lots are not larger.

Mr. Tredy: I said they are larger in either frontage or in square footage or they completely comply.

Mr. York: But the problem is that is playing with words because the question is are these lots the area? Its not whether the frontage is bigger, the area. Do you disagree...I'm asking you a question since you did all this research, that our map shows that of the 94 lots, 63% are smaller in area? Do you disagree with that?

Mr. Tredy: No.

Mr. York: Then you know what? That's the end of our case as far as I'm concerned because it's very simple. That shows that the creation of our lots is more than consistent with the subdivision. What you did is you said, "Well that 63% is not right because I'm going to take the lot width or lot frontage and so I have a small lot but it meets the lot width, I'm going to count that as a different lot." With all due respect, there is not a court of law that will allow that interpretation to stand.

Mr. Tredy: That's your opinion Mr. York.

Mr. York: Absolutely, but I've got 39 years worth of practice doing it and I'm telling you that that would be as far as I'm concerned arbitrary and capricious.

Mr. Tredy: It's not, it's based on numbers. It's not arbitrary. Not in the least. Arbitrary and capricious is a word that I noticed every attorney that comes before us likes to use. To me, that's a scare tactic and it doesn't scare me.

Mr. Yost: There is case law that says whether it constitutes whether you're wrong. Arbitrary and capricious standard is another terminology it means the judge says he disagrees with the decision below and the decision was in error.

Mr. Tredy: Before we go any further and I don't get all of what I want to say out. Mr. York, give me a minute, I am going to read something. I can't do it all from memory, but I have a lot of notes and after which I'm sure the Chairman will leave it up to the board to make a decision. I'm going to address this to the board. Mr. York, in his application, submitted into evidence a vicinity map in which he showed the board all the properties that are within the 200' and 500' radius of the proposed subdivision. The map showed all the lots that were undersized and did not meet the current zoning requirements. We agree on that I'm sure. They don't meet the

current zoning requirements. Mr. York had painted a picture of the area around his client's property that is far different than actually exists in my opinion. He did this by comparing the two new proposed lots to totally conforming lots in the area. Exhibit B-1 which is up on the board right now shows that if the proposed lots are compared to lots in the same area which are larger than his that the picture changes. Mr. York has tried to convince the board that the area is mostly 50' lots where in fact, most of the lots are larger in either frontage or area or both. I think I mentioned the numbers before, so I won't go over that again. Using that criteria that I just mentioned, there are 52 lots that are larger than the proposed new lots. In reading some of the briefs that were brought both by Mr. York and Mr. Yost, our attorney, when you read these case laws that were given to us, they use terms like "exceptional narrowness", "substantially outweighs detriments", when they are talking about giving a variance. They talk about the fact that the style or nature of a home would be given a variance for whatever reason, the access to road frontage and I can understand that. Or an unusual shape, a pie shape property. The property in question is rectangular; it's only slightly larger than what would be considered a minimum under the current zoning. Underutilization was another thing that Mr. York brought up at the last meeting saying that his property should be considered underutilized that's why we should grant the subdivision. The example that was given was a property that was 155' wide by 1461 long. Now this property doesn't even come close to those types of oddball dimensions. As far as the current lot is concerned, I don't see any exceptional or practical difficulties. I use those terms because those are the terms that the lawyers use and they like to hear. I don't see any of those difficulties existing because the property is rectangular in shape, its 100' wide by 156' long. I do not see where there is any undo hardship on the owner or the developer as he could build a beautiful home on this lot and meet all the standards that the town is trying to maintain. I don't see how the Municipal Land Use would be advanced by deviating from the zoning requirements. The benefits of deviating or granting a variance would not substantially outweigh any detriment in my opinion. Lot 5 as it currently exists is not out of character with the neighborhood when you consider...now Mr. York has probably said from time to time that they're only required to notify within the 200' radius of the property in question but yet he showed us a 500' radius so he's sort of opened the door. What's good for the goose is good for the gander. If the applicant can use those numbers, I think the board should be able to too. But trying it bring it home, there are many times that if an applicant is looking for some sort of variance, this board or the Zoning Board of Adjustment would ask that they compare their property, not just to the 200' radius. The 200' radius is where the concern is taking away a neighbors light or air, or an obstruction in the neighborhood. And the neighborhood we've asked from time to time to consider as far as 5 or 6 blocks away, a huge section, in other words a neighborhood could be an area such as Skipper's Cove. The whole cove could be considered because they are all similar. The only thing I would like to say is that Lot 5 as it exists is not out of character with the neighborhood. I would urge the board to deny.

Mr. York: If I might just respond to. The law says we should give notice within 200' which we did. Over 30 homeowners got notices. Guess what? Nobody showed up to object. Now we can talk, I would argue that a lot of objectors showed up that doesn't mean anything because I still have legal rights. But the board, if a lot of homeowners, and every board does, if lots of homeowners show up, it impacts on the board's decision because homeowners know their neighborhood. It doesn't mean that the board will go along with those objectors because they have to be guided by the board. In this instance, over 30 letters went out to people in the neighborhood and not one...

Mr. Tredy: Mr. York....

Mr. York: Can I finish?

Mr. Tredy: No. Your statement isn't relevant because there are no proponents here either.

Mr. York: You know? That's very clever use of words. When people object they show up. When people are in favor they do not come out and support. And by the way, if you're sitting here telling me that on your applications, lots of people come up to support, they only come up when the applicant goes and gets his neighbor and says "look come to the meeting with me and support me". I do these applications every single night of the week. This is the fourth night this week I'm out. When someone gets up and speaks on my behalf, the board looks at me and says "how much did you pay him?" "Did you bring him along?" So, let's be candid about this. It's the objectors that come. It is the objectors that know their neighborhood. Nobody showed up. You said, you're the one that said 200', we did it. Nobody showed up, over 33 or 34 people got noticed, not a small number. Why is it a big number? Because the lots are small. That's a pretty good size list for us. I do these every single day. Normally you have notice 10, 15 people. 33 or 34 got noticed. Plus it's in the newspaper, plus there are a bunch of other notices that go out too. But we're sitting here talking about a neighborhood and there is no testimony that these lots will have any negative impact on the neighborhood. Not one iota of testimony, not from you, not from us, not from anybody. No negative impact. Zero. And you know why there is no negative impact? Because the lots are the same as everybody else's.

Mr. Tredy: Mr. York, they're not the same.

Chairman Anepete: I think we're being redundant now. Are there any other questions the board has for this applicant?

Mr. Knowles: If I could ask just one more time Mr. York, one of the basis that you are saying that it's two lots is that the Tax Assessor or whatever did not legally combine the lots?

Mr. York: What the Tax Assessor did, he did not, first of all, the map was filed appropriately. It was signed by the Planning Board. It's not a map that was filed as his six lots might have been under the old Map Filing Act. Prior to 1953, as strange as it seems, you created these lots on a piece of paper, you came to town hall, and you said "I'm selling newspapers and I'm going to give everyone a lot as part of the subscription". Those lots the board says don't count. But if you have a map subsequent to 1953 where we had our first Planning Act, and it's signed and it's filed, those lots are protected lots. They cannot be combined. What happened here is that the Tax Assessor combined them for tax purposes. In other words he said we're going to call this Lot 5 from now on but the filed map called them a different number and the tax map was never changed. In other words, the Assessor didn't go out and say let's erase the lines, he shows them on the tax map as two different lots. So quite frankly, if I'm a buyer of property and I go and I look at the tax map, I see two lots. Now do I have the right to assume they are buildable? Absolutely not. And that is not what my client did. But we have a survey that shows two lots and it's now in evidence.

Mr. Yost: I have to say I'm a little, in the main presentation; we didn't talk a lot about Loechner. I was a little bit surprised that the issues kind of pivoted to that and I know that when we exchanged briefs, we had talked a lot about the Bressman vs. Gash case and a couple of the other cases and that is why I attached them to the boards brief. If I knew that the Loechner case was

going to be such an issue, I probably would have copied that and provided the board members with a copy of the case and some commentary on that because it's evidentially become an issue in the case. It's an established Supreme Court case and there are exceptions to it that may or may not apply and really the arguments and issues have pivoted away from what I thought the issues were going to be at the last.

Mr. York: But I did in fact site it on December 30th at some length.

Mr. Yost: Yes you did, no question about it.

Mr. York: I just want the record to be clear.

Mr. Yost: And I think it's also actually in the minutes. You actually did raise it in your presentation orally.

Mr. York: And the reason I didn't think of it as a pivotal issue because in my way of thinking it's a straight legal issue. There is not a lot of debate over it.

Mr. Knowles: The first reference to Block 98, Lot 5 was in 1998. The owner purchased the property in 2007 and our Schedule "B" form that shows the schedule of lot building requirements by Zoning was revised on January 13, 2005. So there must have been a method of reinforcing or restating the same zoning requirement at that time. So both of these were done prior to the purchase. It's hard for me to make a decision because I don't know where the breakdown is. Who broke down? Are we definitely wrong or are we not definitely wrong? Did we not follow the proper procedure or what?

Mr. Reilly: I think that is the question I was asking earlier on. The chronology of how did this process go from two lots to one lot to one lot and two lots? To kind of understand how we got to this point and where the breakdown or miscommunication took place to determine whether or not the gentlemen who purchased the property had sufficient knowledge that it was either one lot or two lots.

Mr. Knowles: I understand what the purpose of the Schedule "B" was as with any re-zoning structure, you do a study in density. And how it's going to affect your police, your firemen, the school system and so forth. So when this was presented, it was done in fact with attention being given to the density of and where our future lies in Waretown and I'm thinking that if this starts popping up and happening all the time, we can change everything that we planned for the future and the vision that we planned in doing the study and paying everybody to come up and present this to us.

Mr. Tredy: Bob, my feeling is that as a board we should assume that when the lots were combined, that it was done correctly and our job should be a simple job. To decide whether we should subdivide Lot 5. And as I said before, no disrespect to Mr. York, he's doing his job and very well I have to say, but we should not look at the smoke and mirrors and get to the meat of the problem and decide is it a good thing to subdivide it? Or isn't it? And let the chips fall.

Chairman Anepete: What I'd like the board to do now is address any additional questions they have to the applicant and once that is done, I'd like them to complete their presentation and we can have our discussion and take action.

Mr. York: We're done.

Chairman Anepete: Thank you for your presentation. Now the board is going to discuss the application.

Mr. Tredy: Everything that I said, I'm not going to reiterate it, it's on the record and having said what I said at the appropriate time, I would like that to be in a form of a motion. A motion to deny.

Mr. Knowles: I'd just like to add that I believe that we did everything properly and I'd like to see the system work. Whatever procedure has to be taken let it be taken.

Mr. Reilly: Mr. Chairman, I'd like to get a clearer before we make a decision of how this either broke down or didn't break down in the process through the Tax Assessor, the Tax Department and see why we had a lot having two different designations. One is Lot 5 and one is Lots 16 and 17. To me, that is germane as to where we are tonight.

Mr. Tredy: It is, but it really doesn't, to me doesn't effect the application.

Chairman Anepete: Would it be appropriate to get some information before taking action on this application?

Mr. Yost: To answer your question Mr. Chairman, if the board feels that they don't have adequate information to make a call on it, I think it's appropriate I would ask the applicant if they had an objection to that to open the record again and try to get additional information you feel you need. The alternative is, you take a vote without that information. I think the applicant probably has the right to insist on a vote, but then the board could take the position that there is other information that they wanted before them before they took the vote.

Mr. Reilly: From my perspective Mr. Yost, if it's clarified that it is Lot 5 period, or Lot 16 and Lot 17 would put a different perspective on how I would view a vote. Because if it's Lot 5, that's a whole different story I think. But if it's clarified that there's two separate lots, then it's a whole different avenue we're going down. And to me we're just juggling two things here saying well something happened but we don't know why it happened and maybe it didn't happen.

Mr. Knowles: Mr. Yost also mentioned that it might be a good idea to look into more detail into the Loechner vs. Campoli case because there are some other things that might apply, not just that main issue.

Mr. Yost: My impression is the board seems to be struggling a little bit with the application of the Loechner case whereas my anticipation was that we would be more concerned about the Gressman and Gash and the other cases that really we had talked about in the brief. I saw Mr. York go back and speak to his client. What is the applicant's position, Mr. York, with regard to Mr. Reilly felt he needed additional information that they would like to have before a vote would be taken?

Mr. York: We have no objection carrying another month. I will not be present, someone else from the office will be. (Mr. York will be having surgery). But if the board wants to carry a month, that would be fine.

Mr. Yost: I would like to frankly as I indicated before, I was a little surprised that we talked so much about Loechner. I would like the opportunity to give the board a little more guidance on that if I could just supplement my brief within the next 10 days.

Mr. York: As long as I have enough time before I disappear (surgery).

Mr. Yost: I would copy you so you are not surprised. The board does like to get information 10 days in advance of the hearing so our board Secretary can make copies and disseminate them, everyone gets them in their packet and they can consider them.

Chairman Anepete: The Chair recognizes our Engineer.

Mr. McVicar: I just have a question for Mr. Yost and that's its two years of being engineer to the board, both boards actually. It's come up numerous times where say an undersized lot comes before the board and there are instances where the question will be asked: "Well does the applicant own the lot next to it?" Therefore we combine the lots and there have been instances where it appears this is where two lots were in common ownership and were combined by the Tax Assessor into one lot and accept as gospel that this is the law. Now Mr. York is pointing out that this is not the law. So the question comes to my mind would be how is it that the Tax Assessor has the right to combine the lots?

Mr. Yost: I think it's alluding to the Dallmeyer vs. Lacey Township.

Mr. York: That is a single isolated lot case. What happens is these are two lots and when the two lots were created under a subdivision, a different set of criteria applied. Now let's take one step further, I still have to go...Let me take a better example. Let's assume the Assessor did not combine these lots and I have two 16 and 17. I would still have to go to the Board of Adjustment and prove my case that I was entitled to the variances. That is what you're alluding to. Well, it's gospel that you have to combine them. Well, it's not gospel when you have the lots created on a subdivision and then we would be back proving the same case, but we'd have two lots and our arguments to the Zoning Board would be that these lots are compatible with all the lots in the neighborhood, they were created under the same map, and I wouldn't have the burden of a subdivision. I would just be getting the dimensional variances.

Mr. Reilly: Mr. Yost, that was my point all along. Once we can clarify whether it's one or two lots, then it sets in motion a different set of questions, or approvals.

Mr. Yost: I think the applicant has agreed to carry the hearing to next month and I will supplement my brief with a little more discussion about the Loechner case. It appears to me obviously the board needs some more guidance in the Loechner case. And as frequently is in law, there are exceptions to the all the cases and rules virtually it seems. So...

Mr. York: The Jock case which is a pretty recent case went further and said even if you owned one lot here and one lot here and you put them in under different names, we're still going to give you the benefit of Loechner. And I don't think there, I'll be glad to go back and look, there are

any real exceptions to this. I'm trying to answer the Engineer's question, that you still have to get the dimensional variances. I go back to your six lots, if all six lots independently match all the lots that were being developed in the area, and it was on a map post 53 or 53 or later, the applicant, whether it's you, me or anybody else would then take those six lots to the Board of Adjustment and say look they don't meet the current zoning but here is why I'm entitled to build on all six. Now if they're all 25' lots and everything in the neighborhood is 100' lot, then you're not going to win the case.

Chairman Anepete: Thank you sir.

Mr. Yost: Let me just ask Mr. Reilly, just so we have a sense of what we're looking for and who would bring it to us at the next hearing. Are you asking the applicant to produce any additional information or is this something or are we going to as a board request that the Code Enforcement Office or the Tax Officer come and provide us with this information?

Mr. York: As the municipality, you have better access, is ask the Assessor for a copy of the Tax Records Card for this property. That will give you the history; it will show how it happened. Let me rephrase. It won't show how it happened; there is a Tax Record Card for every piece of property.

Mr. Reilly: I think we should be seeking our own source for a comfort level of the information.

Mr. York: It's obviously easier for you to run downstairs and get it then for me to submit an OPRA request.

Vice-Chairman Avellino: We keep talking about this case. That case in the brief you gave us, that case doesn't come close to this one. It was a pie shaped piece of property and worried about driveway. This is nothing, it's a rectangular lot. Two lots, that's all, cut and dry, that's it. They were combined because of the upgrading of our Township.

Mr. Yost: We have two issues in play. One of them is the subdivision and the other is the variances. I think Mr. Avellino is talking about the variance part of it. We seem to be stuck tonight on the subdivision aspect and we can't get to the variance until we get through the subdivision issue.

Chairman Anepete: The applicant has agreed carry this application to the next meeting. I'd entertain a motion to carry to the next meeting on this application. Mr. Tredy made the motion. Mr. Knowles seconded the motion. All in favor: (aye) Tredy, Knowles, Avellino, Reilly, Sweeney, Eagles, James, Anepete.

Secretary clarified that the next meeting will be March 5, 2009.

NEW BUSINESS

PUBLIC COMMENT

Seeing None.

The board had a brief discussion regarding any applications that may be on the agenda over the next few meetings.

Chairman Anepete gave his philosophy on issues similar to those tonight which really tests the town's ability to win a case in court. I have a problem with spending the town's money on legal battles that we have no chance to win, so we have to look at similar issues to this in the future with that regard.

Mr. Yost added that some cases the principals are difficult to apply. The general principal is that a variance should be the exception. And then you go through the case law and you see this exception, that exception and you think maybe the exception swallowed the rule. What you're doing is not easy, it really is not. I'm always in favor of trying to give you the best advice and tools that I can so you can make a good decision so if the day comes that you do get taken up, then we're in the best position to be upheld.

Mr. Negra asked Mr. Yost if he was still exempt from voting at the next meeting now that he sat through this meeting. Mr. Yost replied that if he listened to the tape of the prior meeting, we felt he would be eligible to vote since he sat through tonight. Mr. Yost continued that he sensed that some of the board members were having difficulty with the application, so that is why he thought we would be conservative.

Mr. Knowles added that it's very important because it's not just the one case that we have before us. It's what it represents that could possibly happen if we don't thoroughly find out all the information we need to make the right decision here because it'll be our whole study will collapse.

Chairman Anepete asked for a motion to adjourn. Mr. Knowles made a motion to adjourn. Mr. Negra seconded the motion. All in favor: (aye).

Meeting ended at 8:45 PM.

Respectfully submitted,

Beth O'Connor, Secretary